Roberto E. Kostoris *Editor*

Handbook of European Criminal Procedure

Springer

Handbook of European Criminal Procedure

Roberto E. Kostoris
Editor

Handbook of European Criminal Procedure

Springer

Editor
Roberto E. Kostoris
School of Law
University of Padua
Padua, Italy

ISBN 978-3-319-72461-4 ISBN 978-3-319-72462-1 (eBook)
https://doi.org/10.1007/978-3-319-72462-1

Library of Congress Control Number: 2018934922

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Foreword

This important book bears the title *Handbook of European Criminal Procedure*, which might appear overambitious. Everybody knows that no European Code of Criminal Procedure in fact exists and that responsibility for regulating criminal proceedings still belongs in the first place to the national legislature. However, that title reflects a reality that is now a part of the daily life of any European lawyer, be they a specialist in criminal procedure or of any other branch of the law. It is nowadays simply impossible to work in the legal field in Europe and only take into account the national dimension.

The applicable rules in any legal domain, including that of criminal procedure, are now the result of the interaction of national and international rules, in particular European rules. This is true when it comes to the field of judicial and police cooperation, but also at the internal level, which is shaped and heavily influenced by EU regulations and directives on the one hand and by the European Convention on Human Rights and the case law of the Strasbourg Court on the other.

No doubt the life of the European lawyer is now more complicated, with the need to take into account, in order to find the appropriate legal rule for a given case, multiple sources of law and multilevel regulations. At the same time, this is a stimulating challenge and a powerful element for the progressive building of a European legal conscience or, even more ambitiously, for the development of *European* law,[1] which is daily shaped and developed in the three relevant circles, namely national law, the law of the European Union and the law of the European Convention on Human Rights.

This book aims to provide the European lawyers dealing with criminal procedure with the appropriate tools to find the right path leading to the solution of legal questions in a number of relevant areas, like police and judicial cooperation, on one hand, and, on the other, mutual recognition, harmonisation and traditional intergovernmental models with regard to personal freedom, rules of evidence, *ne bis in idem*

[1] *See*, for example, Stirn (2015).

and conflicts of jurisdiction and execution, in particular execution of confiscation decisions. The examination of these specific areas is preceded by substantive chapters on the sources of European law as far as criminal procedure is concerned and on the protection of fundamental rights and their contents.

From the point of view of the European Court of Human Rights, the main concern is not surprisingly to fulfil successfully its mission to protect fundamental rights in Europe.

Criminal law, substantive or procedural, is a domain where the need to protect society, whether at the level of the individual state or that of the organisation of European integration—at the quasi-federal level of the Union—must necessarily be confronted and associated with the need to protect fundamental rights.

This stems from the choices made by European States in acceding to the European Convention on Human Rights—and for 28 of them, to the European Union. Acceptance of the Convention implies that the contracting state put pluralistic democracy into practice, upholding the rule of law and respecting human rights. The Union too is built upon the values of democracy and human rights protection; its action must now also be compliant with the requirements of the European Union Charter of Fundamental Rights, under the supervision of the Court of Justice.

Criminal Procedure is thus a particularly important area of intervention for the European Court of Human Rights, which has elaborated a wealth of case law. In particular, under Article 6 of the Convention, it has developed key principles concerning questions such as fair trial, the importance of an independent tribunal and impartial judges, the right to be presumed innocent and various elements of defence rights covered by paragraph 3 of Article 6.

Nowadays, the European Union has taken on significant competence in the field of criminal law, both substantive and procedural. What then is the responsibility of the European Court of Human Rights, the Strasbourg Court, *vis-à-vis* the criminal law competence of the Union?

For the time being, acts emanating from the Union's institutions and organs fall outside the Court's examination. However, the Court has developed a body of case law, established mainly in 2005 with the *Bosphorus v. Ireland* case. According to that case law, the assignment of a contracting state's competence in a given domain to an international organisation such as the EU does not release the Court from its duty to supervise Convention observance. However, in so far as the Union has its own judicial organ, the Court of Justice of the European Union, which protects human rights in a manner that is equivalent to the protection provided by the Strasbourg Court, the latter need not intervene unless it finds such protection to be manifestly deficient in a given case.

The Strasbourg Court therefore has a duty to continue protecting fundamental rights in accordance with its mission. The doctrine of equivalent protection was significantly clarified by the 2012 judgment in *Michaud v. France*, which ruled out the application of the *Bosphorus* presumption because the Luxembourg Court had not had the opportunity to examine the relevant question.

After the entry into force of the Lisbon Treaty at the end of 2009, there were great expectations as to the possibility of the European Union's accession to the European

Convention on Human Rights—a development that, apart from its symbolic value, would eliminate any risk of conflicting case law between the two European courts.

Now, after opinion 2/13 of the Luxembourg Court, that has become a more distant prospect. What can be done about this? Can any solution be found to break the deadlock? I believe that the answer to this question rests with the negotiators, or even with the political leaders, rather than with the judicial bodies. For my part, I remain convinced that the two European courts should continue to act in the spirit of the 2011 declaration made by their two presidents at that time, Messrs. Costa and Skouris, and thus persevere in developing harmonious case law, avoiding any conflict and listening to each other.

It goes without saying that the need for the case law of the two courts to be harmonious is of particular importance when it comes to an area that is as sensitive for human rights as that of criminal procedure.

In this connection, this book, which provides the European lawyers with the appropriate tools to apprehend criminal procedure issues, taking due account of all the relevant sources of law, including the European Convention on Human Rights and the European Charter of Fundamental Rights, will play an important role and will contribute to the shaping and the development of the European law, a promising concept that no doubt will be further defined in the coming years with the contribution of all the European legal actors, both at the national and at the international levels.

President of European Court of Human Rights Guido Raimondi
Strasbourg, France

Reference

Stirn B (2015) Vers un droit public européen. LGDI, Lextenso éditions, Paris

Preface

The European Union undoubtedly lives a moment of crisis of which 'Brexit' is probably only one of the most impressive examples. However, even in this context, European criminal justice is on the move. After the great innovations of the Lisbon Treaty, new instruments have been enacted: among others, the regulation on European Public Prosecutor's Office, which has been finally approved after a long path and which, even if not totally satisfactory, could be a starting point for future challenges in the perspective of a more advanced judicial cooperation, while a proposal of regulation on Eurojust is under discussion; furthermore, an instrument—the European Investigation Order—for transnational evidence gathering is already available for the States, as well as new harmonisation directives on the rights of investigated and accused persons have been approved. On another perspective, in the context of the ECHR system, the European Court of Human Rights case law has an increasing impact on national legal orders.

In this view, it is of crucial importance for European jurists to recognise themselves in a common core of rules, values and culture. Such necessity is indeed imposed, on one hand, by the need of an efficient judicial and police cooperation between Member States in fighting a more and more cross-border and globalised criminality. But it is also imposed, on the other hand, by the need of fundamental rights culture to become more and more widespread in order to not separate repressive policy from the application of guarantees—an aim that must be considered one of the main challenges to be overcome in this time. From both these perspectives—the 'sword' and the 'shield'—European law, which comprises the law of both the 'two' Europes, the EU law and the ECHR law, should represent an essential common platform.

Moreover, it is worth observing that European law not only concerns its relationships with Member States, but also affects directly national systems, even modifying their morphological features. This will imply, especially for civil law systems, deep changes of approach and paradigm, surely not easy to face.

For all these reasons, it can be said that, after the Lisbon Treaty, European regulation of criminal justice probably represents one of the most impressive

juridical phenomena of our era. In this context, procedural aspects take undoubtedly a leading role, and, therefore, on such topics this volume is specifically focused.

In this regard, it is worth making two clarifications about its title and content.

The first concerns a methodological remark: the expression 'Handbook of European Criminal Procedure' is somehow provocative. Indeed, it could lead to think that general and uniform rules for criminal proceedings exist at the European level and that this book intends to illustrate them. Of course, this is not the case: neither a criminal procedure 'model' to which all EU Member States should conform within their domestic systems is provided, nor are centralised European 'federal' rules of criminal proceedings prescribed when 'federal' offences, as the ones affecting the financial interests of the Union could be deemed, are at stake, and even the establishment of a European Public Prosecutor's Office, which would aim to realise a repressive system at EU level, has not been properly conceived in this direction, as in such a context a main role will be in any case played by national rules, nor, even less, is the idea to create an EU Criminal Court in the agenda, unlike what has been decided at a global level with the establishment of the International Criminal Court.

Indeed, the reason for such a title can be easily explained: although the book deals with different and varied issues, which include the complex system of sources, the fundamental rights, the EU system and the ECHR system, the forms and bodies of judicial cooperation, the mutual recognition instruments, it is still possible to draw the features of a great design, which, even if it is not yet defined in all its aspects, appears sufficiently articulated to be dealt with some order.

The second warning concerning the title and the content of the Handbook is linked with this latter conclusion. Precisely because I am of the opinion that the aspects specifically referred to criminal procedural matters in both the European context, the EU one and the ECHR one, have reached a level of complexity, but also of ripeness, I deemed appropriate to dedicate to them the whole analysis of the volume. In Europe, it is already possible to find commendable volumes on 'European Criminal Law'. However, on one hand, they deal normally with EU law and not also with ECHR law, while both these systems need to be known and compared; on the other hand, they deal with procedural aspects together with the substantial ones. This often implies that the former are compressed and not always sufficiently developed. I believe that this is the first attempt in Europe to create a handbook exclusively dedicated to European criminal procedure issues. However, I am convinced that a more in-depth analysis of such themes, which in any case is maintained as far as possible synthetic, in order to avoid to make the text cumbersome, could be useful for academics, practitioners and students.

In this perspective, I hope that the volume will contribute to a better development of this matter, also in view of fostering the 'genuine European judicial and law enforcement culture', which is considered one of the priority objectives of the Union (see Point 1.2.6 of the Stockholm Programme of European Council 2010/C 115/01).

For the same reason, the Handbook includes also a more general framework on the European sources, providing in addition some indications on the functioning of EU law and ECHR law.

Many of the authors of the volume, including myself, are Italian. Consequently, the general shape of the book shows in some way an Italian approach. Even if it is clear that we are dealing with a topic that is still in constant development and that the most significant features of European law are its flexibility, its practical approach, its being expressed more by principles than by rules, I nonetheless thought useful to organise, as much as possible, in a systematic way the 'structure' of the book, by using, indeed, a methodology that is peculiar to the Italian scientific tradition. I really hope that such an approach will be appreciated by the readers.

The volume represents the English version of a handbook published in Italy by Giuffrè (third edition, 2017), even if this text has been updated and expanded. The positive feedback that the Italian handbook received has encouraged to think about its publication in English, in order to make it available to a wider readership.

There are many people I would like to sincerely thank. I am very grateful to Guido Raimondi, President of the European Court of Human Rights, who honors us with his eminent presentation. Obviously, my thanks go to all the authors that worked on this volume. I highlight that they are both academics and judges, all well known for their studies on European criminal justice. This mixed nature of the team witnesses the close cooperation created between the academia and practitioners for a common cultural project.

Furthermore, I would like to thank Springer and, in particular, Dr. Brigitte Reschke for the great help she provided and her patience in answering all my questions, as well as Giuffrè for agreeing to the publication in English of the handbook. Finally, special thanks to Dr. Ph.D. Massimo Bolognari, who so generously helped me to review the translation not only of my parts but also of the entire volume: without his precious help, I would have never been able to carry out such a challenging job.

Padua, Italy
19 December 2017

Roberto E. Kostoris

Contents

List of Contributors

Antonio Balsamo General Prosecution Office of the Italian Court of Cassation, Rome, Italy

Marta Bargis University of Piemonte Orientale, Vercelli, Italy

Ersilia Calvanese Italian Court of Cassation, Rome, Italy

Marcello Daniele School of Law, University of Padua, Padua, Italy

Gaetano De Amicis Italian Court of Cassation, Rome, Italy

Roberto E. Kostoris School of Law, University of Padua, Padua, Italy

Pier Paolo Paulesu School of Law, University of Padua, Padua, Italy

John R. Spencer University of Cambridge, Cambridge, UK

Anne Weyembergh Institut d'Etudes européennes, Université Libre de Bruxelles, Bruxelles, Belgium

ECLAN, Bruxelles, Belgium

Abbreviations

ASFJ	Area of Security, Freedom and Justice
CEPOL	European Union Agency for Law Enforcement Training
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CISA	Convention Implementing Schengen Agreement
CJEU	Court of Justice of the European Union
CMS	Case Management System
E.C.Extr.	European Convention on Extradition
EAW	European Arrest Warrant
EC	European Community
EEC	European Economic Community
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECSC	European Coal and Steel Community
ECRIS	European Criminal Record Information System
EDPS	European Data Protection Supervisor
EEW	European Evidence Warrant
EIO	European Investigation Order
EIS	Europol Information System
EMCDDA	European Monitoring Centre for Drugs and Drug Addition
ENCS	Eurojust National Coordination System
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
EU	European Union
EUCPN	European Crime Prevention Network
Euratom	European Atomic Energy Community
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
FBI	Federal Bureau of Investigation

FIU	Financial Intelligence Unit
Frontex	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GENVAL	Working Party on General Matters Including Evaluation
IDMC	Integrated Data Management Concept
Interpol	International Criminal Police Organization
IRU	Internet Referral Unit
JHA	Justice and Home Affairs
JPSG	Joint Parliamentary Scrutiny Group
OCC	On-Call Coordination
OLAF	Office européen de Lutte Anti-Fraude (European Anti-Fraud Office)
OPOCE	Office of Official Publications for the European Union
PNR	Passenger Name Record
SIENA	Secure Information Exchange Network Application
SIRENE	Supplementary Information Request at the National Entries
SIS	Schengen Information System
SIS II	Second generation Schengen Information System
SOCTA	Serious and Organized Crime Threat Assessment
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UCLAF	Unit for the Coordination of Fraud Prevention
UN	United Nations
UNODC	United Nations Office for the control of Drugs and Crime prevention
VIS	Visa Information System

Part I
Sources of Law

Chapter 1
European Law and Criminal Justice

Roberto E. Kostoris

Contents

R. E. Kostoris (✉)
School of Law, University of Padua, Padua, Italy
e-mail: roberto.kostoris@unipd.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_1

1.1 A Brief Historical Overview

1.1.1 Integration and Regionalization in the History of the Criminal Proceedings in Europe: Continental Routes

Before addressing today's framework and the multiple perspectives that opens toward a strict interaction between national and European systems, it is useful to focus briefly on the past, in order to see how the history of criminal proceedings in Europe has been always characterized by the alternation—and sometimes the struggle but also the interweaving—of universalism and particularism, of integration and regionalization, of supranational dimensions and local dimensions.

Starting from civil law countries, in a first phase, corresponding roughly to the period comprised between the late Middle Ages and the Enlightenment, even in the presence of a variety of different sources of law, a judicial method was applied rather uniformly throughout the territories of continental Europe; in a second phase,

corresponding to the age of codifications and reaching the second half of the twentieth century, criminal proceedings exist exclusively within a state dimension; in a third phase, corresponding to the present time, the state dimension is increasingly and ever more tightly combined with a supranational dimension, within the framework of a movement toward a European integration, not only at the economic and commercial level, but also in the field of criminal justice.

Many similarities can indeed be identified between the current multilevel system, where supranational legal sources are combined with national sources within the framework of the complex process of European integration, and the pluralism typical of medieval sources of law, characterized by the unifying presence of a *jus commune* of Justinian origin, combined and integrated with a series of specific norms—laws, statutes, customs, orders issued by both secular and ecclesiastical authorities—with a law developed by scholars (*auctoritas doctorum*), and, most importantly, with a robust judicial case law, which held—and holds again today—a central role. With regard to criminal proceedings, despite this multiplicity of legal sources, a substantial degree of uniformity of instruments and procedures had been significantly promoted by the inquisitorial proceedings, which, since the beginning of the thirteenth century, had developed in the ecclesiastical context through the roman canon proceedings, to soon be incorporated by secular institutions, and whose main principles were destined to be applied, with minimum variations, throughout continental Europe for a long time until the French Revolution. For its part, the Holy Roman Empire—which in some way could be resembled to a large supranational state—had attempted to achieve some forms of normative harmonization, especially through two interventions: the one enacted in 1532 by Charles V of Habsburg, through the so-called *Constitutio criminalis Carolina*, and the other enacted by Francis II of Habsburg in 1803, through the *Code of Crimes and Serious Political Offences*.

By reforming the so-called *Libri terribiles* (XLVII and XLVIII) of the Justinian Digest, which in the Middle Ages had been almost completely taken over by the particularisms of the municipal laws, the purpose of the *Carolina* was to uniform the regulation of criminal law and of criminal proceedings in the imperial territories. Despite being consistent with criminal policy choices, inspired by an intent of brutal repression and by an insensitive inquisitorial logic, it must be noted that such a project had nonetheless managed, for the first time, to normatively unify a significant part of continental Europe in 'criminal matters', even if with the status of primary source in the sole German nation. Almost three centuries later, in a significantly different context, at the dawn of the age of codifications and just before the 1000-year-old experience of the Holy Roman Empire came to its final conclusion, the *Code of Crimes*, for its part, proposed again a new, albeit ephemeral, project of transnational legislation. In their 'universalistic' vocation—however not in their (rather different) contents—the *Carolina* and the *Code of Crimes* may be somehow considered significant antecedents of the idea of a European regulation of criminal justice and of a European judicial area. Furthermore, it must be stressed that such antecedents, on one hand, were conceived directly and exclusively in matter of criminal law and criminal proceedings—subjects that will be conversely for a long

time entirely excluded from the contemporary unhurried process of European integration—and, on the other hand, that they aimed to achieve that very objective of top-down normative harmonization that appears today still difficult to be accomplished.

The eclipse of the Holy Roman Empire coincides with the development of the Enlightenment thinking. The ideas of Montesquieu, Voltaire, and Beccaria spread rapidly across Europe and influence many criminal legislation. As heirs of the Jusnaturalism movement, these philosophers advocate in favor of the establishment of a legal order shaped on the purity of the state of nature. This is a view that, on one hand, will lead them to develop that abstract conception of law that will characterize the whole Modern Age in continental Europe—and that is currently subject to an intense critical review—but will also lead them, on the other hand, to identify areas of freedom for the individuals: an idea that not only lies at the roots of modern constitutionalism, but that will also represent the basis for granting, for the first time, fundamental rights to every person charged with a criminal offense and that leads to criticize—in the name of a new criminal universalism—inquisitorial principles, ultimately prompting the gradual abandonment of the practice of judicial torture, the symbol of the darkest age of criminal proceedings.

The French Revolution will represent the moment of most intense disjuncture with the past. Indeed, during the revolutionary period, a great interest in the adversarial proceedings typical of the common law of England was shown. Such a discontinuity, however, will be short-lived. Napoleon will end it forever enacting the *code d'instruction criminelle* of 1808, inspired by a new model of 'mixed' criminal proceedings. This model, while claiming to combine the old inquisitorial instances with the new adversarial demands, legacy of the French Revolution, will actually make the former prevail over the latter, in order to better serve the new authoritarian regime, showing itself as a thinned version of the inquisitorial proceedings. This model will be exported in a large part of continental Europe through the Napoleonic campaigns. However, national States have already started to take shape and develop with their claims for autonomy that lead to the movements toward codification. These latter realize the aspiration, typical of the Enlightenment, toward a rationalization of the law. Their aim is to replace the fragmented and liquid character of the medieval legal sources with a univocal, organic, systematic regulation based on logical-abstract thinking. At the same time, codification movements also mark the nationalization of law and, for our purposes, of criminal proceedings. Some of those codes are undoubtedly inspired by the canons of the Napoleonic model of biphasic proceedings (as it will be, for example, not only for the French experience, but also for the Italian, Belgian, and Dutch ones). Nonetheless, they represent a distinctive expression of the sovereignty of the new States that are being established in Europe. Criminal justice and state sovereignty become an indissoluble combination. The latter finds in the former its most complete expression. This explains the reluctance to tolerate external interferences in this reserved sphere and the jealousy of the States in defending their 'sovereign' prerogatives in criminal matters.

1.1.2 Common Law Experience

An entirely separate and rather different experience has characterized England. In this country, law has not been generated by a centralized political power, like it has occurred in civil law countries, but has developed, conversely, through a complex legal system, the common law, made of a combination of judicial interpretation, history, traditions, and a case law characterized by the application of equity, which has lasted over time since the late Middle Ages uninterruptedly throughout the modern era, without England knowing the continental experience of codifications. In this context, the creation of the jury (originally a prosecutorial body, then a judicial one) helped to insulate the island from the influence of the continental inquisitorial proceedings and played a central role in the development of adversarial criminal proceedings, characterized by orality, publicity, and a strong antagonistic charge between the contenders, who are called to confront each other before the jurors. This is a type of proceedings that will be highly admired by the philosophers of the Enlightenment and by the legislator of the Revolutionary France. Following the seventeenth-century early constitutional shift, very important charters of rights like the *writ of Habeas Corpus* (1679) and the *Bill of rights* (1689) ultimately sanctioned some fundamental guarantees in criminal proceedings, such as the right to personal freedom, the protection against arbitrary detention, the due process of law, the right to a speedy trial, the right to a punishment reasonably commensurate to the offense, the principle of the *ne bis in idem.* And, even earlier, at the beginning of the seventeenth century, one of the central principles of the common law criminal proceedings that dealt with the treatment of the accused had been established, namely the right to confrontation. These are all rights that, implemented in the following centuries, will become part of the modern legal guarantees well beyond the area of common law tradition, and that, together with the pragmatic and factual approach that characterizes such a legal experience based on case law, will represent often a model for the development of the categories of European criminal justice.

1.1.3 New Scenarios

The complex process of European integration characterizes the new season that we are currently living. It presents again a new multiplication of the sources of law with their endless intersections and combinations. Now, as then, a ‘unity in the diversity’ can be in some way recognized. The perspectives, however, are radically different. The universalism of the medieval criminal proceedings essentially mirrored the existing situation at that time. It found its unifying moment in the inquisitorial method and in the Roman-canon proceedings. Conversely, the current process of European integration, also with regard to criminal justice, is essentially the result of a ‘choice’. Undoubtedly, albeit in different forms from the past, the first phase of the process of European integration within the framework of judicial and police

cooperation in criminal matters was nonetheless developed with an almost exclusive focus on repression. Indeed, convergence and aggregation have always developed more easily around the fight against the 'enemies'. The true challenge and the real qualitative leap lie in the need to balance, in judicial cooperation but also in legislative harmonization, repressive aims (the 'sword') with procedural guarantees (the 'shield'): it is a difficult but indispensable path in a Europe founded on rights, like the one envisioned by the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union, latest heirs to the ancient common law constitutional traditions.

Certainly, the European Union is not a federal State; it has not been vested with functions of centralized territorial government; its competences are only those that the Member States have conferred to it. However, the expansive force of its legislative production and case law is irresistible. The criminal proceedings resulting from the codifications had developed through judges and scholars an interpretative and systematic logic, both advanced and sophisticated, but in an abstract and autarchic dimension: the legal universe was represented only by national norms, an arrangement certainly heralding comforting certainties. Today, this approach is no longer sustainable and realistic. Criminal proceedings no longer are—and increasingly less and less will be—'state-centric'. The applicable rules are—and increasingly more will be—the result of marked interactions between national law and supranational law, both at the level of judicial and police cooperation, and, most importantly, at a national level. Therefore, it is now crucial to widen the vision including European legal sources.

Through which instruments, in what forms, with what limits are these sources destined to influence our subject? In order to answer this question, it is necessary, at the outset, to recall that the European scenario is characterized by two main legal systems: that of the European Union and that of the Council of Europe. The latter system is the older, and, for our purposes, finds its focus on the European Convention on Human Rights (ECHR): given the high number of States that have joined the Convention (47), it is usually referred to as the 'big' Europe. The former system, conversely, is much younger and has been joined by a lower number of States (28, or 27 considering the withdrawal of Great Britain from the Union after the referendum of 23 June 2016): for this reason, it is usually referred to as 'small' Europe. However, over time, it has reached a level of importance that is overwhelmingly superior, especially in light of the binding force exercised by its mechanims—also with regard to our subject—on Member States' legal orders. These two systems, as we will see, have different spheres of competence, even if they are also characterized by intense moments of contact: indeed, the fundamental rights developed by the ECHR system represent an archetypical model for the European Union's laws, and the Union itself is destined to accede to the European Convention. For these reasons, the two systems will be analyzed separately, giving priority to the system of the European Union, which, considering its importance, and for our purposes, is of central and primary significance, and in light of which this volume has indeed been largely conceived.

1.2 The System of the European Union

1.2.1 The European Union After the Treaty of Lisbon Between Judicial Cooperation in Criminal Matters and Legislative Harmonization

The path to the development of the European Union is rather complex. With regard to our subject, it is deeply interconnected and almost identifies itself with the history of judicial and police cooperation in criminal matters. Therefore, it will be addressed when these issues will be dealt with specifically (see Chap. 4). Here we will just provide a brief outline of the development of the EU institutions, moving then to provide a short framework of the competences, the decision-making procedures, the types of legal acts and of judicial protection of the Union that may be relevant for our purposes.

The starting point of the process leading to the current situation finds its origin in the intention to strengthen, in the aftermath of the Second World War, the economic cooperation between States. This led to the establishment by six States (France, Germany, Italy, Belgium, Netherlands, and Luxembourg) in 1951 of the ECSC (European Coal and Steel Community), followed in 1957 by the Euratom (European Atomic Energy Community) and by the EEC (European Economic Community), whose purpose was to guarantee a free movement of persons, services, goods, and capitals among States. In 1985, the Treaty of Schengen laid the groundwork for the elimination of internal borders. In 1988, with the Single European Act, the three communities are changed into a European Union, through the development of common policies also in areas not strictly economic, such as foreign policy, security, and fight against cross-border crime, to which the commercial liberalization was certainly going to open new operative spaces. The European Union, however, will be established only with the 1992 Treaty of Maastricht (TEU), through the well-known structure organized around three Pillars: the First Pillar being strictly communitarian, for matters reserved to the European Community (into which the EEC and the ECSC were merging); the Second Pillar being concerned with the intergovernmental cooperation concerning Common Foreign and Security Policy (CFSP); and the Third Pillar dedicated to the intergovernmental cooperation concerning Justice and Home Affairs (JHA), including judicial and police cooperation in criminal matters.

This Pillar structure implied a system organized upon different principles, procedures, and instruments: on one hand, the so-called 'intergovernmental method', reserved to foreign and security policy and to judicial and police cooperation in criminal matters, strictly connected to the will of the governments represented within the Council, which deliberated mostly unanimously, without any control by the Commission and the Court of Justice and without any involvement of the European Parliament, and, on the other hand, the so-called 'Community method', adopted for matters falling under the First Pillar, and inspired by decision-making criterion, where the governmental interests of the single States were balanced against

democratic instances and provided for norms subject to the control and interpretation of the Court of Justice, but also susceptible of exercising direct effects on national laws and, therefore, to be invoked by citizens against the Member States.

In the following years the Union enlarges, and many events marked its increasing development. In 1995, the Schengen agreements were implemented and the actual elimination of the internal borders was achieved. In 1999, the single currency was introduced. In 1997, the Treaty of Amsterdam was ratified, becoming effective in 1999. This latter Treaty emphasized the political and social connotation of the European construction, especially—for our purposes—with regard to the recognition of human rights and the rule of law as foundational principles of the Union. The Treaty of Amsterdam also replaced—still within the framework of the Pillar structure, which remained unchanged—the JHA with the Area of Freedom, Security and Justice (AFSJ), in which the Union was assigned a direct competence to establish minimum standards for the harmonization in criminal matters, to strengthen judicial and police cooperation in criminal matters, and to establish special European bodies to promote this cooperation, such as Europol and Eurojust. The Treaty of Amsterdam also reinforced the idea of a multispeed Europe through the instrument of enhanced cooperation.

Finally, after the reforming impulse of the 2004 draft European constitution, failed under the blows of the French and Dutch referendum, the European Council held in Lisbon in 2007 approves a new treaty. This treaty—the Treaty of Lisbon—is actually made of two bodies: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which nonetheless represent a unitary regulatory framework, now comprising, with important and innovative changes (but also with some disadvantages in terms of organicity), the matter previously regulated under the old TEU dating back to Maastricht. While avoiding again the idea of a constitution (all the 'symbolic' elements that may refer to this concept are intentionally abandoned), the Treaty of Lisbon includes many of the aspects that had characterized the faded draft of the European constitution. It redrafts the very structure of the Union by abolishing Maastricht's Pillar structure and merging the Union and the Community into a single body: the European Union. The Community method becomes the functioning approach not only for a single Pillar but also for the whole Union. And if, with the Treaty of Lisbon, the Foreign and Security Policy (CFSP) remains subject to different rules and procedures, even if in the unitary system of the Union, certainly—and this is the most significant innovation—the matters of the former Third Pillar, namely the Area of Freedom, Security and Justice—and, for our purposes, judicial and police cooperation in criminal matters—have fully become EU law. Indeed, on 1 December 2014, elapsed the transitory 5-year period during which the Court of Justice and the Commission were vested with limited powers of intervention over the measures adopted under the old regime. In any case, the integration finds subjective limits with regard to some States (United Kingdom, until the process of withdrawing from the Union will be completed; Ireland, and Denmark).

Undoubtedly, the Area is the space that, with the entry into force of the Treaty of Lisbon, has been interested by the most significant changes. Indeed, with the Treaty

of Lisbon, the Area and, therefore, criminal matters become more important than matters dealing with economic integration, until then considered as a primary importance, in the hierarchy of objectives: to the former is dedicated Par. 2 of Art. 3 TEU, while the latter is merely addressed in the subsequent Par. 3.

The two cores around which the Area develops are represented by judicial cooperation and by the approximation of national legal systems. Judicial cooperation has represented until now the cornerstone of the structure. Everything dealing with criminal justice within the Union was necessarily connected with judicial cooperation. Originally, it was an intergovernmental cooperation, managed through diplomatic channels. Then, after the Lisbon Treaty, this cooperation became a judicial one, managed directly by the judicial authorities of the countries involved.

The aspect concerning the harmonization of the national laws, albeit long advocated, had been remained unimplemented. And it is easy to understand why: criminal proceedings represent a very sensitive area, with regard to which States are particularly reluctant to abdicate to their sovereignty. However, cooperation based on a principle like that of mutual recognition of judicial decisions, which presupposes 'trust' in the respective legal systems of the Member States, cannot properly develop without harmonization of national laws. Indeed, aware of this, the Treaty of Lisbon has led to take a very important step in this direction: an express legal basis for this harmonization was established for the first time. Article 82 TFEU, by linking judicial cooperation with harmonization, provides that, in order to facilitate mutual recognition of judicial decisions and judicial and police cooperation, common minimum standards may be established by the Union. These standards, which will have to take into account the different legal traditions of the Member States, will regulate some principles regarding criminal proceedings, like the mutual admissibility of evidence, the rights of persons involved in criminal proceedings, the rights of the victims, and any other aspect of criminal proceedings that may be deemed relevant.

Article 82 TFUE is a fundamental rule, which will be addressed several times in this volume and which exerts its effects on the entire matter we are dealing with. It represents the legal basis for an increasing series of wide-range interventions based on the need to harmonize the criminal procedure, such as the Stockholm Program enacted by the European Council in May 2010. Specularly, the Treaty of Lisbon aims also to harmonize substantial criminal law, providing in this regard a legal basis in Art. 83 TFEU.

Finally, it must be remembered that with the 'communitarisation' of criminal justice also this area becomes affected by all the problems that are central to the policy of European integration: the relationships between the Union and Member States, with the corresponding division of competences; the legislative and decision-making procedures at the EU level; the primacy of EU law on the national systems; the role of the Court of Justice and its relationship with national judges (including constitutional courts); but also its relationship with the European Court of Human Rights, since both courts are involved in the protection of fundamental rights; the relationships between the two courts also in the perspective of the accession of the Union to the ECHR; the problem concerning the effectiveness in the protection of fundamental rights.

In this regard, the Charter of Fundamental Rights of the European Union, to which the Treaty of Lisbon assigns the same legal value of the Treaties, should represent a general coverage for such a protection. Nevertheless, it must be remembered that the area of judicial and police cooperation, *id est*, the very cornerstone of the matters dealing with criminal procedural law referring to the Area of Freedom, Security and Justice, has shown for long a lack of protection of fundamental rights. Therefore, it is in this very area that a need for a normative action of the Union implementing the aforementioned Stockholm Program was felt. More importantly, with the Treaty of Lisbon and the 'communitarisation' of the former Third Pillar, the Union became competent to legislate criminal law and procedure, a competence that until the enactment of the Lisbon Treaty was reserved to the States, and that now States are expected to 'share' (shared competences) with the Union, being bound by its choices whenever it exercises its powers (Art. 2.2 TFEU).

The circumstance that the matters that fell under the former Third Pillar—and especially police and judicial cooperation in criminal matters—have been communitarized and, therefore, share the same treatment originally reserved to the matters falling under the First Pillar, implies in their regard a different involvement of the European institutions and the application to them of the Union's legislative methods and the respect of the competence rules in the relationship between the Union and the States.

It is therefore necessary to address briefly these issues, taking into account only basic institutional indications, in the purpose to provide for notions and concepts that will be addressed in the following parts. Let us begin from the post-Lisbon institutional framework.

1.2.2 The Competences of the European Union

1.2.2.1 The Principle of Conferral

It is useful to see at the outset which principles govern the competences of the Union, since this issue is clearly connected to the problems dealt with criminal justice.

To this purpose, it is necessary to move from the premise that the European Union is not structured as a federal State, nor can it be seen as an entity with general competences. Conversely, it represents an autonomous legal order to which the Member States have transferred areas or parts of their sovereignty. Such a nature implies a first principle, called 'principle of conferral', pursuant to which, as established by Art. 5.2 TEU, 'The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. The same Art. 5.2 TEU also adds that 'competences not conferred upon the Union in the Treaties remain with the Member States'. The principle, therefore, highlights the derivative nature of the powers of the Union. Such a principle is reaffirmed also in other provisions and in other contexts (see Arts. 3.6, 4.1 TUE and 7 TFUE); and this shows how the need to specify—and, especially, to

limit—the competences of the Union has represented a concern deeply felt by the Member States, jealous of their sovereign prerogatives. From this point of view, the principle of conferral marks the boundaries of the Union's legislative powers, i.e. the perimeter of the Union's law.

A (limited) mitigation of this principle may derive from the so-called flexibility clause provided by Art. 352.1 TFEU, which allows the Union, even absent an express conferral of powers, to adopt, through a particularly rigorous procedure requiring the unanimous vote of the Council and approval by the European Parliament, the appropriate measures that may appear necessary in order to achieve within the framework of the Treaty's policies an objective set out by the Treaties (measures of legislative harmonization, or for the expansion of the Union's powers, or implying changes to the Treaties without the activation of the procedures requested to this purpose are nonetheless excluded from such mechanism: Declaration 42). In other words, the flexibility clause represents the tool to exercise the so-called 'implicit powers' of the Union, namely, the powers that are deemed necessary to achieve one of EU objectives as defined by the Treaties.

1.2.2.2 Shared Competences

After establishing the principle of conferral, Art. 2 TFEU lists various categories of competences of the Union: exclusive competences; shared competences; competences supporting, coordinating, and supplementing the action of the Member States; competences coordinating the field of economic and employment policies; and competence for the definition and implementation of the CFSP.

Our interest will focus on the shared competences, since it is within their purview that the Area of Freedom, Security and Justice is expressly included (Art. 4.2 TFEU). Unlike what happens with regard to the exclusive competences, where the transfer of sovereignty from the States to the Union is complete and unconditional, in the shared competences the relationship between States and the Union is more complex and dynamic. Indeed, in light of Art. 2.2 TFEU, the competence to legislate and to adopt legally binding measures coexists for both the Union and the Member States. The States have full power to act until the Union remains inactive; however, as the Union progressively exercises its competences, States progressively lose their power, and, conversely, they regain it to the extent that the Union decides to stop exercising its competence.

The fact that the Union's activity determines that States are not allowed to act has led to limit such EU supremacy only with regard to the elements composing the specific measure at issue and not to the whole area within which such measure is comprised. Consequently, with regard to this area, the competence of the Member States would remain unaffected (Protocol 25). However, as we will see, Member States are also subject to the principle of sincere cooperation (Art. 4.3 TEU), pursuant to which they must refrain from 'any measure which could jeopardise the attainment of the Union's objectives'. States, therefore, would be prevented from legislating on matters already addressed by acts of the Union. The consequence would be that if the Union adopted a complete and detailed regulation in a given

sector, the States would be completely precluded from acting (the so-called preemption clause). Furthermore, with specific regard to directives, in addition to being obligated to adopt implementing domestic law (Art. 288 TFEU), while the implementing term is pending, States must refrain from introducing new laws in their domestic legal system that could be inconsistent with the spirit and the letter of the directive. Moreover, the Court of Justice (CJEU, 28 April 2011, C-61/11/PPU, *El Dridi*), concerning the so-called Return Directive (2008/115/CE), went as far as to identify—in the name of the principle of sincere cooperation—an 'expansive' effect of the Union act (in the specific case, a directive with direct effect) in matters concerning national criminal law and criminal procedure. The Court ruled that such act would affect also the remaining 'full' legislative competences of the Member States, as the States would not be entirely free to legislate not even in those areas, since they would be expected to ensure that in such contexts as well the 'effectiveness' of the directive is preserved. It must be noted that such a principle, pursuant to which any provision must be interpreted and applied in a manner that will allow it to display all the effects suitable to make it achieve in the fullest and most effective way its aims, has been applied, for the first time, in the field of criminal justice. Such an application has not concerned provisions implementing an act of the Union, but has involved domestic provisions that were extraneous to the direct application sphere of the directive, therefore 'bending' also them to the Union's acts. This is a perspective that, besides making entirely useless the aforementioned limit established by Protocol 25, also adversely affects, eroding it, the principle of division of competences between the Union and the States, in the view to promote the integration between Union legal system and the national legal systems, especially in the area of criminal law and procedure. And it must be stressed that such an approach could be fraught with consequences for our subject.

1.2.2.3 The Exercise of Shared Competences: The Principles of Subsidiarity and Proportionality

While the principle of conferral identifies and limits the competences of the Union, the exercise of such competences is based on the two principles of subsidiarity and proportionality (Art. 5.1 TEU).

As stated by Art. 5.3 TEU, the principle of subsidiarity, which applies specifically to the shared competences, implies that the Union is legitimated to act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level'.

This is a principle of fundamental importance in the process of European integration, reaffirmed and highlighted in various acts: especially by Art. 69 TFEU, with specific reference to the Area of Freedom, Security and Justice. In the context of the division of competences between the Union and Member States, the purpose of the principle of subsidiarity is to counterbalance in favor of the latter the supremacy that

the regulation of the shared competences assigns to the former. In light of this principle, the action of the Member States must be preferred every time it ensures the achievement of the objectives, even just in a 'sufficient' manner, while that of the Union must be preferred only if the Union demonstrates to be able to achieve them at a 'higher' level. On one hand, such mechanism aims to avoid leaving such a sensitive assessment, which includes also political choices, to the unquestionable evaluation of EU institutions concerned in the legislative procedure; for this reason, also national parliaments are involved in this assessment, in order to allow them to have their say on this issue, pursuant to the procedure set out by Protocol 2 and with the consequences indicated therein (see Sect. 1.2.3.3). On the other hand, the Court of Justice is entitled to carry out a judicial assessment on the violation of that principle (Art. 8 Protocol 2).

Also, the fundamental principle of proportionality—which finds application with regard to both shared and exclusive competences—aims to limit an unjustified expansion of the Union's action. Similarly to the principle of subsidiarity, this principle is inspired by the purpose to protect the prerogatives of the Member States. Article 5.4 TEU indicates that, in light of the principle of proportionality, 'the content and form of Union action' must be limited to 'what is necessary to achieve the objectives of the Treaty'. Such limit shows that there must be a relationship of congruence and graduation between the instruments to be adopted (type and content of the act: see also Art. 296 TFEU) and the result to be reached. With regard to the problem concerning the choice of the act, it is clear, for example, that, especially with regard to judicial and police cooperation in criminal matters, the directive shall be generally preferred over the regulation since the former ensures that implementing spaces are left to the Member States.

1.2.2.4 Competences of the Union, National Law of the Member States and Rules of Criminal Procedure

It is useful to end this short overview of the principles governing the competences of the Union with a final remark.

As we said, in light of the principle of conferral, the Union is legitimated to act only in the areas of competence established in the Treaties. Nonetheless, it is important to remember that EU law may regulate, in order to achieve its objectives, aspects concerning domestic criminal procedure. We are not referring here to a direct incidence linked to a wide interpretation of the so-called effectiveness of a directive, based on the principle of sincere cooperation, but, rather, to a direct effect of the EU act on domestic law. Harmonization directives present indeed this very characteristic. A clear example is represented by Art. 82.2 TFEU concerned with judicial and police cooperation in criminal matters. The provision states that 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension', the legislative bodies of the Union may, through directives, 'establish minimum rules' for matters that not only involve a relationship between different legal

systems, such as 'mutual admissibility of evidence between Member States', but also involve broadly and with the most various forms the entire complex of domestic law as such, as it happens for the 'rights of individuals in criminal procedure'. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, and Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings, all adopted in order to implement the 'roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' of 30 November 2009, and the 'Stockholm Program' adopted on 10 December 2009, find their legal basis in Art. 82.2.b TFEU and confirm that the Union, by invoking transnational needs like mutual recognition and judicial cooperation, may affect directly national laws for the purpose of their approximation. It should be noted, therefore, that, by means of Art. 82.2 TFEU, the domestic criminal procedure may become for all intents and purposes a matter falling under the (shared) competence of EU law.

Of course, it should also be added that this possibility does not necessarily imply a passive acquiescence by Member States on this point, especially considering that the national parliaments are involved in the legislative procedure of the Union law by monitoring in advance the respect of the principle of subsidiarity in the legislative drafts presented by the Commission and being allowed to voice their concerns also through their governments inside the Council.

1.2.3 Legislative Bodies and Legislative Procedures

1.2.3.1 Legislative Bodies and General Principles to be Followed in Their Action

Taking into account only the bodies concerned with legislative, decision-making and judicial protection activities, we have to consider, on one hand, the European Parliament, the Council, the European Council, and the European Commission, which are all political institutions, and, on the other hand, the Court of Justice of the European Union, which, conversely, is a control institution performing a judicial function. The other existing European bodies (agencies) created for the performance of specific tasks in the area of judicial and police cooperation in criminal matters, such as Eurojust, Europol and OLAF, will be addressed directly elsewhere (see Sects. 5.1 and 5.2).

The institutional framework is unitary, but the role and powers of the different institutions vary according to the subject matter and to the decision-making procedures.

The European Parliament, par excellence democratic body, represents the citizens of the Member States (elected by universal suffrage); the Council represents Member States' governments (composed of the competent ministers, depending on the matter addressed from time to time); finally, the European Commission (composed of individuals who are not representatives of a Member State and who are chosen for their professionalism and independence) represents the unitary interest of the European Union. These institutions cooperate and interact in the most important functions, and, for our purposes, the Parliament, the Council, and the Commission play a specific role in the decision-making processes and, especially, in the legislative one. In addition, the Commission, among its various functions, also monitors the enforcement of the Treaties and of the measures adopted by the institutions and, in general, the application of EU law under the control of the Court of Justice (see Art. 17.1 TEU). As a guardian of the legality within the European Union, the Commission may therefore initiate an infringement procedure against the Member States and an action for annulment against the legislative acts of EU institutions (see Sects. 1.2.5.2 and 1.2.5.3).

A special position, conversely, is played by the European Council, a mixed body composed of the heads of State and prime ministers of the Member States, of its president, and of the president of the Commission. The European Council does not perform legislative functions but, conversely, acts as the highest policy-making body of the European Union and, in this role, defines the strategic guidelines of the legislative planning within the AFSJ (Art. 68 TFEU). Furthermore, it performs decision-making functions that influence the life of the European Union and, specifically, plays several roles in our subject. Indeed, it operates as an appellate body in the framework of the so-called emergency brake procedure, as defined by Arts. 82.3 and 83.3 TFEU, and also plays a role in the context of police cooperation (Art. 87.3 TFEU) and in the procedure for the establishment of the European Public Prosecutor's Office (Art. 86.1 TFEU).

In their mutual relationships, EU institutions must comply with two fundamental principles. The principle of institutional balance, which implies that each institution may only act within the limits of the competences conferred to it by the Treaties (principle of conferral) and in adherence with the procedures, conditions, and objectives therein indicated (Art. 13.2 TEU) in order to achieve a distribution of powers that prevents the establishment of dominant positions. In other words, each institution must represent only in part the interests involved and must be vested with powers ascribable to more than one different function. For example, the Commission is an executive body but is also vested with the—almost exclusive—power of legislative initiative; the Council shares with the Commission the executive power but is also a legislative body together with the European Parliament, an arrangement that is rather different from the one characterizing, in civil law legal systems, the classic principle of separation between legislative, executive, and judiciary powers and that has also consequences on the very concept of legality, which, within this participatory framework, aiming at balancing the different interests involved, takes the form of a 'widespread legality'.

The other principle that must be complied with by the EU institutions is the principle of sincere cooperation (Art. 13.2 TFEU), which is considered the keystone of the whole EU system. Indeed, this principle is so important that it is deemed to be applicable not only in the relationships between EU institutions but also in the relationships between the European Union and the Member States, which must respect and 'assist each other in carrying out the tasks which flow from the Treaties' (Art. 4.3 TEU).

It must be highlighted that, on the basis of the principle of sincere cooperation, the Court of Justice has developed over time some fundamental principles of EU law, such as the primacy of EU law over national law; the duty of national judges to guarantee the judicial protection of rights of individuals deriving from EU dispositions having direct effect; the duty of Member States to pay compensation, under certain conditions, for damages caused to individuals and originating from their violation of EU law. For a first, forerunning application of the principle of sincere cooperation between the European Union and the Member States, specifically ascribable to the matter of criminal proceedings well before the Treaty of Maastricht, see CJEU, Order of 13 July 1990, C-2/88 Imm., *Zwartveld and Others*, which established the duty of the Commission, which refused to do so, to cooperate with the examining judge of Groningen (Netherlands) in a criminal proceeding for fraud in the management of Community finances by making the requested documents available to him and by authorizing its officials to be examined as witnesses in the national proceedings.

1.2.3.2 Decision-Making Procedures: The Ordinary Legislative Procedure and the Special Legislative Procedures

The decision-making procedures through which the political institutions jointly express with legal acts the will of the European Union (interinstitutional procedures) are rather heterogeneous. In this context, legislative procedures hold a special importance. They are essentially of two types: ordinary legislative procedure and special legislative procedures. Both are employed within the AFSJ and, specifically, in the area of judicial and police cooperation in criminal matters, even if the former is by far the one most commonly used.

Ordinary legislative procedure has general character. It consists in the joint adoption of a legislative act (regulation, directive, or decision) by the European Parliament and the Council on a proposal of the European Commission (Art. 289 TFEU). It is called 'co-decision procedure' since the Parliament and the Council manage together, on an equal basis, the decision-making power and, therefore, act as co-legislators. The initiative, conversely, is assigned to the Commission, which represents the general interests of the European Union; the Commission activates the procedure presenting a proposal that is sent simultaneously to the Parliament and to the Council.

The procedure, which is described by Art. 294 TFEU, foresees the possibility of three readings by the Parliament and the Council of their respective 'positions' on

the text and a possible 'conciliation' phase to which the Commission itself participates in order to favor an approximation between the positions of the two institutions.

Within this procedure, two aspects are worth stressing: first of all, the overcoming of the democratic deficit that characterized the intergovernmental method previously applied to all the measures of the former Third Pillar (common positions, conventions, decisions, and framework decisions), which was centered upon the legislative monopoly of the Council, that is, of the body composed of the representatives of the Member States' executives. Such deficit is now overcome by the application of the co-decision procedure even to these matters and also by the involvement of the national parliaments, which can now verify the compliance of the legislative proposals with the principle of subsidiarity (see Sect. 1.2.3.3).

The other qualifying element of the ordinary procedure is represented by the overcoming of the unanimity requirement previously requested for the Council's decisions, which allowed even a single Member State to stop indefinitely the adoption of a legislative measure. The rule of qualified majority voting now prescribed for this body makes the normative action of the European Union more simplified and timely, also in the area of criminal law and procedure (of course, with the consequence of binding—against their will—also the dissenting States).

An example, in our subject matter, can be represented by the approval of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, which had previously been stopped for as many as 6 years since it was proposed by a framework decision.

In conclusion, the EU legislative acts are enacted in this context by balancing the interests of the various bodies that participate in the decision-making procedure (European Parliament, Council, Commission, national parliaments).

In the Area of Freedom, Security and Justice, the ordinary legislative procedure is required by Art. 75.1 TFEU with regard to the administrative measures concerning capital movements and payments (such as the freezing of funds) in the prevention and fight against terrorism and related activities; by Arts. 77.2, 78.2, 79.2 and 4 TFEU with regard to border checks, asylum, and immigration; by Art. 82.1 TFEU for the adoption of a multiplicity of measures in the area of judicial cooperation (establishment of rules and procedures to guarantee mutual recognition, prevention, and settlement of conflicts of jurisdiction between Member States; training of judiciary and judicial staff; cooperation between judicial authorities in relation to proceedings in criminal matters and the enforcement of judicial decisions; establishment of minimum rules to facilitate mutual recognition; and judicial and police cooperation with regard to the mutual admissibility of evidence between Member States, to the right of the individual in criminal proceedings, and to the right of the victims); by Art. 83.1 TFEU for the establishment of minimum rules in the definition of criminal offenses and sanctions in a series of specifically identified criminal matters having a cross-border dimension; by Art. 84 TFEU with regard to measures to support the action of Member States in the field of crime prevention; by Art. 85 TFEU with regard to Eurojust's structure, operation, field of action, and tasks; by Art. 87.2 TFEU concerning the collection, filing, processing, and exchange of

information; training and exchange of staff and equipment and common investigation techniques in the framework of police cooperation; by Art. 88.2 concerning Europol's structure, functioning, scope, and tasks.

Conversely, the special legislative procedures lack that perfect symmetry of powers between the European Parliament and the Council that characterizes the ordinary codecision procedure. These procedures are carried out consistently with the provisions indicating the 'legal basis', i.e., which assign to the institutions the power to adopt a certain act, by specifying which is the procedure required. As regards the special legislative procedures in the matter of AFSJ, in the majority of cases the Council has a preeminent position compared to the European Parliament. The measure is adopted by the Council with a qualified majority or, sometimes, by unanimous vote, after a mandatory consultation of the European Parliament (consultation procedure). In cases of special importance, conversely, the measure adopted by the Council must receive the consent of the Parliament (consent procedure): in this case, the decisional power is shared by the two institutions, analogously to the ordinary legislative procedure, without, however, activating this latter.

In principle, even in the special legislative procedures, the Commission's power of initiative remains unchanged.

The special legislative procedures that may be activated in the area of judicial and police cooperation are the approval procedures required, respectively, by Art. 82.2 TFEU for the establishment of minimum rules concerning 'other specific aspects of criminal procedure' (different from those specifically indicated in the same provision, which are subject, as indicated, to the ordinary legislative procedure) and by Art. 86.1 TFEU with regard to the establishment of a European Public Prosecutor's Office and those of consultation required, respectively, by Art. 87.3 TFEU in the area of operational cooperation between the police authorities of the Member States and by Art. 89 TFEU with regard to operations to be conducted by the judicial and police authorities of a Member States in the territory of another Member State.

However, a considerable exception to the Commission's initiative power—irrespective of which legislative procedure is applicable, whether ordinary or special—is established with regard to the measures concerning judicial and police cooperation in criminal matters and the related coordination measures (Art. 76 TFEU), where, alternatively to the Commission, the initiative may also originate from a quarter of the Member States. As it can be seen, in the very sensitive area of criminal justice, therefore, the States have reserved to themselves an autonomous power of normative initiative.

It must be highlighted that they have shown to be particularly active in this perspective: this is testified by the fact that both the directive on the European Investigation Order (EIO) and the directive on the European Protection Order (EPO) have been due to the initiative of, respectively, 7 and 12 Member States.

1.2.3.3 The Involvement of National Parliaments and Their Banning Power

The involvement of national parliaments is provided also in the procedure for the adoption of the EU measures (the so-called ascending phase), albeit with some procedural variations, in the context of both the special procedures and the ordinary procedure. Indeed, national parliaments are requested to verify that the legislative proposals—which must be promptly notified to them: see Art. 4 Protocol 2—comply with the principle of subsidiarity (Art. 12 TEU and, with specific reference to the proposals concerning judicial and police cooperation in criminal matters, Art. 69 TFEU). This represents an important review that provides an answer to a democratic need: as the Member States are expected to comply with the Union's measure once it is adopted, they are given the possibility to verify in advance whether it is truly able to achieve the objective with a 'higher' level of effectiveness than the one that could be achieved at the State level.

In special legislative procedures, if the parliaments of at least one quarter of the Member States provide a negative reasoned opinion in matters falling within the AFSJ, the proposing bodies (respectively, the Commission or the group of Member States in the case indicated by Art. 76 TFEU) will be obligated to re-examine the proposal, which they may decide to maintain, amend, or withdraw (Art. 7 Protocol 2). Conversely, in the ordinary legislative procedure for the reexamination of the proposal, it is required the negative reasoned opinion of the simple majority of the votes assigned to the national parliaments. If the proposal is nevertheless maintained, it must be transmitted to the European Parliament and the Council; finally, if they also express a negative majority opinion (with different percentages depending on the body), 'the legislative proposal shall not be given further consideration' (Art. 7.3 Protocol 2).

Furthermore, national parliaments within the AFSJ are involved both in the mechanisms established for the evaluation of the implementation of EU policies in such field (Arts. 12 TEU and 70 TFEU) and in the political control of Europol and the evaluation of Eurojust's activities (Arts. 12 TEU, 88 and 85 TFEU).

In the perspective of ensuring a higher degree of democratic legitimacy, the possibility of a popular initiative (of at least one million European Union citizens, representative of the various Member States) is also foreseen in order to invite the Commission to submit a legislative proposal (Art. 11.4 TEU); such invitation may also come from the Parliament and the Council (Arts. 225 and 241 TFEU) and in any case has no binding effects.

Both in the ordinary procedure and in the special procedures, with regard to matters of criminal law and procedure, mechanisms are foreseen that assign to Member States special powers of intervention, aimed either at preventing or delaying the adoption of an act that they oppose or, conversely, at avoiding that the act in which they hold an interest is not adopted because of the lack of unanimity in the Council.

– The first scenario—specifically connected to AFSJ—occurs in the context of the ordinary procedure: the single Member States may activate the procedure

so-called emergency brake when they deem that a legislative proposal would affect fundamental aspects of their criminal justice systems. Therefore, they can request that the proposal is referred to the European Council: Arts. 82.3 and 83.3 TFEU.

Such request is sufficient to suspend the ordinary legislative procedure. If the European Council adopts the proposal by consensus (that is, without the opposition of any Member State) within 4 months, the proposal is referred back to the Council and the ordinary legislative procedure starts again. Conversely, 'if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly' and the authorization to proceed with enhanced cooperation 'shall be deemed to be granted'. The dissenting State has, therefore, the power to stop the procedure, but ultimately cannot prevent the adoption of the act through an enhanced cooperation (which, in any case, such State would not be obligated to join).

As we said, the possibility for the State to activate the emergency brake procedure with regard to an act that the State may deem to be going against the basic principles of its criminal justice system (both substantive and procedural) is only foreseen preventively, while the legislative procedure is pending. The mechanism could not be activated once the act has already been adopted. This circumstance would appear to deprive of protection the State with regard to which an act adopted in the context of the former First Pillar (with regard to which the emergency brake procedure was not foreseen) is today suitable to significantly affect the criminal justice system of that State.

– The second scenario occurs, conversely, in the context of special legislative procedures, which require a unanimous vote by the Council. Article 86.1 TFEU requires such condition (subject to the approval by the Parliament) for the establishment of a European Public Prosecutor's Office. Lacking unanimity in the Council, a group of at least nine Member States may request that the draft regulation is referred to the European Council. Consequently, the procedure in the Council is suspended; within 4 months, if the European Council decides to apply the consensus, it refers the draft back to the Council for direct adoption; otherwise, a request for enhanced cooperation on the basis of such draft may be presented by at least nine Member States, pursuant to the aforementioned procedure.

  A situation similar to that provided by Art. 86.1 is regulated by Art. 87.3 TFEU with regard to the cooperation between police authorities, with the only difference that, in case of disagreement, a special consultation procedure will find application.

The possibility to activate in such cases an enhanced cooperation must be considered within the more general context from which this procedure originally developed. We refer to the idea of a 'multi-speed Europe' employed during the process of European integration in order to offer to some Member States (at least nine) the possibility, every time that a non-exclusive EU competence comes into play, to establish among them forms of cooperation that are not shared by all the

Member States, with the aim of promoting the achievement of the EU objectives, to safeguard its interests and strengthen its process of integration when the Council—vested with the power to authorize such cooperation, upon a proposal from the Commission subject to approval by the European Parliament—considers that such objectives cannot be achieved by the European Union as a whole within a reasonable time (Art. 20 TEU and Arts. 326 to 334 TFEU). This is a makeshift solution, but also a precious and flexible one: enhanced cooperation indeed binds only the participating Member States while allowing, at the same time, the Member States that want to engage in a more advanced route to promote the process of European integration. It ultimately represents at the same time a stimulus for other States, which, even though initially cautious, may later decide to join the project when this has become a winning one.

1.2.4 Legal Acts

The European Union is an autonomous legal order to which Member States have conferred, even though in limited areas, their sovereign powers and that recognizes as subjects not only the Member States but also their citizens. This concept, expressed by the Court of Justice for the first time in the famous decision of 5 February 1963, C-26/62, *Van Gend & Loos*, with regard to the European Community, can certainly be applied also to the European Union's post-Lisbon legal order.

Such order is based on a system of hierarchically organized legal sources.

1.2.4.1 Primary Legislation: The Treaties and the Charter of Fundamental Rights of the European Union

The Treaties lie at the top of the hierarchy: specifically, this is the case of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), with their Protocols and annexes, which also regulate very important aspects (see, for example, Protocol 2 on the principles of subsidiarity and proportionality) and which constitute 'an integral part thereof', as indicated by Art. 51 TEU.

Both these Treaties, which form a unitary body, represent the fundamental law of the Union. They establish the principles with which all EU law must comply. While these are formally international Treaties, their constitutional tone is clearly perceivable, a tone that has been emphasized by the Court of Justice itself by stressing that the Treaties have established a special and autonomous legal order. This perspective is reflected, on one hand, in the direct effect that Treaties' provisions have, provided their content is clear, precise, and unconditional (see Sect. 1.2.6.1); direct effect that may be both vertical (when Treaties vest individuals with rights that can be invoked against the Member State) and horizontal (when, conversely, Treaty provisions can

be invoked also between individuals: a situation that is clearly extraneous to the area of criminal justice). On the other hand, this perspective is reflected in the extensive interpretation that the Court has given of the powers of the European Union, often sacrificing the letter of the provisions to the need to make prevail the EU foundational principles.

The Treaties include various provisions that directly affect judicial and police cooperation in criminal matters and criminal procedural law in the perspective of the approximation of national legislation. It is worth citing, for example, on one hand, clause 1 and, above all, clauses 4 and 5 of Title V TFEU (the latter two specifically dedicated to, one, 'judicial cooperation in criminal matters' and, the other, 'police cooperation') and, on the other hand, Art. 6 TEU, dedicated to fundamental rights, and that has a significant impact in our subject.

The same legal value of the Treaties is conferred to the Charter of Fundamental Rights of the European Union (Art. 6.1 TEU). As a charter of rights, this act also shows a clear constitutional 'tone'. Treaties and the Charter represent the EU primary law.

However, according to a well-established opinion, also the general principles of law enjoy a status that is analogous to that of primary law. Such very important principles have been developed over time in the case law of the Court of Justice, and through them, in the absence of written rules, the basic structure of European law has been established. We refer to the principle of primacy of EU law, the principle of sincere cooperation, or the principles that constitute a general elaboration of national principles, such as those deriving from the constitutional traditions that are common to the Member States and, later, also those arising from the ECHR: see, for example, the principles concerning fundamental rights, now expressly referred to by Art. 6 TEU, which, probably more than any other general principle, are called to play a key role in the relationship between domestic and European orders, or, furthermore, the principles derived from legal logic or from needs of material justice, such as the principles of rule of law, of legality, of legal certainty, of legitimate expectation, of effective judicial protection, which all have a very important impact on criminal proceedings.

At the intermediate level in the hierarchy of sources, we find the provisions of general international law and the international agreements concluded by the European Union with third States or international organizations. The former must be complied with by the European Union as a subject of international law, but, if they are not binding norms (*ius cogens*), they can be derogated by the Treaties. With regard to the international agreements, these, once concluded by the Union, become part of the European Union's legal order, ultimately binding both the Union and the Member States (Art. 216.2 TFEU). However, they must respect EU Treaties and must also comply with general principles of EU law and especially those protecting fundamental rights (see CJEU, 3 September 2008, C-202/05P and C-415/05P, *Kadi*). Conversely, since they are, in any case, binding for the EU institutions, such agreements and the decisions issued by the bodies established by them are also binding for EU secondary law.

Secondary law, for its part, lies at the bottom of the hierarchy of EU legal sources and is represented by EU institutions' acts. It consists of several kinds of acts—the basic ones and the implementing or enforcement ones—a set of instruments that, in turn, may be legislative or non-legislative, depending on the decision-making procedure (whether legislative or not) requested for their adoption.

With regard to their structure, the acts of the institutions are typical or atypical. Regulations, directives, decisions, opinions and recommendations are all typical acts. However, only the first three are EU legal sources, due to their binding force, while, pursuant to Art. 288 TFEU, recommendations and opinions have no such character.

While all three have binding force, regulations, directives, and decisions show different characteristics, even if there is no hierarchical order between them, as in the hierarchy of legal sources they all enjoy the same status, and any one of these acts can abrogate the others.

1.2.4.2 Regulations and Directives

Pursuant to Art. 288 TFEU, regulations have general application and are binding in their entirety and directly applicable in all Member States. Their general application and binding force demonstrate their normative nature. Specifically, general application implies that regulations are applicable to an indefinite series of subjects, while binding force concerns all the elements of the act; Member States, therefore, could neither leave unapplied nor limit the scope of some of its provisions. Finally, direct applicability implies that regulations produce direct effects in the national legal orders, without the need—or, better, with the prohibition—to be implemented. With regard to specific matters—due to their sensitivity—the adoption of regulations is expressly foreseen also in the field of judicial and police cooperation in criminal matters. Articles 85.1 and 88.2 TFEU require them with regard to the establishment of the structure, operation, field of action, and tasks of, respectively, Eurojust and Europol, and Art. 86.1 TFEU with regard to the establishment of a European Public Prosecutor's Office. There is no doubt, however, that in light of their full binding force, regulations are particularly invasive instruments and, for this reason, are not seen with favor by the Member States, especially for interventions in an area as 'sensitive' as that of criminal justice.

Directives have different characteristics. Pursuant to Art. 288 TFEU, they are binding upon Member States only as to the results to be achieved, leaving them free to choose the form and methods to achieve such results. Therefore, directives, like regulations, cannot be applied selectively or partially, but, unlike regulations, they are not directly applicable and become effective in the national legal order only indirectly, that is, by means of the specific measures through which the State must implement them.

Directives represent the most appropriate instruments to achieve the approximation of national laws. The fact that they request only 'an obligation of result', therefore leaving Member States free to choose the means to achieve it, makes directives particularly suitable for this purpose. Indeed, approximation presupposes

achieving certain background goals, leaving a margin of appreciation to national systems in implementing them. In this regard, directives represent a more ductile and less intrusive tools than regulations. Therefore, they come to be preferred in the areas of criminal law and criminal procedure (see, for example, Arts. 82.2 and 83.1 TFEU dealing, respectively, with the establishment of minimum rules in criminal law and criminal procedure).

Directives must be implemented within a term established by them, but they are already able to produce some legal effects after their enactment, by determining an obligation—expression of the principle of sincere cooperation—on the States to not issue, while the term is pending, legislative measures that are inconsistent with the directive or that in any case would make more difficult its implementation: it is the so-called standstill obligation (see CJEU, 18 December 1997, C-129/96, *Inter-Environment Wallonie*).

It happens often that States implement directives with delay or incompletely or insufficiently, therefore hindering the achievement of the directive's goals. In light of these pathologies, the Court of Justice, in its case law, has laid down the principle that if a Member has not transposed the directive by the deadline or if it has transposed the directive only partially or not sufficiently and the directive recognizes individual rights against public powers, the directive may have direct effect, provided its provisions are clear, precise, and unconditional (that is, they do not require any further regulatory specification) (CJEU, 4 December 1974, C-41/74, *Van Duyn*).

The direct effect of directives enables individuals to have their rights recognized by a national judge against the violating State (so-called vertical direct effect), also by means of the disapplication of the national law that is inconsistent with the directive, as happens with regard to a regulation (see Sect. 1.2.6). Conversely, if the directive does not contain provisions with such characteristics, no direct effect can be recognized, but the national judge will still be obligated to interpret national law consistently with the directive (CJEU, 4 July 2006, C-212/04, *Adeneler*).

Another question concerns the time from which the obligation of consistent interpretation arises: if only after the transposition deadline expires or, conversely, earlier, since the directive is adopted. The aforementioned standstill obligation, which applies also to judicial bodies, and, in general, the principle of sincere cooperation would point toward the latter option. The Court of Justice, for its part (see the *Adeneler* judgment) does not seem to be far from this view. However, the Court foreshadows it in the context of a not entirely coherent reasoning. While linking the obligation to the expiration of the term, the Court adds that 'from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive'.

1.2.4.3 The Ultractivity of the Acts of the Former Third Pillar: Framework Decisions

Until the entry into force of the Treaty of Lisbon, the matter of judicial and police cooperation in criminal matters, as it belonged to the Third Pillar, could not be governed through regulations and directives, which were typical of community law, at that time reserved only for matters falling under the First Pillar. Different types of acts had been foreseen for judicial and police cooperation in criminal matters, acts that we will now briefly address since some of them are still in effect, even after the entry into force of the Lisbon Treaty. Indeed, Art. 9 Protocol 36 provides that their legal effect will remain unchanged until they are abrogated or amended by a subsequent act of the Union in the application of the Treaties. In any case, with the expiration of the 5-year transitory period, the Court of Justice and the Commission enjoy the same powers in respect of these acts, if still in effect, that they enjoy in respect of EU acts (Art. 10 Protocol 36). This concept is usually expressed by saying that Third Pillar's acts have become 'Lisbonised'.

Article 34.2 of the old TEU listed four categories of legal acts that could be adopted by the EU bodies in the context of the Third Pillar: common positions, framework decisions, decisions, and conventions. Besides conventions—typical instruments of international law, which, albeit being negotiated within the EU bodies, needed in any case to be ratified by every Member State, making this a lengthy procedure—the other acts were acts of secondary legislation and, as such, were more manageable.

Among these measures, framework decisions have assumed special importance. Article 34.2.b of the old TEU specified that these were instruments aimed at the 'approximation of the laws and regulations of the Member States'; binding upon the Member States as to the results to be achieved, but such to leave it free as to the choice of form and methods to be employed; and, finally, without direct effect. With regard to the first two aspects, it is clear that the regulation of framework decisions was similar to the one of directives. The express exclusion of any direct effect, sought by the Member States in order to safeguard their legislative autonomy in criminal matters, highlighted, conversely, a difference compared to the directives: regarding the latter, the legislator had left unresolved the problem, but the Court of Justice, for its part, had resolved it positively, as we said before (see Sect. 1.2.4.2). The events that occurred on 11 September 2001, which inaugurated an intense period of fight against cross-border crime, led to the proliferation of framework decisions in the area of criminal law and procedure, the most famous of which is certainly 2002/584/JHA on the European arrest warrant (EAW).

The awareness of the importance of the framework decision instrument for the EU intervention strategies in a key field as criminal justice and the consideration that the lack of direct effect and the absence of coercive means determined a high level of non-compliance by the Member States to the duty of implementing framework decisions within the prescribed deadlines led to an important turning point prompted by the Court of Justice. In a famous decision (CJEU, 16 June 2005, C-105/03,

Pupino) specifically addressing criminal proceedings, the Court established the principle that framework decisions, while not exerting direct effects in the national legal orders, nevertheless impose on the judge—even if not implemented—the duty to interpret national law consistently with framework decisions. This principle since long has been applied to directives as a consequence of the principle of sincere cooperation. Linking it also to framework decisions, the Court made the legal regime of these two instruments more similar, thereby extending for the first time to the field of criminal law and procedure a rule typical of the acts falling within the First Pillar.

However, this lack of direct effect for framework decisions continues to distinguish them from directives, even after the expiration of the aforementioned 5-year transitory period.

1.2.4.4 Decisions

Decisions represent the third type of binding acts. Article 288 TFEU specifies that they are binding in their entirety, and, if they indicate specific subjects to which they are addressed, they are binding only on them. This implies that it is possible to distinguish between individual decisions and general decisions. Individual decisions have been characteristic of this type of acts since their origin, as expression of an administrative activity of the Union, which aimed to apply to a concrete case the abstract provisions of the Treaties or of other community acts. Such characterization still persists today, especially when decisions are addressed to individuals, while if they are addressed to States, they may have normative nature. Like regulations, decisions are binding in their entirety and directly applicable; like directives, they do not have general application; unlike directives, however, they may be addressed not only to Member States, but also to all the subjects encompassed by EU law.

General decisions may have various nature. In principle, they include provisions addressed to the EU institutions or to Member States as actors of the Union's institutional life. Sometimes they represent the only employable instrument to regulate some sectors, such as the CFSP. Some other times—and this is the case that is most relevant to us—they define an action of the European Union. Therefore, they perform—as indicated by Art. 28 TEU—an 'operational measure' in a specific situation, by defining its objectives, extent, means. As a result, they are binding for Member States' actions and positions.

With regard to criminal justice, the European agencies that play a fundamental role in judicial cooperation in criminal matters and in administrative and police cooperation have been established through decisions: let us think of Council Decision 2002/187/JHA, which established Eurojust, and Council Decision 2009/426/JHA, which partially modified its regulation; Council Decision 2009/371/JHA, which transformed Europol into an agency of the European Union (but was replaced by Regulation 2016/794/EU); and Commission Decision 1999/52/EC, which established OLAF.

Furthermore, decisions are expressly foreseen in special cases. Article 82.2.d TFEU provides that, through a decision, the Council, with a unanimous vote and the approval of the European Parliament, will identify 'other specific aspects of criminal

procedure'—different from those already listed in the same provision, which can be established through directives—in order to provide 'minimum rules' with the aim of facilitating mutual recognition and judicial and police cooperation in criminal matters having cross-border dimension. A similar provision is included in Art. 83.1 TFEU with regard to substantive criminal law. And a decision adopted through the same procedure is foreseen also in order to extend the competence of the European Public Prosecutor's Office (Art. 86.4 TFEU) regarding offenses different from those affecting EU financial interests.

In conclusion, an important point should be emphasized: through secondary legislation, the European institutions adopt legal acts that bind directly the Member States in various ways and that, therefore, prevail over national law, enacted both before and after such European acts. Such consequence derives from the nature of the EU legal order, to which Member States transferred part of their sovereignty in certain areas, and that, therefore, exercises its powers by imposing to the States in these fields its legal acts. It represents a fundamental difference from the classic dynamics that characterize international law, where a State that violate an obligation established in a Treaty to which it is a party is in principle only responsible at the international law level toward the other contracting parties.

1.2.5 The Role of the Court of Justice and the Preliminary Ruling Procedure

1.2.5.1 Overview

Finally, we have to focus especially on the Court of Justice of the European Union, as it has played a crucial role in the development of community law, by elaborating through its case law and, in the absence of a written legal basis, its fundamental principles, which only later have been incorporated in the Treaties. It is therefore a body that played—and still plays—a central role in the process of European integration and that, in the post-Lisbon framework, is destined to have a position of primary and increasing importance, especially in the area of judicial and police cooperation in criminal matters and, generally, in the area of criminal law and procedure falling under the competence of the European Union. Here we will examine the different ways through which the Court intervenes, with specific regard to our subject. Conversely, we will reserve the study of its relations with the other courts (the European Court of Human Rights, the constitutional courts, the national courts) in Sect. 2.1 as such relations, albeit having a general nature, are primarily concerned with the protection of fundamental rights.

The Court, which sits in Luxembourg, represents a unitary institution, despite its being composed of three different bodies: the Court, strictly speaking; the General Court; and the specialized tribunals (the only one established so far being the Civil Service Tribunal). Article 19.1 TEU provides this complex judicial structure (and, therefore, each body included in it, within their respective competences) with the

core function of ensuring that 'in the interpretation and application of the Treaties the law is observed'. This makes the Court the supreme judge of EU law and the final guarantor of its interpretation and application.

First of all, here is a general remark on its competences. The jurisdiction of the Court is exercised on rather different matters and at different levels. With the Treaty of Lisbon and the removal of the Pillar structure, the jurisdiction of the Court has, in principle, extended to all the subjects in which the European Union has competence. However, one limit still remains. Indeed, by express exclusion established by Art. 275 TFEU (with the exception of Council decisions establishing restrictive measures for natural and legal persons), the jurisdiction of the Court is still excluded in the area of CFSP, which still deeply characterizes the different regulation of this sector. Conversely, regarding judicial and police cooperation in criminal matters, after 1 December 2014, the limits to the jurisdiction of the Court in this area, which had characterized the transitory post-Lisbon Treaty 5-year period, have generally been removed.

An exception, which regards a general and absolute limit, is still identified by Art. 276 TFEU, which prohibits the Court to adjudicate on the validity or proportionality of operations conducted by police authorities or similar authorities of a Member State and on the responsibility of Member States for maintaining public order and domestic security. It is clear that these aspects touch upon very sensitive interests of the Member States and of their management of domestic matters: therefore, with regard to them, the States decided to exclude any possibility of external control (at least by the European Union; however, a different dynamic may come into play with regard to the ECHR and the European Court of Human Rights if such operations violate fundamental rights).

Before addressing the Court of Justice's different types of intervention, it is necessary to highlight a very important aspect in order to understand the overall functioning of the EU system of judicial protection: we mean to say that the Court does not represent the only body that aims to safeguard the legal positions established by EU law. The system of judicial protection indeed operates on two levels: the Court of Justice's level—which is limited to certain types of intervention—and the general level represented by the national judges. While the Court has exclusive competence over actions for infringement, proceedings for annulment, in addition to proceedings for failure to act and proceedings for damages, outside of these fields the national judges—to whom is assigned, together with the role of domestic judges, also the role of first judges of the European Union—are vested with general competence. Therefore, it will be possible to call them to adjudicate on matters concerning the application of EU law. This principle is enshrined in Art. 19.1 TEU, which provides that Member States 'shall provide remedies sufficient to ensure effective legal protection in the field covered by Union law'. However, it must be added—and this second aspect is also of primary importance to understand the logic that governs the entire EU judicial system—that these two levels of protection—external and internal—are not aimed to act separately and autonomously but that, conversely, they find a crucial connection in the instrument of reference for a preliminary ruling. Indeed, through such a mechanism, the national judge is given

the possibility (and sometimes the duty) to refer issues concerning the interpretation of Union law to the Court of Justice. It is a special device designed to avoid that the widespread control of national judges, performed in a plurality of different legal systems, would lead to differences in the interpretation of EU law that could compromise the need for uniformity and legal certainty in EU law. At the same time, this mechanism has created a fast lane based on a direct dialogue between the Court of Justice and national judges.

This dual level of judicial protection represents a system that is, in principle, complete and self-sufficient, which is typical of a 'community of law', as the Union is intended to be. Such a system guarantees an effective judicial protection for both individuals who suffered damage caused by an act of the EU institutions, bodies, or entities and individuals who, enjoying a right deriving from EU law, suffer prejudice to that right due to acts of Member State authorities. In other words, as stated by the Court, 'neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' (CJEU, 23 April 1986, C-294/83, *Partiécologiste Les Verts*).

That said, it must be highlighted that the actions that can be lodged in the Court of Justice, directly connected to our subject, can be divided in two groups, depending on whether they are directed against a Member State or against an institution of the Union. The infringement procedure belongs to the first group, while the proceedings for annulment fall in the second one. Conversely, the procedure for a preliminary ruling has autonomous features.

Generally, individuals enjoy only a very limited possibility of direct intervention in these proceedings. Such a possibility is altogether excluded when the proceedings regard EU legal acts concerning criminal procedure.

Indeed, in the infringement proceedings, such intervention is not admitted, while in the proceedings for annulment it is allowed only when European acts are specifically adopted addressing individuals or when they directly concern them (Art. 263.4 TFEU): conditions that cannot be fulfilled in our subject since it does not involve individuals as such.

This means that with regard to criminal justice, the judicial protection granted to individuals falls within the exclusive competence of national judges, with whom individuals can lodge complaints both in cases when a right conferred upon them by the European Union is violated by an act adopted by a Member State and when an illegal act of the European Union is implemented by a Member State. In the first case, the individual will challenge the legitimacy of the act concerning his position. In the second case, the individual will be able to challenge the indirect validity of the implementing measure before a national court, which, in turn, will be requested to review the validity of the original act of the Union, by referring for a preliminary ruling to the Court of Justice.

1.2.5.2 The Infringement Procedure

Such a procedure is brought against a Member State that failed to fulfill one of its obligations under the Treaties (for example, the lack or incorrect implementation of a directive before the expiration of the transitory period, as well as other types of violation, such as the development of a case law inconsistent with EU law or the failure to refer for a preliminary ruling when it is mandatory). The infringement procedure falls within the competence of the Commission (Art. 258 TFEU) consistently with its role of guardian of the law of the European Union (Art. 17.1 TEU). The procedure consists of two stages: a prelitigation stage and, possibly, a litigation stage. The Court of Justice is not involved in the first stage, which remains within the competence of the Commission. This latter delivers a reasoned opinion on the alleged failure to the State, which is invited to present its observations within a specific term; then the Commission delivers a final reasoned opinion, which specifies the failure and assigns a term to the State to be complied with (Art. 258 TFEU).

In deciding whether the matter should be brought before the Court of Justice or whether the procedure should be stopped, the Commission enjoys broad political discretion. The procedure may resume after a first declaratory decision is taken by the Court with a second, additional phase, which, in turn, may itself involve a prelitigation stage and a litigation stage, which eventually may culminate in a judgment against the State that failed to fulfill its obligation for payment of a penalty in an amount that is proportional to the seriousness of the violation and which, in any case, is intended to have a strong deterring effect (Art. 260.2 TFEU).

The possibility for the Commission to open an infringement procedure against a State allegedly in violation of its obligations, as established by EU law in the area of judicial and police cooperation in criminal matters—and, first and foremost, of the duty to implement directives in this area within the prescribed term—certainly represents one of the most important consequences of the abolition of the Pillar structure by the Treaty of Lisbon and can become an effective instrument to strengthen EU law in this crucial field.

However, an indirect limit to the infringement procedure in the area of judicial and police cooperation in criminal matters derives from Art. 276 TFEU, which provides that the Court of Justice has no jurisdiction to review the validity of domestic police operations carried out for the maintenance of public law and order and for the safeguarding of internal security.

1.2.5.3 Action for Annulment

While the infringement procedure is directed against a State that failed to comply with its EU obligations, action for annulment is directed against the invalid legislative acts enacted by EU institutions in order to request for their annulment. Therefore, this action consists in a review of the legality of EU secondary legislation, which falls under the exclusive competence of the Court of Justice. This monopoly

excludes national judges (including constitutional courts) from exercising any power in this area in order to avoid the non-uniform application of EU law. If the validity of an act of EU institutions is challenged before national judges as a precondition for the validity of a national implementing act, they are expected to refer the case to the Court of Justice through a request for preliminary ruling on the validity of the Union's Act (CJEU, 22 October 1987, C-314/85, *Foto-Frost*).

For our purposes, the proceedings can be opened only by the Member States and by the European Parliament, the Council, and the Commission, which, as bearers of a general interest to the legitimacy of EU acts, are not requested to demonstrate any specific interest. The action for annulment can be opened in case of lack of competence, infringement of an essential procedural requirement (that is, of the rules concerning the procedure necessary to adopt the act, such as the obligation to consult the Parliament, if necessary, or the obligation to provide reasons), infringement of the Treaties and of any rule of law relating to their application, or misuse of powers (Art. 263 TFEU). If the action is founded, Art. 264 TFEU provides that 'the Court of Justice of the European Union shall declare the act concerned to be void': the expression should be interpreted as meaning that the nullity of the act has a retroactive effect to the moment when the act was issued, even if—as specified by Art. 264 TFEU—the Court may, in its discretion, limit the effects deriving from the invalidity. For its part, the institution, body, or entity that issued the annulled act must take the necessary measures to comply with the judgment of the Court of Justice (Art. 266 TFEU).

It is clear that the proceedings for annulment can be promoted against acts concerning judicial and police cooperation and acts concerning minimum common rules in criminal law and procedure (Arts. 82 and 83 TFEU).

With regard to criminal law, this is testified by CJEU, 13 September 2005, C-176/03, *Commission v. Council*, where the Court annulled, due to lack of competence, a framework decision adopted by the Council under the Third Pillar, establishing for the first time the competence of the rules of the First Pillar to directly impose upon Member States the criminalization of certain conducts affecting community interests.

1.2.5.4 Jurisdiction to Give Preliminary Ruling

The jurisdiction to give preliminary ruling represents the most important and most frequently used instrument within the judicial system of the European Union. It is a rather special and original tool through which the Court has, over time, shaped and built, with innovative judgments of historic importance, the very foundations of Community law.

In order to understand the reason of such a mechanism, it is important to consider that, by themselves, European institutions would not be able to perform a widespread control on the violations of EU law. For this reason, the application of and the control over compliance with the EU law take place, first and foremost, within the legal systems of the Member States through the national judges, who, as first judges of the Union, perform a general, widespread, and decentralized review of such law.

Therefore, since EU law has often a direct effect, it is likely that before such judges may arise issues concerning the application of EU law that fall outside of the Court's direct jurisdiction. However, it must be remembered that EU law is intrinsically complex due to the multiplicity of sources and also in light of linguistic problems. Furthermore, its provisions could lead to different meanings within national legal systems. Leaving their interpretation to national judges could prejudice the uniform application of EU law, which is necessary to guarantee its unity, coherence, and legal certainty. Therefore, in order to safeguard such objectives, the Court of Justice has been assigned the jurisdiction to give preliminary rulings. The main feature of this mechanism, regulated by Art. 267 TFEU, is that the Court is called upon to rule—on the interpretation of law, or of an act of the European Union, or on the validity of such act—only when requested by a national judge who deems necessary—and, therefore, preliminary—the Court's intervention in order to define the proceedings pending before him/her (the Court of Justice stated both that such assessment is left exclusively to the national judge and that a presumption of relevance exists when matters concerning the interpretation of EU law are at issue; see CJEU, 8 September 2015, C-105/14 *Taricco*). In these cases, the pending proceedings remain within the competence of the national judge, while the Court has only to provide the interpretation of EU law through a judicial non-adversarial intervention.

Historically, the preliminary ruling mechanism has been crucial for the strengthening and building of EU law. Through it the Court has been able to systematically develop the Union's foundational principles. Moreover, it created a close interaction between the Court of Justice and national judges, enhancing their role as first judges of the Union and promoting a widespread dissemination of EU law. Finally, the procedure for preliminary ruling is also a mechanism that can be used by private individuals for the protection of their rights guaranteed by the Union, both against the European institutions and against their own Member State.

With regard to the first aspect, private individuals, who are excluded from the possibility to lodge a direct complaint through the proceedings for annulment, especially in the area of criminal justice, can challenge indirectly EU law claiming the indirect invalidity of national acts of implementation, therefore providing the national judge with the opportunity to initiate the procedure for a preliminary ruling. With regard to the second aspect, the protection of the rights guaranteed by the Union against their own Member State has mainly been expressed through the so-called alternative use of the preliminary ruling. As we previously said, the Court of Justice has been assigned the competence to interpret EU law. The Court is not competent, conversely, to rule directly on the compatibility of a national law with EU law and even less to interpret national law; these two functions are reserved to the national judge who has initiated the procedure for preliminary ruling. However, since the true objective of the reference for a preliminary ruling is often to establish the compatibility of domestic law with EU law (an objective that is, first and foremost, aimed by individuals requesting the reference), the Court has been receptive to this demand by changing the request in order to provide the national judge with all interpretative elements of EU law that could be necessary to identify possible incompatibilities of the national provisions that are relevant for the

adjudication of the case. So doing, the Court provides an indirect assessment of such incompatibility (the classic formula employed by the Court indicates that 'provision X of EU law is to be interpreted as precluding/not precluding provision Y of a Member States which states…'). Such an assessment can have effects that are similar to those originating from a judgment issued in an infringement proceeding, pursuant to Art. 258 TFEU, that finds that a Member State has failed to fulfill its obligation under the Treaties.

In this respect, two aspects should be emphasized: (a) the answer of the Court becomes fundamental—given its general scope—in light of the duty of national judges to interpret national law consistently with EU law (see Sect. 1.2.6.2); (b) the Court, in order to issue its judgment, will know national law only through the indications provided by the referring judge. Consequently, if they are incorrect or incomplete, the preliminary ruling would be indirectly affected: a typical example of this scenario took place with regard to the Italian criminal proceedings in the famous '*Pupino* case' (CJEU, 16 June 2005, C-105/03, *Pupino*). The fact that the Court's answer is conditioned by the explanation of national law provided by the referring judge may be consistent with the view that the answer must provide only an interpretation of EU law, but certainly represents a limit for the overall quality of the result. Indeed, other national judges might deem the interpretation provided by the Court irrelevant, since it was based on an incorrect assessment of domestic law, and therefore apply again for a preliminary ruling on the same issue or simply disregard it, except when they are courts of last resort.

The preliminary ruling requested to the Court may not only be of interpretive nature, but may also address the validity of an act adopted by the EU institutions, bodies, or entities. If this happens, the Court's review is carried out in the same cases and with analogous effects of the proceedings for annulment pursuant to Art. 263 TFEU. The difference is that here, in addition to being excluded the application of the 2-month term for raising the issue, the instrument may be urged by private individuals. Therefore, it may be able to indirectly and partially offset their lack of active legitimacy to file the action for annulment. In other words, in this way, the individuals may solicit—through the reference for a preliminary ruling lodged by the national judge—a decision of invalidity by the Court concerning acts like regulations and directives in criminal matters that cannot be considered as directly or individually affecting them.

The faculty for national judges to file a reference for a preliminary ruling turns, conversely, into an obligation for the judges of last resort (Art. 267 TFEU). Indeed, with regard to these latter, an error in the interpretation of EU law would become unamendable and would also affect the nomophylactic function generally reserved to them, while, as previously indicated, the Court of Justice has exclusive competence over the interpretation of EU law.

It must be pointed out that no obligation is provided when the matter referred to the Court is substantially identical to another one already decided by the Court (CJEU, 27 March 1963, C-28-30/62, *Da Costa*) or when, on this specific point of law, an established case law of the Court exists, even if the matters at issue are not identical (CJEU, 6 October 1982, C-283/81, *CILFIT*), or, finally, when the

application or non-application of EU law to the specific case is so clear that it does not leave any reasonable interpretive doubt. In this view, the judge should be persuaded that the specific solution would be shared by any judge of the other Member States and by the Court of Justice itself, even considering the different linguistic versions of EU law and the possibility that the same legal concept would not be identical in EU law and in national laws (CJEU, 6 October 1982, C-283/81, *CILFIT*).

Conversely, the failure to comply with the obligation amounts to a violation of the Treaty; therefore, it may give rise to infringement proceedings by the Commission or by the other Member States.

Furthermore, the Court has established a duty of reference for preliminary ruling also for national judges not of last resort with regard to the validity of EU law: indeed, a national judge cannot autonomously ascertain the invalidity of an act adopted by EU institutions (CJEU, 22 October 1987, C-314/85, *Foto-Frost*); therefore, if a national judge deemed founded the reasons for invalidity presented by the parties, he/she is obligated to submit the matter before the Court of Justice.

In the proceedings for preliminary ruling, in addition to the parties of the *a quo* proceedings, also Member States, the Commission—in light of its role as a representative of the interests of the Union—and the institution, body, or entity that adopted the act whose validity or interpretation is being challenged (Art. 23 Protocol 3) may intervene. To these subjects is also given the opportunity to file written observations. The Court, therefore, in reaching its decision, may rely on the adversarial assessment between subjects bearing different views and claims.

An important topic concerns the value of the judgment delivered under the preliminary ruling procedure. The general opinion is that it is binding for the *a quo* judge in deciding the case at issue (CJEU, 3 February 1977, C-52/76, *Benedetti*). Outside of this area, the issue becomes less clear. By providing that the Court 'shall ensure that in the interpretation and application of the Treaties the law is observed', Art. 19 TEU seems to refer not to general binding effects but rather to a nomophylactic function that is similar to that performed by the European Court of Human Rights, which, according to Art. 32 ECHR, has jurisdiction to adjudicate 'all matters concerning the interpretation and application of the Convention and the protocols'. It is the case law of the Court of Luxembourg that assigns to its decisions a more pervasive effect in order to ensure the unity of the EU system. Specifically, the Court has stated that the consequence of the rule prescribing that in cases of mandatory preliminary reference there is no obligation to refer the matter to the Court when the Court has already ruled on the same matter (CJEU, 27 March 1963, C-28-30/62, *Da Costa*) is that the preliminary ruling judgments both on the interpretation and on the validity of EU law are generally binding for every national judge, obviously, only on the same legal issue (with specific regard to the preliminary ruling on the validity of EU law; see CJEU, 13 May 1981, C-66/80, *International Chemical Corporation*).

In this view, the Court has ruled that the circumstance that a judge did not comply with the interpretive ruling of the Court can determine the liability of the Member State for damages caused to private individuals for violations of EU law (CJEU,

30 September 2003, C-224/01, *Kobler*; CJEU, 13 June 2006, C-173/03, *Traghetti del Mediterraneo S.p.A.*).

Nevertheless, as the binding effect claimed by the Court is limited to 'identical' matters, any difference—even a negligible one—characterizing the case at issue would allow the judge, through the distinguishing method, to depart from that precedent; the same would happen when the Court of Justice based its ruling upon an incorrect interpretation of national law in case of the so-called alternative use of the preliminary ruling.

As the Court's interpretation clarifies the meaning and extent of the provision as they should have been interpreted and applied since the provision was enacted, preliminary ruling judgments apply retroactively and, therefore, also to legal relations already established, unless the domestic decision has become final (CJEU, 27 March 1980, C-61/79, *Denkavititaliana*).

One could wonder what judges other than the one who initiated the reference for a preliminary ruling should do while the case is pending before the Court of Justice when they are aware of the reference and are called upon to address a case analogous to the one referred to the Court. Aside from the possibility for them to lodge a new preliminary reference, such judges (except when they act as judges of last resort) could provide an autonomous interpretation, without prejudice to the duty to comply with the possibly different one subsequently carried out by the Court.

A more sensitive situation occurs when the Court of Justice has invalidated a domestic law implementing a directive, then the domestic law has been amended accordingly, but the national judge is of the opinion that some parts of the amended national law are still inconsistent with the EU provision that had originally determined the Court's decision: in such case, is the judge allowed to disapply the national provision that he/she deems inconsistent with directly applicable EU law, or is he/she expected to refer the matter to the Court of Justice for a preliminary ruling in order to verify the compatibility of the amended domestic law with EU law? This case arose with regard to the so-called 'return directive' (2008/115/CE) and the judgment of the Court of Justice of 28 April 2011, C-61/11/PPU, *El Dridi*, which had deemed inconsistent with such directive both the Italian implementing law and the new law that had replaced the original implementing legislation. In such a case, the legitimacy of the domestic judge to disapply the (new) national provisions would presuppose the direct effect of the directive and a clear inconsistency between EU law and national law; in case of doubts, the reference for a preliminary ruling should be preferred.

Finally, it must be noted that the preliminary reference presents a high operational potential in the field of judicial and police cooperation in criminal matters and in general for the assessment of the compatibility between EU law and national law in criminal law and procedure.

An indirect confirmation of such an impact can be found in Art. 267 TFEU, which specifically provides that, when a reference for a preliminary ruling is raised during proceedings concerning a person in custody, the Court 'will act with the minimum of delay'.

1.2.6 EU Law and Domestic Legal Orders: Disapplication and Consistent Interpretation

EU law grants legal personality not only to Member States but also to those subjects that are granted legal status by the domestic legal orders. In particular, EU law regulates the relations between private subjects (horizontal relations) or between private subjects and a public subject, such as the State (vertical relations). In this latter case, which may occur in the area of criminal procedure, EU law may regulate such relations directly—as happens with regard to regulations, which, being immediately self-executing in all Member States, replace any preexisting national law—or may establish rules aimed at preventing the application of inconsistent national norms. In both cases, EU law has direct effect in national legal orders. Therefore, the individual who benefits from such an effect may obtain that EU law is complied with by the other subject of the relation (i.e., the State, in criminal proceedings), even requesting to a national judge, as first judge of the Union, to ensure such judicial protection. Conversely, if EU law has no direct effect, it may nonetheless provide for an indirect effect, either by exerting a binding interpretation in the application of domestic law, which is the duty to interpret domestic law consistently with EU law, or by granting to the individual the right to claim damages against the liable Member State.

Since both cases of direct effect in vertical relations and cases of indirect effect of EU law may occur in the area of criminal proceedings, it is useful to focus on these perspectives.

1.2.6.1 Direct Effect and Disapplication

Which are the conditions determining the vertical direct effect against the State? According to the Court of Justice's established case law, EU law must be 'sufficiently precise' and 'unconditioned' (CJEU, 19 November 1991, C-6/90, *Francovich*; CJEU, 18 February 1982, C-8/81, *Becker*).

The condition of 'sufficient precision' requires that EU provision, considered in light of its purpose and of the context in which it is included, must have a sufficiently defined prescriptive content in order to be understood by everyone and to be applied by the judges. To this purpose, it must specify who is obligated, who is the holder of the right, which is the content of the obligation and which is the content of the right. For its part, 'unconditioned' is the EU provision that does not need any implementing measure by Member States or EU institutions and that excludes any margin of appreciation by the States in applying it. If both conditions are achieved, the domestic judge, if the national provision presents an irreconcilable contrast with EU provision, will have to 'disapply' the former and apply the latter instead (CJEU, 19 April 2016, C-441/14, *Dansk Industri*).

This is the strongest level of application of EU law, which demonstrates its special primacy. The disapplication is a phenomenon that has no equal in other

models of interaction between supranational law and domestic laws. National judges, considered as first judges of the Union, are indeed asked to perform a widespread control on national legislation, absolutely unthinkable before in civil law systems founded on the centralized review of constitutional courts and on the principle of separation of powers. With regard to the first aspect, relating to directly applicable EU law, the constitutional review is bypassed in favor of the widespread control of ordinary judges. As regards the second aspect, ordinary judges enjoy a preeminent position over national law, since they can disapply it to safeguard the primacy of EU law. A direct dialogue is established between the domestic judges and the Court of Justice, to which they tend to apply through the preliminary reference in order to obtain a ruling on the interpretation of EU law that must be applied in the case at issue and that will be binding on such judges. Finally, and for our purposes, this widespread control performed by the domestic judges is extended in the post-Lisbon framework also to criminal law and procedure. Moreover, disapplication has also been applied in clearly twisted ways. In fact, notwithstanding it presupposes a conflict between norms (the domestic one and the European one), the Court of Justice (CJEU, 8 September 2015, C-105/14, *Taricco*) has gone as far as to apply it to a conflict between a domestic norm (the provision increasing the duration of the statute of limitations) and an objective of criminal policy, represented by the effectiveness of the fight against the frauds affecting the Union's financial interests.

The disapplication of domestic law represents the final step toward the establishment of the primacy of EU law, which, while not expressly established in the Treaties (it is mentioned only in the attached Declaration 17), is considered an undisputed principle of EU law.

It was mainly the Court of Justice's judgments in the *Costa v. Enel* (15 July 1964, C-6/64) and *Simmenthal* (9 March 1978, C-106/77) cases that identified the theoretical foundation of the primacy of EU law. In this perspective, the Court envisioned the European Community as a higher entity, which Member States established circumscribing, albeit in limited areas, their sovereign powers; it is an entity whose law, therefore, imposes itself by its own power on the national laws, pursuant to a 'monist conception' of the relationship between supranational law and domestic law. For its part, the *Simmenthal* judgment specified the consequences of the primacy of EU law: when EU acts have direct effect, they 'since their entry into force make automatically inapplicable any conflicting provision of prior national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each Member State – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. To this purpose—as the Court of Justice further noted (CJEU, 14 December 1995, C-312/93, *Peterbroeck*)—the national judge is in any case bound to review the compatibility of national law with EU law, even *ex officio*.

The disapplication of internal law by the national judge is binding *inter partes*: therefore, it applies exclusively to the case at issue and cannot have any general invalidating effects, which, if anything, only domestic legal orders of the single Member States are entitled to produce. In the Court of Justice's view (CJEU,

24 March 1988, C-104/86, *Commission v. Italy*), it is, indeed, convenient that States take the initiative to repeal national laws that are inconsistent with EU law in order to prevent any confusion and uncertainty.

1.2.6.2 Indirect Effect and Consistent Interpretation

If, conversely, the EU act has only indirect effect—and this usually happens in criminal procedure—it demonstrates—as stressed by the *Granital* judgment—that in this case 'the Community (today, the Union) has not exercised its legislative competence with the same intensity'. Nonetheless, such indirect effect produces, as an important consequence, the obligation for the domestic judge to interpret national law consistently with EU law (CJEU, 10 April 1980, C-14/83, *von Colson*; CJEU, 13 November 1990, C-106/89, *Marleasing*).

Such level of implementation of EU law is usually considered a consequence of the duty of sincere cooperation (Art. 4.3 TEU), which requires Member States to refrain from adopting any measure or conduct that may jeopardize the fulfillment of EU obligations, and which, first of all, binds national judges, who are required to attain case by case such objective. Furthermore, the duty of consistent interpretation can also be related to the provision of Art. 288 TFEU, which, stating that directives are mandatory for Member States as to the result to be achieved, requires each national body to pursue such goal through appropriate forms, which, for the national judge, are first and foremost represented by the interpretation (CJEU, 5 October 2004, C-397/01, *Pfeiffer*; CJEU, 19 January 2010, C-555/07, *Kücükdeveci*).

In any case, consistent interpretation represents a preliminary obligation for the judge also with regard to EU law with direct effect. Indeed, if consistent interpretation were able to solve the conflict between supranational and national law, there would not be any need to disapply the latter.

According to the case law of the Court of Justice (CJEU, 5 October 2004, C-397/01, *Pfeiffer*; CJEU, 16 June 2005, C-105/03, *Pupino*), the objective of consistent interpretation is to 'interpret national law in light of the wording and of the purpose of EU law'.

Such an obligation concerns not only the 'national law adopted to implement the directive' (CJEU, 10 April 1980, C-14/83, *von Colson*), but, as specified by the Court of Justice, the national law as a whole (CJEU, 5 October 2004, C-397/01, *Pfeiffer*; CJEU, 4 July 2006, C-212/04, *Adeneler*; CJEU, 28 July 2016, C-294/16 PPU, *JZ v. Prokuratura Rejonowa Łódź–Śródmieście*).

With regard to the parameter to which national law must comply with, on one hand, the principle of consistent interpretation concerns the entire EU legislation, both primary and secondary, including, besides the framework decisions of the former Third Pillar after the *Pupino* judgement, especially the directives, with regard to whom such principle clearly shows its highest operational potential. Consistent interpretation is destined to have a strong expansive trend, especially with regard to criminal procedure, after the Treaty of Lisbon has transferred this matter from the

former Third Pillar into EU law. On the other hand, the Court of Justice has stated that, in order to identify the correct meaning of the EU provision with which domestic law must comply, it is necessary to take into account not only its literal meaning, but also the legal context to which it belongs (CJEU, 8 November 2016, C-554/14, *Ognyanov*).

As it presupposes a hierarchical relationship between norms (the lower must comply with the higher), the principle of consistent interpretation is applicable with regard not only to EU law, but also to ECHR law. It is an interpretation that aims to coordinate internal law with supranational law. It follows that—except when the 'consistency' of the national provision with the supranational one can already be achieved through an interpretation based exclusively on internal resources—consistent interpretation produces an 'integrating' effect, since it leads to a hermeneutical outcome that is the result of the combination between the domestic provision and the supranational one.

From this perspective, consistent interpretation—representing a crucial aspect in the complex interaction between European law and national legal systems—can be considered at the same time a precious and a delicate instrument. It is precious because, by prompting national judges to read domestic law in light of European goals, it could promote an EU (and ECHR) oriented development of national criminal proceedings. Moreover, consistent interpretation could also create the conditions for a more cultural homogeneity among lawyers, for an increasingly widespread common 'thinking', which, in turn, may favor a hermeneutical approximation of domestic systems and, consequently, a higher level of mutual trust, which is an essential tool to achieve a better police and judicial cooperation and mutual recognition.

At the same time, consistent interpretation is also a very delicate instrument, since it can determine a tension between 'domestic legality' and 'European legality'. Indeed, at least when civil law systems are involved, it can imply an interaction between legal instruments that are structurally inhomogeneous. In fact, in such cases, the detailed provisions typical of national codes—describing rules that are organized and coordinated according to the organic logic of a system—have to interact with supranational provisions, often general and generic, drafted in terms of principles, which are, in turn, shaped and enriched by the creative case law of the two European courts, and which represent the parameter with which internal provisions must comply. In this context, it is likely that national rules may yield to European principles, so favoring a sort of 'de-codification' effect at operational level.

This is a result that in the area of criminal proceedings could also be promoted by the instruments of mutual recognition. Indeed, also such mechanism could easily lead judges to a lesser observation of domestic rules, due to a perception that these latter would not be in principle respected by external judicial materials that, in any case, would be entitled to have the same value of the internal ones.

Coming back to the duty of consistent interpretation, according to the case law of the Court of Justice, it must be stressed that it is not unconditional, being subject to two types of limits: an axiological limit, represented by the need to comply with the

general principles of law, considered as common principles of EU law, as well as the fundamental principles of the domestic constitutional orders, and a logical limit, represented by the prohibition against *contra legem* interpretations.

It shall be highlighted that, from a conceptual point of view, the first limit may be deemed to be comprised in the second. Indeed, an interpretation that does not respect the general principles of law should be considered certainly *contra legem*. However, from a pragmatic perspective, the distinction may be useful to underline that the prohibition against *contra legem* interpretation protects, especially in civil law system, law of parliamentary origin.

(a) With regard to the first limit, the prohibition against consistent interpretation can be considered a consequence of the general prohibition for EU law to have a content that is in conflict with the general principles of law. Such an aspect has important consequences in the field of substantive criminal law, with regard to the principles of legality and nonretroactivity.

The Court of Justice (CJEU, 8 October 1987, C-80/86, *Kolpingluis Nijsmegen*; CJEU, 3 May 2005, C-387-391-403/02, *Berlusconi et al.*) has indeed stated that such principles imply that a directive cannot 'of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive' (for the same conclusions, with regard to framework decisions, see CJEU, 16 June 2005, C-105/03, *Pupino*). The Court of Justice stated, for its part, that 'the principle of non-retroactivity of the criminal law means in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought' (CJEU, 8 November 2016, C-554/14, *Ognyanov*; CJEU, 5 December 2017, C-42/17, *Taricco II*).

Conversely, the Court of Justice has considered admissible consistent interpretations of procedural rules that can produce unfavorable effects for the accused, on the assumption that they would not affect the 'extent of the criminal liability' (CJEU, 16 June 2005, C-105/03, *Pupino*), provided, of course, that they respect fundamental rights, first and foremost the right to a fair trial.

The second limit represented by the prohibition against consistent interpretation in contrast with fundamental principles provided in the domestic constitutional orders is, conversely, more elusive and almost 'virtual'. It appears to identify itself substantially with the so-called 'counter-limits' that the States can oppose to EU law; their identification remains, in any case, rather vague, and national constitutional courts are generally reluctant to invoke them.

(b) The prohibition against *contra legem* interpretation should be considered, for its part, as a natural consequence of the fact that consistent interpretation must remain a hermeneutical tool that 'maintains' itself and that operates within the borders of the 'law'. In other words, it should imply a range of choices between several possible interpretations, which is destined to drop when an irreconcilable

antinomy between a domestic law provision and a supranational law provision occurs. Indeed, crossing that limit, the interpreter would be transformed into a legislator and would surreptitiously assign direct effect to EU provisions that are lacking it, therefore *de facto* disapplying inconsistent domestic provisions.

However, it must be highlighted that such limit is *de facto* systematically crossed. The Court of Justice aims to encourage the broadest expansion of consistent interpretation by making less stringent, if not eluding it altogether, the prohibition against *contra legem* interpretation. Indeed, it endorses consistent interpretation even when, despite that there appears to be a clear contrast between a specific domestic provision and a directive (or a framework decision of the former Third Pillar), this contrast may be overcome taking into consideration 'all the rules of national law' (CJEU, 16 June 2005, C-105/03, *Pupino*; CJEU, 4 July 2006, C-212/04, *Adeneler*; CJEU, 24 January 2012, C-282/10, *Dominguez*).

Strictly speaking, such a criterion conversely shows to be rather elusive, as it must be remembered that every provision needs in any case to be interpreted in light of the whole national legal system and that consequently any contrast becomes relevant only after such an interpretation is performed. In this light, the formula adopted by the Court of Justice can be seen as an invitation to national judges to apply consistent interpretation also at the cost of manifest distortions, aiming above all at avoiding any conflict between national law and EU law.

This can be clearly showed by the following examples.

The first example concerns the famous and previously cited '*Pupino* case', where the main issue was the consistency of Italian national law to Arts. 2, 3, 8.4 of Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings. These provisions required States to introduce protections in criminal proceedings for especially vulnerable victims, safeguarding their possibility to be heard, conferring them the best treatment in accordance with their needs and avoiding the possible negative consequences of giving evidence before the court at a public hearing. The Court of Justice with a preliminary ruling (*Pupino* judgment) stated that the provisions of the framework decision needed to be interpreted in the sense that 'a national court must be able to authorize young children who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements ensuring them an appropriate level of protection, outside the public trial and before it takes place', adding that, as a result, 'the national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision'. Following this judgment, the referring judge ruled—through a choice based more on personal values than on interpretative criteria and in any case not 'imposed' but only suggested by the Court of Justice—that the testimony of the young children at issue should be given through the special evidentiary hearing (the so-called '*incidente probatorio*'), despite that the specific circumstances did not fall in any of the cases exceptionally and strictly provided by the Italian code of criminal procedure for the use of this instrument, which derogates to the general principle pursuant to which evidence is to be collected only at the trial stage.

Another example of hidden disapplication can be found in the area of the EAW.

We refer to the decision of the Italian Court of Cassation, Joint Chambers of 30 January 2007, *Ramoci*, where, with regard to the Italian legislation implementing Framework Decision 2002/584/JHA on the European Arrest Warrant (namely, Art. 18.e, Law 69 of 22 April 2005), the Court deemed admissible the surrender of an accused to Germany, where a 6-month maximum limit for precautionary detention, which can be extended for subsequent 3-month periods if some conditions are met, is provided, but no total maximum limit for precautionary detention is established. In order to comply with the Framework Decision and enhance mutual recognition, the rule establishing the need for the requesting State to provide a system of 'maximum limits of provisional detention' (Art. 18.e of Law 69/2005) was replaced by a system guaranteeing that the accused is not limited in his freedom for an unreasonably long time. This way, the Italian Court of Cassation disregarded a clear and unequivocal provision included in the domestic implementing legislation. Undoubtedly, in the specific case at issue, the solution could be considered agreeable and actually warranted by the fact that the framework decision, unlike the Italian implementing legislation, does not provide for a similar reason for rejection of the request. From this perspective, the Court of Cassation adopted a 'teleological' approach in order to prevent Italy from becoming a shelter of preference for transnational crime. However, it is also true that, this way, the Court of Cassation performed a hidden disapplication.

Conversely, *praeter legem* interpretation does not fall within the prohibition against *contra legem* interpretation and is, therefore, entirely admissible. Indeed, in this case, the judge carries out an interpretation that is consistent with supranational norms in the absence of domestic rules on the issue. However, such lack must be effective; in any case, it must be stressed that there are often diverging views on this point. Indeed, it frequently happens that fully fledged *contra legem* interpretations are presented as *praeter legem* ones: suffice it to say that some scholars interpret the two aforementioned examples as expressions of the latter type of interpretation.

(c) When consistent interpretation cannot be achieved, and, therefore, the aim of the directive cannot be reached, EU law imposes on Member States an obligation to restore the damages suffered by individuals as a result of the violation, provided that the violation is manifest and serious, the relevant EU act grants rights to individuals, and there is a direct causal link between the violation and the damage suffered.

Such obligation to provide reparation for damages—which is not mentioned in any of the Treaties—has been established by the Court of Justice in its case law and derives from the obligation provided in Art. 4.3 TEU for Member States to take any appropriate measure, general or particular, that can ensure the fulfillment of the obligations arising from EU law; among these obligations, the duty to remove the unlawful consequences deriving from a violation of EU law should be included (CJEU, 19 November 1991, C-6/90 and C-9/90, *Francovich*). The corresponding action can be brought only before national judges.

Such a remedy is the result of a balancing of interests between the need to guarantee the (even indirect) effectiveness of EU law and the need to safeguard the sovereignty of the States in regulating according to their legal orders the legislative and judicial functions and, therefore, the consequences deriving from the conflict between domestic law and EU law having indirect effect.

It is clear that the obligation to provide reparation for damages was conceived with regard to individual positions that could be easily involved in violations concerning matters falling in the former First Pillar. This issue is less likely to occur in the area of criminal proceedings, but it may nonetheless become relevant with regard to some individual protections: for example, the rights of victims, and especially vulnerable ones, that are violated by domestic laws and whose infringement gives rise to nonmaterial damages.

1.3 The Council of Europe and the ECHR System

1.3.1 The ECHR and the European Court of Human Rights

1.3.1.1 The System of the ECHR

Addressing the European sources of law concerning criminal proceedings, it is also crucial to consider the Council of Europe's legal system, which for its part extensively is relevant for also EU law.

The Council of Europe was established in 1949, in the aftermath of the Second World War, as an international organization based in Strasbourg, whose purpose is to safeguard the principles of rule of law, political freedoms and human rights. Over time, many countries have joined the original founding States (United Kingdom, France, Belgium, Luxembourg, Netherlands, Denmark, Ireland, Italy, Norway and Sweden), including, after the fall of the Berlin Wall, countries from the former communist bloc and almost all of the former Soviet Union republics, reaching the current number of 47 Member States.

The Council of Europe is a system of international cooperation that includes, specifically, two political bodies: the Committee of Ministers, composed of the ministers of foreign affairs of the Member States, and the Parliamentary Assembly, composed of representatives of each Member State from the corresponding national parliaments, in addition to the Secretary General, who assists both bodies, and other entities, such as the Commissioner for Human Rights and the Committee for the Prevention of Torture, which pursue the same general objectives of the Council, through monitoring activities on the Member States. But, most importantly, especially for our purposes, an integral part of that system is represented by the European Convention on Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and the 15 Protocols that over time have been added to regulate specific aspects.

An important feature of the Council of Europe that distinguishes it from the European Union is given by the fact that it does not create rules with which Member States must comply, but it 'proposes' international conventions that each State, in its own discretion, may ratify. Among these conventions, the ECHR is by far the most important and widely known, and all the member States of the Council of Europe have ratified it, becoming therefore 'Parties' to the Convention.

1.3.1.2 The European Court of Human Rights

It is of primary importance the fact that, at the international level, the ECHR represents the only case in which a catalog of rights—many of which are specifically concerned with criminal proceedings and, particularly, the role of the accused—is linked to a specific judge—the European Court of Human Rights, sitting in Strasbourg—with which individuals (private citizens, entities, social organizations) can lodge complaints against a State Party by claiming that it has violated one of their conventional rights (Art. 34 ECHR).

In particular, the circumstance that single individuals may bring an action against a State (irrespective of the fact of being a national of that State) represents another absolute distinctive feature of the ECHR, which distinguishes it from the other international conventions and from the EU system, within whose order—especially when rules of criminal procedure are concerned—private individuals, as we have seen, are excluded from such a chance.

The possibility for individuals to claim that their rights granted by the ECHR have been violated is connected to the fact that the purpose of the Convention is to ensure that the protection of such fundamental rights is granted by the States in all their various articulations, including, first and foremost, the legislative and judicial powers. Therefore, the type of control that the European Court of Human Rights performs is external to the national legal order taken into account; in this respect as well, the ECHR system differs from the EU system, where the Court of Justice performs a type of control that is internal, since it addresses the very same system of the Union.

The only derogation to the duty established by Art. 1 ECHR for the Member States to recognize 'to everyone within their jurisdiction the rights and freedoms' guaranteed by the Convention is provided by Art. 15 ECHR as an absolute exception, in case of 'war or other public emergency threatening the life of the nation'. In such case, 'any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. Furthermore, it is required that such High Contracting Party shall keep the Secretary General of the Council of Europe 'fully informed' of the measures taken, the reasons therefor, and the date when such measures have ceased to operate.

The ECHR system comprises not only the Convention but also the Additional Protocols, both 'as interpreted' by the European Court of Human Rights. Indeed,

Art. 32 ECHR has assigned to this Court the function of 'official' interpreter of the Convention. The 'uniformity of application' granted by the European Court through its centralized interpretation of the ECHR assigns to the Court a relevance that is certainly different compared to that of other international agreements, the interpretation of which remains exclusively subject to the contracting parties.

1.3.2 The Interpretation of the ECHR Law by the European Court of Human Rights

The interpretation of the Court is certainly binding with regard to the specific case decided. Article 46 ECHR clearly obliges Member States to abide by the judgment 'in any case to which they are parties'. That said, what effects does such an interpretation produce outside of this area? The debate on this issue is currently pending in Europe. In order to examine it correctly, it is useful to set forth some clarifications.

(a) First of all, it must be remembered that the European Court of Human Rights is characterized by some special aspects that make it an entirely peculiar judicial authority within the international framework. In fact, not only the ECtHR oversees a plurality of different national systems and entertain a direct relationship with each one of them, being called upon to assess whether they respect Convention rights, taking into account the special features of each one of them, but, above all, it also does perform such assessment with regard to a specific judicial case. This, in principle, implies that the European Court of Human Rights can be qualified not as a court ruling on laws, but, rather, as a court ruling on the concrete cases submitted to it. Therefore, its decisions are the combined result of statements of principle and balancing connected to the particular features of not only the legal system at issue but also, and especially, the specific case under judgment, which, furthermore, is assessed by the Court 'as a whole', namely by taking into account all the relevant elements that are at stake. It is a case-by-case assessment focused on the criterion of the 'significant disadvantage' suffered by the applicant. Such criterion has become an admissibility requirement for lodging a complaint with the European Court of Human Rights, pursuant to the text of Art. 35 ECHR, as amended by Protocol 14.

In this view, with the purpose to ensure 'guarantees that are practical and effective, rather than merely theoretical and illusory' (see for this recurring expression ECtHR, 9 October 1979, *Airey v. Ireland*; ECtHR, 30 October 1991, *Vilvarajah v. UK*; ECtHR, 7 July 2015, *Cestaro v. Italia*), the Court, by performing a concrete balancing evaluation, adopts also a 'compensatory' logic, which allows it to consider fair a trial, even in the presence of procedural violations that the Court deems to have been 'compensated' by other advantages enjoyed by the accused, or in light of specific circumstances of the case (ECtHR, 9 June 1998, *Twalib v. Greece*; ECtHR, 15 December 2015, *Schatschaschwili v. Germany*);

or, conversely, to qualify as unfair a trial in which the accused suffered a concrete harm, even in the absence of formal violations. Such an approach radically distinguishes the European Court of Human Rights from the Court of Justice of the European Union. Indeed, this latter, especially in the case of a request for preliminary reference, interprets EU law only abstractly.

(b) However, while assessing a case, the European Court of Human Rights also performs an important general interpretative function, which assumes a key and increasing importance, so much so that the Court, through this interpretative function, has implemented considerably the range of conventional guarantees compared to the (bare) ones expressly included in the text of the ECHR. On such a creative activity allude nevertheless the frequent references (by both European and national judges, and now also in the acts of the European Union) to the ECHR 'as interpreted' by the Strasbourg Court.

The Court considers such nomophylactic function of the highest importance. Indeed, such function seeks to ensure 'a high degree of consistency in the interpretation and application of the Convention from case to case', and, therefore, the highest possible uniformity in the protection of conventional rights, at least at a minimum degree (see Art. 53 ECHR). To that extent, the Court, while highlighting how 'it is well established that there is no formal doctrine of precedent in the Strasbourg jurisprudence', has long recognized that 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from its precedents laid down in previous cases' (see, for example, the 'Preliminary opinion' issued on 20 February 2012, by the Plenary meeting of the Court in view of the Intergovernmental Conference in Brighton).

It is worth reminding that the mechanism available for avoiding interpretative discrepancies is represented by the Grand Chamber, whose task is to solve possible contrasts, in favor of which each Chamber can relinquish jurisdiction (see Art. 30 ECHR) when one of them foresees that it will deviate from the well-established case law of the Court.

This nomophylactic function is also likely to receive further impulse by Protocol 16 to the ECHR, drafted by the Committee of Ministers of the Council of Europe on 10 July 2013 and opened for signature of the Member States since 2 October 2013. The Protocol, implementing a longstanding aspiration, introduces a possibility for national courts to request an advisory opinion to the European Court of Human Rights, which is analogous to the request for preliminary reference to the Court of Justice of the European Union, except for the fact that it has a merely advisory nature. The purpose of such procedure is to receive an advisory opinion from the Strasbourg Court on the interpretation of an ECHR provision that is relevant to decide a case pending before a national court. Undoubtedly, it is a mechanism that aims to reduce the workload of the Court, as it could prevent a future lodging of a case with the Court. However, at the same time, this new procedure would assign to the Court—together with the traditional function of adjudicating concrete cases—a new function as 'judge of the laws', which rules abstractly on legal issues.

(c) That said, the issue concerning the effects of the judgments of the European Court outside the decided case must be examined from two different perspectives: on one hand, from the point of view of the ECHR system and, on the other hand, from the point of view of each national legal system.

(c1) Under the first perspective, two opposite theories have been envisaged: the one of *erga omnes* binding nature of ECtHR case law and the one of its non-binding nature. In favor of the first theory, it has been held that the obligations that the States have undertaken by adhering to the Convention should also include the obligation to comply with the case law of the European Court, to which Art. 32 ECHR refers every issue concerning the 'interpretation or implementation of the Convention and of its Protocols'.

In favor of the opposite theory, it can be conversely highlighted that in the Convention, there is no reference to the binding nature of the case law of the Strasbourg Court, while the only explicit limitation that is provided in the text of the Convention in this area consists indeed in the obligation for the States to comply with final judgments issued by the European Court in any case in which they are party (Art. 46.1 ECHR).

Furthermore, as we said, a formal doctrine of precedent in relation to the decisions of the European Court is lacking. Moreover, the same Court, in order to clarify the relationship between the ECHR and the national legal systems, has drawn up (ECtHR, 1 July 1961, *Lawless v. Ireland*; ECtHR, 7 December 1976, *Handyside v. United Kingdom*; ECtHR, 25 November 1996, *Wingrove v. United Kingdom*) the 'doctrine of the margin of appreciation', pursuant to which the Court itself limits its power of control and leaves to the national authorities a certain degree of autonomy in the application of the Convention, provided that the 'substance' of the claimed right is respected. To this principle Protocol 15 ECHR, approved on 16 May 2013, has made an express reference in the preamble to the Convention, providing that 'in accordance with the principle of subsidiarity', the Member States have the responsibility to secure the rights and freedoms of the Convention and 'in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights'.

Actually, the doctrine of the margin of appreciation could theoretically serve to deny the assumption of the nonbinding nature of the case law of the Strasbourg Court, since, in providing that the 'substance' of the claimed conventional right is, in any case, safeguarded, it seems to confirm within such limits the *erga omnes* binding effects of the Strasbourg Court's decisions. Conversely, it is clear that such a doctrine introduces a strong relativization of the European Court's interpretation, confirming its non-binding nature.

The margin of appreciation is, indeed, a typical elastic concept, lacking a predefined content and varying its broadness depending on various elements: the type of rights at issue, the seriousness of their violation, and, above all, the existence of an established consensus on the level of protection granted to a specific right within the democratic societies of the European legal orders (consensus standard). Therefore, such margin progressively reduces to almost

disappear in case of mandatory rights (as for example the right to life, the prohibition of torture, the prohibition against double jeopardy), while, conversely, it progressively expands, favoring States' freedom, proportionally to the degree of lack of homogeneity of the level of protection of a right in the national legal systems. The Court—which is the supervising body of the margin—aims to avoid imposing on the States parameters that they may deem unacceptable for their systems, considering that national authorities would be in a better position than the Court of Strasbourg to assess the best ways for the implementation of Conventional rights within their legal systems. The doctrine of the margin of appreciation should balance the need for uniform application of the Convention with the need for respect of national differences: but it is a rather difficult aim to be achieved; often the Court's review has been limited to an assessment that the national measures are of a 'not manifestly unfounded character', leaving broad operational spaces to the States, especially in the most sensitive matters.

Being a result of a balance, it is possible to refer to margin of appreciation also with regard to the application of EU law by the States, even if the concept in this case shows rather broad differences compared to its homologous within the ECHR system. Indeed, in this case, no reference is made to a doctrine of 'consent' referring to shared views. Furthermore, while in the system of the ECHR the margin of appreciation is used to legitimize limits to Conventional rights, in the system of the European Union it has been employed, in the framework of a more general balancing between the values of European integration and the fundamental needs of the States, to safeguard, in adherence with the principle of proportionality, fundamental rights as conceived in the domestic legal orders, also to the detriment of an EU freedom (for example, the protection of minors has been given priority over the principle of free movement of goods: CJEU, 14 February 2008, C-244/06, *Dynamic Medien*). In this perspective, the assignment of a margin of appreciation to the States—which must anyway be subject to a rigorous control on the actual suitability of the measure to achieve its objectives and on its proportionality—is consistent with the principle pursuant to which the Union must respect both 'the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional' (Art. 4 TEU) and its 'rich cultural and linguistic diversity', ensuring that 'Europe's cultural heritage is safeguarded and enhanced' (Art. 3 TEU).

Coming back to the main issue, the fact that it is not assigned an *erga omnes* general binding nature to Strasbourg case law does not exclude that persuasive authority must be recognized to it. Indeed, there is the need for national legislators and judges to grant it the highest degree of consideration ('to take it into account', using a common expression that appears in the Human Rights Act of 1988 and in the Declaration of the Brighton Conference of 19–20 April 2012 on the future of the European Court), seeking to comply, as far as possible, with such case law in order to avoid exposing the States to future judgments by the European Court. Therein lies the 'general' value of ECHR case law with regard to different States from the one in which

the violation of the Convention occurred (see ECtHR, 18 January 1978, *Ireland v. United Kingdom*; ECtHR, 6 November 1980, *Guzzardi v. Italia*; ECtHR, 24 July 2003, *Karner v. Austria*; ECtHR, 7 January 2010, *Rantsev v. Cipro e Russia*). In order to define such concept, the notion of '*res interpretata*', referring both to the operative part of the judgment and to its grounds, if they include general principle assumptions, has been developed.

In any case, it must be remembered that the Court uses legal terms that have an autonomous and different meaning compared to the one given to them in each national legal system (it is sufficient to think of the meaning of 'criminal law', 'criminal accusation', 'accused person', 'witness'). It is, therefore, necessary to focus on such meanings when we refer to ECHR case law.

(c2) The issues examined above must be finally considered also from the perspective of national legal systems. Every State is, in fact, free to grant, within its borders, to ECtHR case law a degree of importance higher than that requested by ECHR.

In this regard, it is appropriate to mention the special—but not isolated at all—solution adopted by the Italian Constitutional Court. Interpreting Art. 117.1 of the Italian Constitution—which provides that 'Legislative powers shall be vested in the State (. . .) in compliance with the constraints deriving from EU legislation and international obligations'—such Court stated in decisions 348 and 349/2007, on one hand, that provisions of the ECHR enjoy a status in the hierarchy of legal sources that is higher than ordinary legislation, and that therefore such provisions cannot be abrogated or amended by a law enacted later in time. On the other hand, and most importantly, the Court also ruled that such provisions—'as interpreted by the European Court of Human Rights'—integrate the parameter to assess the constitutionality of national laws, provided they are consistent with the Italian Constitution. In this way, national provisions violating the ECHR as interpreted by the European Court of Human Rights automatically also violate the Italian Constitution. The Italian Constitutional Court derived this consequence from the international obligations taken on by Italy through the signature and ratification of the ECHR. In this way, however, the Court assigned to the interpretation of the ECHR provided by the European Court a binding value. Such circumstance has been heavily criticized, especially because—as we said—the European Court of Human Rights is in any case influenced by the specific features both of the national legal order at issue and of the case lodged with the Court. Probably, aware of such inconvenience, in a series of subsequent decisions (judgments 311 and 317/2009, 236 and 303/2011, 230/2012), the Italian Constitutional Court has mitigated the strictness of its position, specifying that it will, in any case, reserve to itself a 'margin of appreciation' with regard to the incidence that the interpretation of the European Court might have on the specific features of the Italian legal order, provided the 'substance' of such interpretation is safeguarded. In this way, by referring to the aforesaid theory of the 'margin of appreciation', the Italian Constitutional Court has formally maintained the commitment, while at the same time making it more relative.

Finally, the Court has further reduced this obligation for Italian law to comply with the interpretation of the ECHR provided by the European Court of Human Rights (Judgment 49/2015), applying it exclusively with regard to 'well-established' interpretations or to pilot judgments. Nevertheless, it is quite difficult to ascertain when an interpretation can be considered 'well-established', and therefore which are the boundaries of the binding force of European Court interpretations in the Italian legal system.

1.3.3 ECHR Law and National Legal Systems

In the ECHR system—as well as in the EU system—national judges represent the first guarantors of the application of European law.

This is clearly indicated by Art. 13 ECHR, which provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority', and by Art. 35 ECHR, which requires the previous exhaustion of 'all domestic remedies' as a condition to bring an action before the European Court of Human Rights. This latter provision is especially important because it links the domestic protection to the protection provided by the ECHR system. According to the Strasbourg Court case law, this link requires the domestic protection to meet certain criteria: remedies must be effective, access to them must not be too burdensome, these remedies must produce effective results, suitable to concretely redress the claimed violation (ECtHR, 18 June 1971, *De Wilde, Ooms and Versyp v. Belgium*).

This implies that the jurisdiction of the Strasbourg Court is subsidiary, as it will be possible to resort to it only if the domestic remedies have been unsuccessful, on both 'vertical' perspective (i.e., all instances must be exhausted) and 'horizontal' perspective (i.e., the same claims presented before the Strasbourg Court must have been presented at the national level, and all the means available to promote a successful claim must have been employed at that level, as the respect of the national procedural rules and the production of evidence). However, the subsidiary character of the European Court of Human Rights finds some exceptions in case of the so-called 'futility rule' (the domestic remedy is clearly destined to fail due to a legislative measure or a judicial practice contrary to the Convention), or when the national authorities are completely idle (ECtHR, 16 December 1996, *Akdivar v. Turkey*). In these latter cases, an individual would be allowed to complain directly to the European Court.

In this context, the national judge must comply with some obligations.

1.3.3.1 Limits to the Direct Applicability of ECHR Provisions

First and foremost, that national judge, whenever possible, has to apply the ECHR directly.

However, in this regard, it is necessary to distinguish between provisions that are self-executing and provisions that are not, because they require further specifications

in order to be applied. In the majority of cases, Convention provisions are believed to fall into this latter category and to be, therefore, merely programmatic. Direct applicability—which, in any case, could imply not the disapplication of national provisions that are inconsistent with the ECHR, but only the application of the ECHR provision to areas that are not inconsistently regulated by national law—remains, therefore, a rather theoretical possibility, despite the fact that some Convention provisions, including some related to criminal procedural matters, would appear to enjoy a sufficient degree of detail and autonomy: let us think, for example, of the right of the accused to a 'public hearing' provided by Art. 6.1 ECHR, which is subject to specific exceptions for cases in which access to the courtroom may be prohibited.

1.3.3.2 Interpretation Consistent with the Convention

The so far more important area in which domestic judges are called upon to play a fundamental role is therefore concerned with all cases in which ECHR provisions are not self-executing. In these situations, ECHR provisions will be relevant for the national judge as parameters for an interpretation of domestic law consistent with the Convention.

The ECtHR has clarified that national judges must carry out such interpretation considering ECHR provisions as interpreted by the Strasbourg Court (ECtHR, 27 March 2003, *Scordino v. Italy*) and following its interpretative approaches (ECtHR, 27 February 2001, *Lucà v. Italy*). The view of the Strasbourg Court is that failure by a national judge to provide a consistent interpretation generates liability of the State to individuals (ECtHR, 15 June 2006, *Lacàrcel v. Spain*).

Some methodological differences, however, exist between the consistent interpretation required under ECHR law and that requested under EU law.

The first difference—which concerns, at a more general level, the relationship between the ECHR and the domestic legal systems—deals with the 'margin of appreciation' recognized to national judges with regard to the interpretation of the ECHR provided by European Court of Human Rights. Consequently, consistent interpretation normally seems to allow possible adjustments from ECtHR interpretation. This can be easily understood, considering that ECHR principles must be observed by a multiplicity of different national legal systems and that the interpretations provided by the European Court of Human Rights, although general, may nonetheless be influenced by the specific features of a case, even if, undoubtedly, in the future, the possibility (provided by Protocol 16) to request the Strasbourg Court to give preliminary advisory opinions on the interpretation of ECHR (see Sect. 1.3.2) might lead to an increased interpretative homogeneity.

A second difference concerns the general context in which consistent interpretation is provided, depending on whether it refers to the ECHR or to EU law. In the former case, domestic law must be interpreted consistently with an external legal system that does not enjoy supremacy over national provisions. In the latter case, conversely, domestic law must be interpreted consistently with an autonomous legal order that prevails over domestic systems. Therefore, it is clear, on one hand, why in

this second case the only (feeble) domestic limit applicable to this type of consistent interpretation is eventually represented by the so-called counter-limits and, on the other hand, why the European Court of Justice has repeatedly invited domestic judges to overcome the limit to consistent interpretation represented by the prohibition against *contra legem* interpretation, thereby turning consistent interpretation into hidden forms of disapplication of inconsistent national provisions.

1.3.4 The Obligation of the States to Comply with the Judgments of the European Court of Human Rights Against Them

The last core profile concerning the relationship between the ECHR and national legal systems is directly linked to the special feature of this international convention, which is provided with a judicial system that controls the respect of Conventional rights by Member States. This implies the duty of the State—including its judicial bodies—to implement judgments of the European Court of Human Rights establishing a violation committed by it, in its various articulations, including the judicial branch, of Conventional rights. Indeed, Art. 46 ECHR provides that 'the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

This obligation may concern two different situations: on one hand, the specific case decided, because the Court found a violation of the Convention exclusively with regard to it. On the other hand, the obligation may also concern more broadly the structural deficiencies of a national legal system, the case brought to the attention of the Court representing a direct consequence of them.

1.3.4.1 The Duty to Comply with the Judgment of Condemnation: The Just Satisfaction

With regard to the first scenario, it should be clarified at the outset that the duty to comply with the Court's judgment concerns only the specific case decided by the Court. This is a consequence of the special type of judicial review carried out by the European Court of Human Rights, which always concerns a specific case.

Secondly, as specified by the Court itself (ECtHR, 13 July 2000, *Scozzari and Giunta v. Italy*; ECtHR, 29 March 2006, *Scordino v. Italy*), this duty represents an obligation of result, in the sense that the defendant State is free—under the supervision of the Committee of Ministers, whose task is to check the implementation of judgments of the Strasbourg Court (Art. 46 ECHR and Art. 16.2-3 Protocol 14)—to choose according to its own legal system the most suitable means to implement the decision. In this regard, each legal system follows its own rules.

With regard to the content of the obligation, Art. 41 ECHR requires, as a priority, the condemned State to remove the consequences deriving from the violation, and, if the

internal law of a State does not allow such removal (or allows it only partially), the Strasbourg Court to afford, 'if necessary', a 'just satisfaction to the injured party'. This latter possibility—which is, indeed, not binding ('if necessary')—consists in a monetary payment. For a long time, it has represented the only type of satisfaction for the injured party, and it still remains such today when the nature of the violation does not allow any other form of satisfaction, such as the unreasonable length of the proceedings.

1.3.4.2 Reviewing a Case and Reopening Proceedings

However, at least since Recommendation R(2000)2 of the Committee of Ministers, the first need—i.e., removing the negative consequences of the violation—has been considered of crucial importance. In particular, the Recommendation urged the State Party to provide for suitable possibilities to review the case or to reopen the proceedings (the so-called 'retrial clause') when the Court has ascertained a violation of the ECHR and the following conditions are met: (a) the injured party continues to suffer serious negative consequences as a result of the violation, (b) the domestic decision that produced the violation is on the merits contrary to the Convention (that is, it infringes a Conventional substantive criminal guarantee), or (c) the violation is the result of procedural errors of such gravity that a serious doubt is cast on the outcome of the domestic proceedings.

The reopening of proceedings—when the violation affects procedural rules—or the review of the case—for example, by replacing the sentence at the enforcement stage, when it was the result of violations of substantial criminal law—aim to guarantee to the injured person the chance that he or she had lost, allowing him or her to enjoy the same position that he or she had when the violation occurred (ECtHR, 8 February 2007, *Kollcaku v. Italia*; ECtHR, 17 September 2009, *Scoppola v. Italia*).

The prescriptions provided by the Recommendation were then confirmed and integrated by the case law of the European Court of Human Rights, which increasingly identified the reopening of the proceedings as the privileged form of satisfaction for violations of guarantees concerned with procedural fairness (ECtHR, 3 March 2005, *Stoichkov v. Bulgaria*; however, in a less peremptory way, see ECtHR, 11 July 2017, *Moreira Ferreira v. Portugal*). The States Parties have complied with this approach in different ways. Sometimes, the legislator has intervened; other times, judicial practices have occurred. The situation is especially sensitive given the need to overcome a domestic final decision in criminal matters (decision that is the result of the required previous exhaustion of all domestic remedies). Therefore, the legislative solutions adopted in the various contracting parties have concerned special forms of review of such a judgment, like revision.

1.3.4.3 Structural Problems and 'Pilot Judgments'

Until now we have discussed about individual measures aimed at providing satisfaction for violations of Conventional rights. However, such violations may also find

origin in structural problems that need to be addressed from a general point of view in order to prevent other future violations.

Several interventions have focused on this matter, which have been promoted by the Committee of Ministers (Recommendation 6/2004), the Parliamentary Assembly of the Council of Europe (Resolution 1516 (2006) and Recommendation 1764 (2006)). The problem does not concern only a specific case, but it assumes a more general scope, and, in light of the heavy workload currently pending before the Strasbourg Court—the majority of which is indeed represented by serial violations—it certainly becomes very relevant.

Considering this need, starting from the famous *Broniowsky* case (ECtHR, 22 June 2004, *Broniowsky v. Polonia*), the Court, when it has ascertained that the violation of the Convention committed by a State is not an effect of an isolated breach but, conversely, is the result of a systemic shortcoming in its legal system (or of the way this is interpreted), has thereby begun to indicate to the State—including its legislative and judicial powers—the concrete 'general measures' that should be adopted in order to avoid future violations.

We are referring to the so-called pilot judgments, in which the Court, in order to prevent the risk of further serial violations—and therefore also to reduce its future workload—deprives the State of the freedom that it usually enjoys to choose the measures necessary to comply with Strasbourg judgments. Thus, the Court performs an activity that falls outside the mere ascertainment of a violation in a specific case. So doing, the Court no longer acts as a judge of a single case, but it advocates the role of a judge of the laws, indicating the remedies that it deems necessary to avoid future violations, performing, in this view, also the functions usually assigned to the Committee of Ministers.

This represents a significant innovation that goes beyond the traditional case-by-case approach of the Strasbourg Court and that now finds a specific normative basis in Art. 61 of the Rules of Court, in the amended text of 21 February 2011. The importance of this innovation has also been emphasized in the 2012 Brighton Declaration. On the other hand, the preliminary advisory reference for the interpretation of ECHR provisions to the European Court of Human Rights provided by Protocol 16 could strengthen such perspective even further.

1.4 The Network-Like Dimension of the European Sources

1.4.1 Network-Like System of the European Sources and the Central Role of Case Law

After having addressed the specific aspects concerning both the EU and ECHR sources, it is now worth providing some general considerations about the structural aspects of these sources and emphasizing some of their specific features.

In this regard, the most significant element is represented by the fact that the European project, based on a multiplicity of exchanges and experiences, produces a marked legal pluralism and polycentrism even in the area of criminal justice. It is an aspect of the legal globalization—in itself an expression of the complexity of our postmodern societies—of which European law represents a 'regional' expression and that marks the overall crisis of national sovereignty and of monopoly of States over the production of law.

The resulting system of sources is quite distant from the traditional pyramid hierarchical model of Kelsenian origin, through which civil law systems define the domestic law that originates from the legislative body and where national courts have the role to merely apply it, albeit in the physiological range offered by judicial interpretation.

The European landscape shows, conversely, a system based on a multiplicity of sources and is characterized by a network-like structure, within which European and national sources interact. In such a context, norms and institutions belonging to different legal systems coexist, intertwine, and dynamically interfere on the same subject.

On one hand, due to the various forms through which the primacy of European law is expressed (direct effect, consistent interpretation, duty to comply), national laws undergo a 'relativization'. Within this context, the codes of criminal procedure enacted by the States of continental Europe become only one of the sources regulating the matter. Furthermore, as a result of their interaction with European law, their provisions are themselves destined to take on different meanings.

On the other hand, this interaction between different legal systems unavoidably produces antinomies and contrasts. What is missing, though, is a center—typical of a monist system—that creates order and enforces a hierarchy, ultimately able to solve such antinomies and contrasts through the traditional criteria that characterize civil law systems (*lex superior derogat inferiori*, *lex specialis derogat generali*, *lex posterior derogat priori*). This is precisely the reason why, within the network-like system, it is impossible to realize a *reductio ad unum.* However, while inconsistencies may not be solvable, they can certainly be bypassed. Indeed, they can be managed by making them coexist, adopting an inclusive logic by creating what has been called an 'ordered pluralism', through balanced, teleological—rather than axiological—solutions. As it will be stressed, an approach based on practical rationality—focused on persuasiveness and authoritative solutions—is necessary to achieve this goal. Such practical rationality is associated with the image of law as a practical science, consistently with the teachings of Aristotle, and, more recently, according to the canons of legal hermeneutics. This is an approach that shows the eminently factual dimension of European law, that is far from the purity and abstractness of the legal structures developed within the civil law tradition.

An additional important aspect should also be emphasized: the sources of law addressed here are not limited to 'legislative' ones (primary and secondary EU legislation, ECHR provisions, and provisions of other conventions that may be relevant to our subject). Indeed, in this context, case law plays a central and strategic role.

This is certainly true for the two European courts. They, while operating within different contexts and with different tools and goals, are, in themselves, sources producing European law; such concept can be called 'jurisprudence as source law', given that these courts not only interpret European law but also autonomously establish its mandatory content while they apply it. A classic example is, on one hand, the semi-legislative role that the Court of Justice has played in creating, absent any legal basis, the very foundations of EU law and, on the other hand, the role played by the European Court of Human Rights in defining the provisions of the ECHR—or, better, in clearly supplementing the list of them—so much so that it has become commonplace—also by the acts adopted by the European Union—to refer to the ECHR 'as interpreted' by the Strasbourg Court.

In another perspective, as previously noted (see Sect. 1.2.6.2), also national judges—first judges in both the EU and ECHR systems—must be in some way considered as lawmakers in the specific case at issue when they carry out a consistent interpretation.

1.4.2 Floue *Logic, Material Rationality, and European Legality*

In such a polyphonic system of sources, the aspiration to achieve a formal rationality—considered as an expression of the principle of legality in its traditional meaning, typical of civil law systems—becomes inevitably blurred, even in the area of criminal justice, traditionally the most strenuous and jealous depository of such aspiration in continental Europe.

The problem involves not only substantive criminal law but also procedural legality.

The illusion of the Enlightenment, which considered the rules of criminal procedure as aseptic precision mechanisms, is now definitely faded. The 'rules', typical of civil law systems, considered as abstract normative models for procedural acts that produce specific effects, are applicable with increasing difficulty in a context where formal logic—based on a deductive method relying on definite premises—is now banned. Indeed, such premises are destined to vanish in a framework characterized by the plurality and heterogeneity of the sources. Increasingly, principles tend to overlap and replace rules; these latter are suitable to be applied, pursuant to Dworkin's approach, according to the 'all or nothing' paradigm, while principles, conversely, produce general and generic provisions, suitable for mutual modulations. Indeed, European law is often expressed by principles, since these are believed to represent the most appropriate instruments to regulate the multifaceted European legal landscape.

Moreover, the central role played by judges within the system deeply affects the principle of legality, as it is intended traditionally in continental Europe: firstly because reasoning through principles, instead of through rules, greatly enhances

their space of creative intervention, then because European law requires them to use as principles judgment parameters based on material—rather than abstract—rationality. Clear examples are the importance given to the substance of the situations, or the evaluative modulations, that represents a core expression of the principle of proportionality, the true keystone of the EU law (see Sect. 2.1.5). On similar judicial modulations are also based the adequacy principle and the principle of effectiveness; furthermore, from this perspective, even the need to comply with the 'due process' guarantees and, especially, with fairness, which has to be assessed in light of the case brought before the court considered as a whole, must be taken into account, stressing moreover that this latter parameter was originally created by the European Court of Human Rights, but is now increasingly adopted also by EU law as an open clause.

No less important is the clause requiring a significant disadvantage as a condition to identify a violation of procedural guarantees. If we consider the very different and more formal approach followed by some national legal systems (for example, in the Italian code of criminal procedure where the defects that produce nullity of procedural acts exist irrespective of an effective prejudice), we can see how the clash with European law may determine strong hybridizations of internal laws.

All these perspectives are clearly extraneous to the modern conception of continental legality typical of a positivist imprinting. The path toward the Europeanization of law is an expression of a pluralist, composite, liquid postmodern society. Therefore, it should not surprise that, even in the area of criminal justice, it is applied a logic no longer based on the concept of inclusion/exclusion, but, conversely, a graduated and proportionate one based on the concept of partial inclusion/exclusion; in other words, a logic that is indeterminate, fuzzy, or *floue*, according to the well-known expression used by Mirelle Delmas-Marty. This produces a clear transition from a legality of a highly 'normative' character—typical of continental law—to a European legality of a highly 'judicial' character.

Certainly, continental lawyers, used to the positivist way of reasoning, might be deeply worried by the loss of the central role held by the law (albeit already eroded by various reasons) in an area—such as criminal justice—where the contrast between state authority and individual freedoms is traditionally most acute and where, as a consequence, the need to limit the judges' power is more urgent. However, it is unrealistic that such an area may remain insulated from the general and deep transformation of the contemporary legal framework, where different legal orders coexist and interfere. In this perspective, a static conception of legality, whose goal is an abstract respect of normative models, is replaced by a dynamic conception of legality, which presents a 'teleological' character, whose aim should consist in obtaining a result that, receptive to the circumstances of the specific case, and therefore based on the requirements of suitability, adequacy, proportionality, would produce a 'right' decision. Through European law, therefore, a logic that is typical of common law systems becomes familiar also in civil law systems. In this perspective, in a multilevel system, structured according to a logic that is no longer hierarchical, but rather characterized by the coexistence of judicial bodies belonging to different legal orders, national and European, that are called upon to interact on an identical issue, the persuasiveness, commonality, and authoritative character of a

judgment—rather than its authority, which is granted in a continental system by compliance with abstract rules—becomes essential.

This 'new' legality, however, should, in any case, safeguard the main purpose—shared also by the formal conception of legality—of guaranteeing the knowability of applicable rules, and, as a consequence, the foreseeability of judicial decisions. In the formal conception, foreseeability was seen as a consequence of the judge's compliance with law; in the substantive conception of law, conversely, foreseeability can only be identified with the knowability of the case law of the supreme courts, a possibility that requires such case law to achieve a high level of stability—as it is recommended by the European Court of Human Rights—and to become binding as 'precedent'.

Secondly, the hegemonic role and the broad freedom reserved in this context to judges in the management of concrete cases—which may lead to political choices and their institutional hybridization: judges are no longer exclusively national or exclusively subject to domestic law, circumstances that show an overcoming of the continental principle of separation of powers—would in any case require the overall rethinking of the position held by such subjects in civil law systems, by imagining new sources of legitimacy and new forms of control and liability for them.

Further Reading

Arai-Takashi Y (2002) The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR. Intersentia, Cambridge

Armenta Deu T, Bachmaier Winter L, Gascón Inchausti F, Cedeño Hernán M (eds) (2006) El derecho procesal penal en la Unión Europea. Colex, Madrid

Arnardóttir OM (2016) Rethinking the two margins of appreciation. Eur Constitutional Law Rev, pp 27 ff

Baker E (2015) The Court of Justice of the EU and the "New" Lisbon Treaty environment five years on. Eur J Crime Crim Law Crim Just, pp 1 ff

Balsamo A, Kostoris RE (eds) (2008) Giurisprudenza europea e processo penale italiano. Giappichelli, Torino

Bernardi A (2004) L'europeizzazione del diritto penale e della scienza penale. Giappichelli, Torino

Billis E (2016) The European Court of Justice: a "Quasi-Constitutional Court" in criminal matters? The Taricco Judgment and its shortcomings. New J Eur Crim Law, pp 20 ff

Blanchet T (2015) The genesis of protocol 36. New J Eur Crim Law, pp 434 ff

Bodnar A (2013) *Res Interpretata*: legal effect of the European Court of Human Rights' Judgments for other states than those which were party to the proceedings. In: Haek Y, Brems E (eds) Human rights and civil liberties in the 21st century. Springer, Heidelberg, pp 223 ff

Borgers M (2010) Function and aims of harmonisation after the Lisbon Treaty. In: Fijnaut CJ, Ouwekerk J (eds) The future of police and judicial cooperation in the European Union. Martinus Nijhoff, Leiden, pp 347 ff

Braum S, Weyembergh A (dir) (2009) Le contrôle juridictionnel dans l'Espace pénal européen?. Éditions de l'Université de Bruxelles, Bruxelles

Brodowski D (2017) Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick. Zeitschrift für Internationale Strafrechtsdogmatik, pp 11 ff

Caianiello M (2012) Premesse per una teoria del pregiudizio effettivo nelle invalidità processuali penali. Bup, Bologna

Caianiello M (2014) To sanction (or not to sanction) procedural flaws at EU level? A step forward in the creation of an EU criminal process. Eur J Crime Crim Law Crim Just, pp 317 ff

Caianiello M (2017) You can't always counterbalance what you want. Eur J Crime Crim Law Crim Just, pp 283 ff
Callewaert J (2000) Quel avenir pour la marge d'appréciation? In: Mahoney P, Matscher F, Petzold H, Wilbhaber L (eds) Protecting human rights: the European perspective. studies in memory of Rolv Ryssdal. Carl Heymanns Varlag, Köln, pp 147 ff
Cartabia M (2008) La Convenzione europea dei diritti dell'uomo e l'ordinamento italiano. In: Balsamo A, Kostoris RE (eds) Giurisprudenza europea e processo penale italiano. Giappichelli, Torino, pp 33 ff
Cassese S (2009) I Tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale. Donzelli, Roma
Chiavario M (2008) La "lunga marcia" dei diritti dell'uomo nel processo penale. In: Balsamo A, Kostoris RE (eds) Giurisprudenza europea e processo penale italiano. Giappichelli, Torino, pp 11 ff
Daniele M (2015) Norme processuali convenzionali e margine di apprezzamento nazionale. Cass pen, pp 1690 ff
Dannecker G (2016) Anforderungen des nationalen Strafverfassungsrechts an die Inbezugnahme EU-rechtlicher Verhaltensnormen und an Rückverweisungsklauseln in nationalen Rechtsverordnungen. Begrenzung des nationalen Grundrechtsschutzes durch den unionsrechtlichen "effet utile"? Zeitschrift für Internationale Strafrechtsdogmatik, pp 723 ff
Dawes AL (2008) The ever-longer arm of EC law: the extension of community competences into the field of criminal law. Common Mark Law Rev, pp 131 ff
De Hert P, Muraszkiewicz J (2017) EU criminal law and the republican need to harden principles into rules. New J Eur Crim Law, pp 277 ff
de Kerchove G, Weyembergh A (dir) (2000) Vers un espace judiciaire pénal européen, Ed. de l'Université de Bruxelles, Bruxelles
de Kerchove G, Weyembergh A (dir) (2002) L'espace pénal européen: enjeux et perspectives, Ed. de l'Université de Bruxelles, Bruxelles
de Kerchove G, Weyembergh A (dir) (2003) Quelles réformes pour l'espace pénal européen?, Ed. de l'Université de Bruxelles, Bruxelles
Delmas-Marty M (1986) Le flou du droit. Du code pénal aux droits de l'homme. PUF, Paris
Delmas-Marty M (2006) Le pluralisme ordonné. Les forces imaginantes du droit (II). Seuil, Paris
Di Marco A (2016) L'État face aux arrêts pilotes de la Cour européenne des droits de l'homme. Rev. trim. droits de l'homme, pp 887 ff
Donini M (2011) Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza fonte. Giuffrè, Milano
Durdević Z, Ivičevic Karas E (eds) (2016) European criminal procedure law in service of the protection of the European Union financial interests: state of play and challenges. Croatian Association of European Criminal Law, Zagreb
Dzehtsiarou K, Konstadinides T, Lock T, O'Meara N (eds) (2014) Human rights law in Europe: the influence, overlaps and contradictions of the EU and the ECHR. Routledge, London
Emmerson B, Ashworth A, Macdonald A (2012) Human rights and criminal justice. Sweet & Maxwell, London
Fletcher M (2005) Extending "Indirect Effect" to the third pillar: the significance of Pupino. Eur Law Rev, pp 862 ff
Flore D (2014) Droit pénale européenne. Les enjeux d'une justice pénale européenne. Larcier, Bruxelles
Gaeta P (2012) Dell'interpretazione conforme alla CEDU: ovvero la ricombinazione genetica del processo penale. Arch. pen., pp 1 ff
Gerards G, Fleuren G (eds) (2014) Implementation of the European Convention on Human Rights and of the judgements of the ECtHR in national case-law. A comparantive analysis. Intersentia, Cambridge
Gless S, Vervaele J (2013) Law should govern: aspiring general principles for transnational criminal justice. Utrecht Law Rev, pp 1 ff

Hecker B (2015) Europaisches Strafrecht, 5 Auflage. Springer, Heidelberg
Itcovich G (2009) Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L'Europa e il suo diritto in tre concetti. Dir. pubbl. comp. ed eur., pp 34 ff
Jakab A, Kochenov D (eds) (2017) The enforcement of EU law and values. Oxford University Press, Oxford
Jimeno Bulnes M (ed) (2016) Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar, Editorial JM. Bosch, Barcelona
Kaddous C (ed) (2015) The European Union in international organizations and global governance. Recent developments. Hart, Oxford
Kaiafa-Gbandi M (2010) Harmonisation of criminal procedure on the basis of common principles. The EU's challenge for rule-of-law transnational crime control. In: Fijnaut CJ, Ouwerkerk J (eds) The future of police and judicial cooperation in the European Union. Martinus Nijhoff, pp 357 ff
Klip A (2012) European criminal law. An integrative approach, 2ª edn. Intersentia, Cambridge
Klip A (2014) Contra legem. Eur J Crime Crim Law Crim Just, pp 105 ff
Kosař D (2017) Nudging domestic judicial reforms from Strasbourg: how the European Court of Human Rights shapes domestic judicial design. Utrecht Law Rev, pp 112 ff
Kostoris RE (2008) Verso un processo penale non più statocentrico. In: Balsamo A, Kostoris RE (eds) Giurisprudenza europea e processo penale italiano. Giappichelli, Torino, pp 3 ff
Kostoris RE (2015) Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico post-moderno. Riv it dir e proc pen, pp 1177 ff
Kostoris RE (2016) Equità, processo penale, diritto europeo. Riflessioni di un giurista di civil law. Riv it dir e proc pen, pp 1653 ff
Krüssman MT (2009) Transnationales Strafprozessrecht. Nomos, Baden-Baden
Kurban D (2017) Forsaking individual justice: the implications of the European Court of Human Rights' pilot judgment procedure for victims of gross and systematic violations. Hum Rights Law Rev, pp 731 ff
Laffranque J (2012) Who has the last word on the protection of human rights in Europe? Juridica international. Law Rev Univ Tartu, pp 117 ff
Lambert-Abdelgawad E (2015) L'exécution des arrêts de la Cour européenne des droits de l'homme (2014). Rev trim droits de l'homme, pp 5 ff
Manes V (2012) Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali. Dike, Roma
Mitsilegas V (2009) European criminal law. Hart, Oxford
Mitsilegas V (2016) European criminal law after Lisbon. Rights, trust and the transformation of justice in Europe. Hart, Oxford
Mowbray A (2015) Subsidiarity and the European Convention on Human Rights. Hum Rights Law Rev, pp 313 ff
Neframi E (ed) (2015) Renvoi préjudiciel et marge d'appréciation du juge national. Larcier, Bruxelles
Nilsson HG (2014) Where should the European Union go in developing its criminal policy in the future? Eucrim, pp 19 ff
Öberg J (2015) Subsidiarity and EU procedural criminal law. Eur Crim Law Rev, pp 19 ff
Ost F, Van De Kerchove M (2002) De la pyramide au réseau? Pour une théorie dialectique du droit. Facultés Universitaires Saint-Louis, Bruxelles
Ouwerkerk J (2015) Criminal justice beyond national sovereignty. An alternative perspective on the Europeanisation of criminal law. Eur J Crime Crim Law Crim Just, pp 11 ff
Palazzo F (2005) Sistema delle fonti e legalità penale. Cass. pen., 2005, pp 313 ff
Paliero CE (2014) Il diritto liquido. Pensieri post-demalsiani sulla dialettica delle fonti penali. Riv it dir e proc pen, pp 1099 ff
Peers S (2016) EU justice and home affairs law – volume II: EU criminal law, policing and civil law. Oxford University Press, Oxford

Pi Llorens M (2017) El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia. Revista de Derecho Comunitario Europeo, pp 77 ff
Rafaraci T (ed) (2007) L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia. Giuffrè, Milano
Raimondi G (2012) La dichiarazione di Brighton sul futuro della Corte europea dei diritti dell'uomo. AIC, no. 3
Rossi LS (2017) "Same Legal Value as the Treaties"? Rank, primacy, and direct effects of the EU Charter of Fundamental Rights. German Law J, pp 771 ff
Salazar L (2016) The Ventotene Manifesto and the European area of freedom, security and justice. Eucrim, pp 150 ff
Sánchez MA (2016) Integración europea y legitimidad de la jurisdicción constitucional. Revista de Derecho Comunitario Europeo, pp 941 ff
Saul M (2015) The European Court of Human Rights' margin of appreciation and the processes of national parliaments. Hum Rights Law Rev, pp 745 ff
Schünemann B (ed) (2006) Ein Gesamtkonzept für die europäische Strafrechtspflege. Verlag, Berlin
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden
Soo A (2016) Potential remedies for violation of the right to counsel in criminal proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its output in national legislation. Eur Crim Law Rev, pp 284 ff
Sotis C (2012) La mossa del cavallo. La gestione dell'incoerenza nel sistema penale europeo. Riv it dir e proc pen, pp 464 ff
Spiellman D (2012) Allowing the right margin the European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of European review? https://www.cels.law.cam.ac.uk
Tacik P (2017) After the dust has settled: how to construct the new accession agreement after opinion 2/13 of the CJEU. German Law J, pp 919 ff
Ubertis G, Viganò F (eds) (2016) Corte di Strasburgo e giustizia penale. Giappichelli, Torino
van Ballegooij W (2014) Better regulation in European criminal law. Assessing the contribution of the European Parliament. Eucrim, pp 107 ff
Vervaele JAE (2005) L'europeizzazione del diritto penale e la dimensione penale dell'integrazione europea. Riv. trim. dir. pen. economia, pp 129 ff
Vervaele JAE (2014) European criminal justice in the post-Lisbon area of freedom, security and justice (with a prologue by G. Fornasari and D. Sartori). Editoriale Scientifica, Napoli
Viganò F (2017) Supremacy of EU Law vs. (Constitutional) National Identity: a new challenge for the Court of Justice from the Italian Constitutional Court. Eur Crim Law Rev, pp 103 ff
Vogler R, Huber B (eds) (2008) Criminal procedure in Europe. Duncker & Humblot, Berlin
von Bogdandy A (2016) La transformación del derecho europeo: el concepto reformado y su búsqueda de la comparación. Revista de Derecho Comunitario Europeo, pp 441 ff
Weyembergh A (2008) L'effectivité du troisième pilier de l'Union européenne et l'exigence de l'interpretation conforme: la Cour de justice pose ses jalons In: Grasso G, Sicurella R (eds) Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale. Giuffrè, Milano, pp 353 ff
Weyembergh A (2017) Consequences of Brexit for European Union criminal law. New J Eur Crim Law, pp 284 ff
Yourow HC (1996) The margin of appreciation doctrine in the dynamics of European Human Rights Jurisprudence. Martinus Nijhoff, Leiden
Zeder F (2015) Typology of pre-Lisbon acts and their legal effects according to protocol no. 36. New J Eur Crim Law, pp 485 ff
Zysset A (2017) The ECHR and human rights theory: reconciling the moral and the political. Routledge, London

Part II
Fundamental Rights

Chapter 2
The Protection of Fundamental Rights

Roberto E. Kostoris

Contents

R. E. Kostoris (✉)
School of Law, University of Padua, Padua, Italy
e-mail: roberto.kostoris@unipd.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_2

2.1 The Development of Fundamental Rights, the Charter of Fundamental Rights of the European Union, and the Perspectives of the EU Accession to the ECHR

2.1.1 The Multilevel Protection of Fundamental Rights

A fundamental aspect of both European law systems that is crucial for criminal procedure concerns the protection of fundamental rights.

It has been sustained that the pluralism of European sources in criminal matters and their mutual intersection is the result of mainly two elements: the internationalization of regulations on economy and the development of fundamental rights. Behind these two main aspects we can see the two broad transnational legal systems that have coexisted on the European continent: the ECHR, which has been established with the specific purpose of ensuring compliance with fundamental rights by the States within their national legal systems—an action that has been of fundamental importance, especially with regard to criminal proceedings—and the European Union, a system that originally developed from a transnational regulation of markets and that has increasingly used criminal law and procedure as instruments for the protection of that regulation and fundamental rights as limits and base for its own activity. In this view, and as regards criminal justice, fundamental rights become a common ground of the Union and the ECHR, subject to mutual interference.

For the Union, fundamental rights are a fantastic tool of integration since the Union recognizes in them the role of general principles of EU law. They are the pillar upon which the process of 'European constitutionalisation' is founded.

Fundamental rights represent, therefore, a crucial aspect in the matter at hand. This section will address their forms of protection, while Sect. 2.3 will then address their specific content.

Many sources are involved in this protection. In the post-Lisbon framework, these are represented by (a) the national legal orders and national constitutions; (b) the ECHR; (c) EU's primary legislation: TEU (Art. 6) and the Charter of Fundamental Rights of the European Union; (d) EU's secondary legislation (Art. 82.2.b TFEU); (e) provisions included in international treaties (for example, the 2000 United Nations Convention Against Transnational Organized Crime: Art. 11.3). This rather varied framework is enriched by case law, which holds fundamental importance in this matter as the true engine behind the establishment of fundamental rights in Europe: first and foremost, the case law of the European Court of Human Rights and of the Court of Justice of the European Union, but also the case law of domestic judges and of national constitutional courts.

This landscape can be described with the expression multilevel protection of fundamental rights, in the sense that each one of these aspects aims—in the context of the network-like system of sources addressed at the end of the previous chapter—to protect those rights, even if in different areas and through different forms and procedures and with different outcomes, with regard to both the injured party and the

legal systems addressed. This multilevel protection, however, is achieved in radically different ways compared to the one traditionally provided in civil law countries, where national constitutions are considered the exclusive source of fundamental rights.

Therefore, the multilevel protection of fundamental rights can be described by the complex of normative and jurisprudential tools through which the various competences and relations between national and supranational jurisdictions before which it is possible to invoke protection for fundamental rights are established.

In this context, the entry into force of the Lisbon Treaty and the recognition of the binding value of the EU Charter of Fundamental Rights must be considered elements of the highest importance. Furthermore, a key aspect in the path to EU constitutional integration would be represented by the European Union's accession to the ECHR (when and if it will be enacted). Both these aspects present a strong potential impact on the matter of criminal procedure, both in terms of approximation of national legislation, which will absolutely have to include the respect for fundamental rights, and in terms of judicial cooperation, an area certainly more developed than approximation, but that for a long time has been structured mainly in repressive terms, with clear deficiencies with regard to the protection of fundamental rights. Finally, the respect of fundamental rights will also be the polar star for the activity of the European Public Prosecutor's Office (see Sect. 5.2.8.2).

2.1.2 The Judicial Development of Fundamental Rights and the Relationship Between the Court of Justice and the European Court of Human Rights

The development of fundamental rights within the European Union is the result of a 40-year long, innovative case law of the Court of Justice of the European Union (formerly of the European Communities). This case law finds its origin in the strong stimulus provided by the Italian (Judgment 183/1973, *Frontini*) and German (Judgment 37/1974, *Solange I*) constitutional courts. The two courts had highlighted the many shortcomings that characterized EU law with regard to fundamental rights. And, for this reason, they had opposed to the strength of the supremacy of EU law, the so-called 'counter-limits', represented by the level of fundamental rights protection afforded by their national constitutions. Thus, they had indicated that 'until' EU law would not have provided the same level of protection ensured by their constitutions, they would have reviewed the compliance of EU law provisions with such rights. Such an approach would have clearly and adversely affected the supremacy and the unitary character of EU law. The Court of Justice, aware of the risks caused by the insufficient level of protection for fundamental rights, decided to advocate to itself the function of assessing the compliance of EU law with them. In this perspective, the Court assigned to such rights the value of 'general principles of

EU law' (CJEU, 12 November 1969, C-29-69, *Stauder*; CJEU, 17 December 1970, C-11/70, *Internationale Handelgesellschaft*; CJEU, 14 May 1974, C-4/73, *Nold*), drawing inspiration from the 'constitutional traditions common to the Member States' and from the principles of the ECHR, as interpreted by the European Court of Human Rights. This way, the Court of Justice held that the protection of fundamental rights had become a condition for the legality of the action of European institution and of EU secondary legislation, which needed to be interpreted and applied in accordance with them. Such principle was then extended by the Court—through the well-known *Pupino* judgment (16 June 2005, C-105/03)—also to the acts enacted under the (former) Third Pillar.

However, the elaboration of fundamental rights made by the Court of Justice has sometimes shown appreciable differences compared to the interpretation of the ECHR rights by the European Court of Human Rights.

The functions and the approaches of the two courts have been, indeed, different. The European Court of Human Rights was established with the functions of a Human Rights Court. Its task is to protect individual rights and review their compliance by the Member States within their respective legal orders. Thus, the Court performs an 'external' control with a natural ascertaining tendency that has brought it to identify a high number of violations of the Convention committed by Member States. The Court of Justice, conversely, has acted as a Court of European Integration. For this reason, it has safeguarded guarantees not as such, but in the perspective of achieving Community objectives, such as the effectiveness and the autonomy of the EU legal order and the development of the common market. Its control, therefore, has been 'internal' to the system and primarily aimed at preserving Community law.

Furthermore, the Court of Justice has identified the main features of fundamental rights by drawing inspiration from elements external to its legal order and of various origin. Indeed, it has considered not only ECHR rights, but also the rights deriving from the common constitutional traditions of the Member States.

This 'double' jurisdiction on ECHR fundamental rights assigned to the two European courts has produced not only different kinds of interpretation of the same matter—each one functional to a different legal order—but very soon—without an objective-regulating criterion like the one that could have been derived from an accession of the EU to the ECHR—has generated problems of interference between the jurisdictions of the two courts.

After an initial period of self-restraint, since the beginning of the 1990s, the European Court of Human Rights has, in fact, claimed its jurisdiction over the violation of ECHR human rights, even when the States had transferred part of their sovereignty to the European Union in matters falling within its exclusive competence. Those States—as the Court affirmed—still had to be considered liable for the violation of those rights before the European Court of Human Rights (see ECtHR (Commission), 9 February 1990, *Melchers & Co. v. Germany*; ECtHR, 18 February 1999, *Matthews v. United Kingdom*). Such statement was perceived by the Court of Justice as a dangerous interference from the European Court of Human Rights and, in any case, implied that the same matter could be addressed by both courts (i.e., the European Court of Human Rights, in light of the

aforementioned decisions, but also the Court of Justice of the EU, since this was a matter falling within the competence of the EU law: see CJEU, 18 June 1991, C-260/89, *DEP*), with potentially different approaches and outcomes. Finally, in the so-called '*Bosphorus* case' (ECtHR, 30 June 2005, *Bosphorus v. Ireland*), the European Court of Human Rights made an important turning point: while still advocating to itself the competence to rule on violations of human rights also in matters falling within the competence of the EU, the European Court developed—in all the cases in which States had to make direct application, without any discretion, of EU acts—the so-called 'equivalence theory', pursuant to which, if the international organization grants to fundamental rights a level of procedural and substantial protection equivalent to the one ensured by the ECHR, the Court is dispensed from exercising its control. In light of this, the European Court affirmed that the system of protection of fundamental rights granted by the EU met these conditions. Undoubtedly, it was a political choice, motivated by not hindering the path toward European integration and not interfering with its power of review on subject strictly assigned to the competence of the EU.

Furthermore, it may be interesting to emphasize that with the *Bosphorus* decision, the European Court of Human Rights changed its methodological approach. Indeed, in that case, the Court gave up both specific features that usually characterize its intervention: namely, its role as a court adjudicating on the concrete case and its external control on the Member States' compliance with the Convention. In fact, while reviewing whether the European Community system protected fundamental rights, and responding affirmatively on the basis of a presumption of conformity, the Court *de facto* made an abstract assessment, not a concrete one. Such abstract assessment is rebuttable only if there were clear evidence that the system established by the Community (now the EU) provided an insufficient level of protection for fundamental rights. Indeed, this latter could be the only case in which the Strasbourg Court could deem justified its intervention (a case in which the European Court of Human Rights found such an insufficient level of protection was ECtHR, 20 January 2009, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands*).

In a following decision (ECtHR, 6 December 2012, *Michaud v. France*), the Court pointed out further that the presumption of equal protection is justified only on the ground of the control that jurisdictional EU bodies perform on the conformity of national laws to the conventional parameters of fundamental rights protection. Therefore, such presumption is destined to fall when during national proceedings the reference for a preliminary ruling to the Court of Justice is inhibited because in such case the EU system for the protection of human rights would lose one of its essential aspects.

With the *Bosphorus* decision, the European Court of Human Rights endorsed the EU system of fundamental rights' protection, as developed by the Court of Justice. In doing so, the Court also opened the way to an increasing dialog and interaction between the two courts.

Finally, even if we are focusing here on the relationship between the EU legal system and the ECHR system, it should be noted that the issue concerning the

protection of fundamental rights has come into play also in the relationship between the EU law and the international legal order established by the United Nations.

In this latter context, the Court of Justice of the EU has taken on the role of protector of fundamental rights whenever these were infringed by acts of international institutions. In the well-known '*Kadi* case' (CJEU, 3 September 2008, C-402/05 and C-415/05, *Kadi and Al Barakaat International Foundation*), the Court of Justice indeed claimed the primacy of EU law and of its own jurisdiction to rule on the violation of fundamental rights caused by a resolution of the United Nations Security Council providing for blacklists of Islamic terrorists with corresponding freezing of assets *inaudita altera parte*, and, therefore, in violation of the provisions guaranteeing a fair trial pursuant to Art. 6 ECHR, as transposed in EU law. In such case, the Court of Justice affirmed that the obligations deriving from United Nations resolutions find a limit in EU primary law, and, especially, in EU general principles, which in turn include fundamental rights, whose protection must indeed remain entrusted to the Court of Justice. As a result, this latter indicated that an international agreement cannot jeopardize the system of competences established by the Treaties and, therefore, the autonomy of the EU system. This can be considered a clear application of the doctrine of counter-limits referred to EU law against United Nations acts.

2.1.3 The Charter of Fundamental Rights of the European Union

The development of fundamental rights through the case law of the Court of Justice finds its first official recognition with the 1992 Treaty of Maastricht. The Treaty assigned to those rights the value of 'general principles of Community Law' that the Union must 'respect' (Art. 6.2 TEU old text). The most significant turning point, however, occurred with the Treaty of Lisbon and the Charter of Fundamental Rights. Such acts provided these rights with a special 'normative' force and fixed a written list of them, which codified the developments of the Court of Justice case law. Let us summarize the most relevant aspects of this matter.

The adoption, in 2000, of a Charter of Fundamental Rights in Nice, transferred into a written text the results of the elaboration performed by the Court of Justice through its case law. At the same time, the Charter established a strong link between those rights and the rights protected by the ECHR. The Charter, however, still did not have a binding force, and therefore it was a source of 'soft law', even if it had significantly influenced both the Court of Justice case law and the Member State courts' case law. Finally, the Treaty of Lisbon has elevated the Charter, in the version adopted with few changes in 2007 in Strasbourg, to primary law of the Union, therefore assigning to the Charter the same legal status of the Treaties (Art. 6.1 TEU).

This is a crucial step that brought about significant consequences for the general framework of the multilevel protection of fundamental rights. Indeed, the Charter, enjoying now the status of primary EU law, is binding on both secondary EU law and Member States law.

In addition, it must be stressed that the Charter not only has codified the fundamental rights that had been recognized exclusively by the case law of the Court of Justice but also includes a list of new rights, such as 'human dignity' (Art. 1 of the Charter); this principle was already recognized in some national legal systems and in the Charter spreads indeed its effects on every other fundamental right.

The specific content of the rights linked to criminal proceedings included in the Charter will be analyzed in Chap. 3, where these rights will also be considered with regard to homologous rights included in the ECHR. Here, we will briefly address the main features of the Charter as fixed in Title VII, which establishes some rules for its application and interpretation.

2.1.4 Follows: The Principles of Conferral and Equivalence

Starting from Art. 51.1, it is provided that—in light of the principle of conferral, which represents the keystone of the system of EU competences—'the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. In turn, Arts. 6.1 TEU and 51.2 of the Charter introduce a strict prohibition against any extension of competences of the Union through the Charter, pursuant to the incorporation doctrine. Indeed, both articles indicate that the Charter 'shall not extend in any way the competences of the Union as defined in the Treaties, not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'.

In this recurring need to reaffirm the limit of the competences assigned to the European Union, we can see all the concerns of the Member States to preserve their areas of sovereignty. The fear is that such a Charter, which has a 'European constitutional tone' and which recognizes fundamental rights, may have special expansive tendency, which indeed occurs, thus making the possibility of a clear distinction of competences more and more vague.

That said, it should be noted that the purpose of the Charter is to prescribe the respect for fundamental rights within the areas already falling (or that will fall in the future) within the competences of the European Union (CJEU, 3 February 2013, C-617/10, *Aklagaren v. Alkerberg Fransson*). The Charter, therefore, establishes that the main feature that must characterize all EU law is represented by its consistency with the Charter's guarantees. It is an aspect of the highest importance since it implies the compliance of all European Union law with the Charter. It appears clear that such an aspect may have significant consequences for criminal proceedings, especially in the area of judicial and police cooperation in criminal

matters, an area originally developed pursuant to an almost exclusively repressive perspective, as well as with regard to the investigations and actions of the EPPO (Art. 41 Regulation 2017/1939/EU).

The principle of attribution, which the Charter is inspired from, can pose the problem of the so-called 'reverse discriminations', which can arise with regard to analogous safeguards as a consequence of the differences between provisions having an EU relevance, to which it will be possible to apply the Charter, and provisions having only an internal relevance, to which it will not be possible to apply the Charter. Apart from the increasing difficulties in distinguishing between areas of internal competence and of EU competence, a way to extend to the 'internal' provisions any more favorable protection granted by the Charter could be represented, for the national legal systems that recognize the principle of equality in their constitutions, by submitting a question of the constitutionality of the national provision on that ground. Conversely, if the Charter guarantee should be in conflict with an internal one, even at constitutional level, given the primacy of EU law, the internal provision would in principle be destined to not prevail, except when it integrates a supreme principle of the domestic legal system consisting in a 'counter-limit'.

While the Charter of Fundamental Rights certainly provides the most relevant catalog of rights, it is far from representing the only list of fundamental rights of EU law. Other sources may interact with the Charter or may represent criteria for the interpretation of the Charter.

The former aspect concerns the 'other' rights included in the Treaties that are mentioned by Art. 52.2 of the Charter, which address guarantees that are similar to those protected by the Charter. The relationship between these two kinds of guarantees cannot always be described *a priori* in terms of prevalence of one over the other.

The latter aspect, conversely, concerns the corresponding rights included in the ECHR and the rights resulting from the constitutional traditions common to the Member States, both used as interpretative parameters for the rights included in the Charter.

With regard to ECHR rights, Art. 52.3 of the Charter establishes a principle of equivalence: insofar as the Charter contains rights that 'correspond' to rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. This equivalence, however, should not 'prevent Union law providing more extensive protection' than the one provided by the ECHR, pursuant to the principle of maximum protection that characterizes EU law. For its part, the 'correspondence' shall be assessed in light of the 'Explanations' developed by the Praesidium of the Convention.

Naturally, such an equivalence and such a correspondence must be referred only to the 'contents' of the rights and not to their regulation. Indeed, it must be stressed that the Charter incorporates the content of the ECHR rights, but it remains EU law and, as such, is subject to the jurisdiction—and the interpretation—of the Court of Justice. Nevertheless, it must be noted that the highest possible level of interpretative uniformity is advocated, especially in light of the correspondence clause included in Art. 52.3 of the Charter. In any case, in order to avoid any possible interpretative

conflict with the European Court of Human Rights, for the time being an application of the so-called '*Bosphorous* doctrine' on the alleged equivalence between the levels of protection of fundamental rights in the EU law and ECHR law may help. However, a suitable solution to this problem will have to be found in the perspective of the accession of the European Union to the ECHR.

With regard to the 'Explanations' included in the Charter, it is expressly provided that both the judges of the Union and the judges of the Member States will have to 'duly consider' them in interpreting the rights, liberties, and principles of the Charter (Arts. 6.1 TEU and 52.7 of the Charter). These Explanations, however, are not binding, but, as indicated by the Charter, represent only 'a valuable interpretative tool'.

2.1.5 Follows: Limitations on the Exercise of the Rights and Freedoms and Principle of Proportionality

Article 52.1 establishes a general statutory reservation, stating that 'any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law'. The rigidity of such a rule is, however, balanced by the flexibility of assessment imposed by the principle of proportionality. Indeed, it is established that any limitation on the exercise of the rights and freedoms shall (a) correspond 'effectively to purposes of general interest recognized by the Union, or to the need to preserve other rights and freedoms', (b) be strictly 'necessary' (i.e., less intrusive measures to obtain the same result are lacking), and (c) respect in any case the 'essential content' of these rights and freedoms, so that their sacrifice does not become excessive.

The proportionality test provided by Art. 52.1—consistently with the case law of the European Court of Human Rights, which has drawn inspiration by the parameters created by the German Constitutional Court—requires, therefore, three types of assessment: suitability, necessity, proportionality *stricto sensu* of the measure to be adopted. In this perspective, the principle of proportionality represents really a crucial instrument that is destined to be increasingly employed in EU law and that can be considered a symbol of European teleological legality, which is characteristic of a legal system mainly built on principles, which need to be mutually balanced. The principle of proportionality, established in Art. 52.1 Charter, refers to the legislative evaluations and to the control that can be performed on them by the Court of Justice (not always, however, such a control has been satisfactorily carried out: for example, the Court of Justice has justified limitations of defence rights in light of such principle, giving a clear prevalence to EU interests: see CJEU, 29 January 2013, C-396/11, Radu; CJEU, 26 February 2013, C-399/11, *Melloni*). In a different perspective, it must be highlighted that the proportionality test has to be performed also, and especially, by national judges applying EU law, as they have to carry out a delicate balance between the values at stake in a concrete judicial case. In

this regard, the EIO, that is set to become a central instrument of judicial cooperation, requiring both to the issuing authorities and to the executing authorities the control on the proportionality of the requested investigative measure or evidence, can be considered a significant prototype of such judicial assessment (see Sect. 9.1.8).

2.1.6 Follows: The Principle of More Extensive Protection and Its Breach by the Court of Justice

Moreover, the Charter provides two kinds of prohibition: one concerns external protections and the other internal ones.

With regard to the external guarantees, Art. 53 provides that 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by EU law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

It is a limit that primary EU law applies to itself in its relationship with external guarantees.

In other words, Art. 53 provides that the system of protection established by the Charter must be coordinated with different ones, including first and foremost the ECHR rights different from the 'corresponding' rights included in the Charter addressed by Art. 52.3 and rights provided by national constitutions, both interpreted pursuant to the meaning assigned to them in the legal order of origin. In addition, Art. 53 requires that such coordination respects the principle of more extensive protection. This means that, among the various guarantees that may abstractly find application to the same issue, the one providing a higher level of protection should be applied. The same principle is also fixed in Art. 82.2 TFEU with regard to harmonization directives and is established by Art. 53 ECHR with regard to the Conventional law, and, furthermore, it is believed to be a general rule of international law.

However, it must be considered that, while for the ECHR and the European Court of Human Rights this protection represents an institutional objective by itself, for the Union and the Court of Justice this protection is taken into account as much as it can promote (or does not clashes with) the objectives of European integration. This implies that, while in the context of the ECHR the principle of more extensive protection can operate in harmony with the objectives of the Convention, in the Union system its implementation can become more problematic.

This is clearly testified by the Court of Justice, which in the *Melloni* case (see CJEU, 26 February 2013, C-399/11, *Melloni*) interpreted very restrictively the principle of more extensive protection expressed by Art. 53 of the Charter. The

Court has indeed stated that such principle does not authorize that guarantees of higher degree included in the national constitutions can generally prevail, when this would allow a Member State to hinder the application of EU legal acts consistent with the Charter (the case at issue dealt with the refusal to enforce a European arrest warrant related to a decision *in absentia* outside of the cases provided by Art. 4-bis.1 of Framework Decision 2002/584/JHA in which the refusal of the enforcement is allowed). Afterward, the Court, in its Opinion 2/13 of 18 December 2014, went so far as to make such solution—originally referred to a specific case—general and absolute. Indeed, the Court stated that the application of higher national standard of protection may compromise the primacy, the unity, and the effectiveness of EU Law. This leads to a complete emptying of Art. 53 of the Charter. In fact, it seems that these statements of the Court of Justice indicate that what is more important is the standardization (inevitably conceived on the lower levels of protection), because it allows to easily obtain a primary objective of the Union, such as the efficiency of judicial cooperation and of mutual recognition, rather than protecting the safeguard levels. If this approach will not change, higher national safeguards risk becoming entirely non-challengeable when a 'parallel' European safeguard is provided; such trend could concern not only the Charter of Fundamental Rights but also the harmonization directives, which, for their part, include clauses of 'non regression' similar to the one provided in Art. 53 of the Charter, and, more generally, any judicial cooperation instrument. This could compromise the possibility to recognize any operative space for the so-called national counter-limits.

In light of the latter prohibition, which concerns the internal protections of the Charter, it is provided that the Charter cannot be interpreted as authorizing any activity or acts aimed at 'the destruction of rights or freedoms' recognized in the Charter or at the limitation of such rights to a greater extent than what is provided for by the Charter itself (Art. 54).

2.1.7 Article 6 TEU

Article 6.3 TEU requires special attention as it represents—in light of the supremacy of the Treaty of Lisbon over all the other sources of EU law—the foundational basis for rights within the European Union. It provides that 'fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member State, shall constitute general principles of the Union's law'.

This text—more assertive than the corresponding one of the previous version of the TEU, which only included a reference to the need to 'respect' such rights by the Union—can be considered as the result of the case law of the Court of Justice, which over time elaborated fundamental rights as general principles of EU law.

The formulation of Art. 6.3, however, needs to be clarified. In fact, the statement that fundamental rights of the ECHR, as resulting from the common constitutional traditions, must be considered as general principles of EU law, has led someone to believe that the ECHR had integrally become part of EU law (see, for example,

Italian Council of State, Judgment 1220/2010). This opinion does not seem to be correct. Indeed, Art. 6 TEU and, in turn, the general principles of law addressed by paragraph 3 apply only to EU law. The same can be said for the Charter of Fundamental Rights, which includes rights that 'correspond' to ECHR rights. The EU law referred to by Art. 6.3 TEU certainly includes the 'contents' of the rights listed in the ECHR: more specifically, the contents of those rights that are also resulting from the common constitutional traditions. However, the ECHR itself, as an international convention, is not incorporated within EU law. The ECHR in itself, therefore, as such, is not 'communitised' and, therefore, does not enjoy the supremacy of EU law, including, first and foremost, the obligation for national judges to disapply inconsistent domestic provisions.

This opinion has been endorsed by the Court of Justice (CJEU, 24 April 2012, C-571/10, *Kamberaj*; CJEU, 26 February 2013, C-617/10, *Åklagaren v. Akerberg Fransson*). The Court clearly indicates that the ECHR 'as long as the European Union has not acceded to it, does not constitute a legal instrument which has been formally incorporated into European Union law. Consequently, the European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that Convention and a rule of national law'. The Court reaffirmed this view in its Opinion 2/13 of 18 December 2014, on the Draft Agreement for the Accession of the EU to the ECHR, where, moreover, it is pointed out that under Art. 216.2 TFEU the conclusion shall be the opposite, in the sense that the ECHR shall be considered an integral part of EU law, once the Union acceded to the former.

That said, however, it is necessary to understand the rationale of Art. 6.3 TEU, considering that the Charter of Fundamental Rights enjoys the status of primary EU law and that it provides an equivalence clause between the rights of the Charter and those of the ECHR. In fact, the ECHR rights would appear to be referenced as rights of the EU twice: on one hand, as rights corresponding to the rights of the Charter and, on the other hand, as general principles of EU law, even if combined with the principles deriving from the common constitutional traditions of the Member States.

Undoubtedly, Art. 6 TEU is not a well-drafted provision. Indeed, it includes two perspectives that were originally conceived as alternatives: the codification of a charter of rights and the accession of the EU to the ECHR. Nonetheless, it seems possible to assign to the two references to the ECHR rights included in Art. 6 TEU a different meaning. In this regard, three possible aspects may come into play. a) First and foremost, the Charter of Fundamental Rights does not apply to all the EU Members States: the United Kingdom and Poland have exercised their right to opt out from application of the Charter. However, Art. 6.3 TEU applies also to those States, given its general scope. Indeed, absent such a provision, there would have been a deficit of fundamental rights protection with regard to these Member States. b) Art. 6.3 does not take into account the rights of the ECHR separately but rather consider them in their relation to the rights deriving from the common constitutional

traditions, rights that conversely are not considered by the Charter of Fundamental Rights. Certainly, the boundaries of these 'additional' rights are quite indefinite, even if the Court of Justice includes in them the rule of law, the right of defense, the prohibition against double jeopardy, and effective judicial protection. However, c) such vague formulation, however, ensures a precious flexibility as the list of such rights can be left open in light of their development in the case law, without freezing them into their current meaning.

2.1.8 The Perspectives of the EU Accession to the ECHR

Article 6.2 TEU provides for the accession of the European Union to the ECHR, but points out that such accession will not affect the Union's competences as defined in the Treaties.

Due to mutual mistrust and closure between the two European courts, the Court of Justice, in its well-known opinion of 1996 (CJEU, 28 March 1996, Opinion 2/94), had excluded the competence of the EU to accede to the ECHR without a revision of the Treaty establishing the European Union. The situation had remained unchanged for a long time. The enactment of the Treaty of Lisbon had overcome this obstacle, while, at the international level, the legal prerequisite for such agreement was fulfilled. Such prerequisite is represented by Protocol 14 to the ECHR, signed on 13 May 2004, and effective from the 1 June 2010—after being ratified by Russia—whose Art. 17 amended Art. 59 ECHR, thereby making the accession possible.

Following a Recommendation of the Commission issued on 17 March 2010, the Council adopted on 4 June 2010, a decision authorizing the commencement of negotiations on the agreement for accession, with the Commission acting as a negotiator. On 5 April 2013, the negotiation had led to a draft agreement on the provisions deemed necessary to realize the accession. On 4 July 2013, the Commission, pursuant to Art. 218.11 TFEU, requested an opinion to the Court of Justice on the compatibility of such draft agreement with the Treaties. The Court of Justice expressed a negative assessment on the draft agreement with Opinion 2/13 of 18 December 2014, causing therefore a setback in the accession process.

Indeed, it is undoubtable that such an accession presents a series of implications. Much will depend on how the accession will be regulated. The accession requires a particularly complex process, including, *inter alia*, ratification by all the EU Member States (Arts. 218.6 and 8 TFEU). Furthermore, the accession could also be *sui generis*, different from the traditional ones. Certainly, as emphasized by the Court of Justice in its Opinion 2/13, unlike any other party to the ECHR, the European Union, due to its own nature, cannot be considered a State, but the Union represents a peculiar legal order, with its own specific nature and foundational principles, its own special structure, and a complete set of legal norms and bodies that guarantee its functioning. Furthermore, it cannot be forgotten that such legal order is binding on the same Member States that are also parties to the ECHR.

2.1.8.1 Conditions for the Accession

It is for these very reasons that some provisions of the Treaties and of the corresponding Protocols state that the accession will have to comply with some basic conditions, which can be considered as 'counter-limits' of EU law.

In particular, (a) Art. 6.2 TEU and Art. 2 of Protocol 8 to the Treaty of Lisbon establish a 'protection clause': the accession will not affect the Union's competences as defined in the Treaties; (b) Art. 3 of Protocol 8 provides that the access agreement will not affect in any way the exclusive competence of the Court of Justice to define the controversies of the Member States concerning the interpretation and application of the Treaties, as established by Art. 344 TFEU; (c) Art. 1 of Protocol 8 and declaration 2 attached to the Treaty of Lisbon establish that the accession must be realized so as to preserve the specificities of the European Union and of the EU legal order. To this end, the Union should be included in the controlling bodies of the ECHR. In this perspective, for example, an involvement in the Committee of Ministers, whose task is monitoring the implementation of the European Court of Human Rights' decisions, or the appointment, among the judges of the Strasbourg Court, of a judge representing the Union should be provided. In addition, mechanisms guaranteeing that proceedings pursued by non-Member States and specific applications are properly directed, as the case may be, to the Member States and/or the Union should be settled. The purpose should be to avoid that the European Court of Human Rights, by identifying the respondent in a proceedings concerning a violation of the ECHR, might indirectly interpret the provisions included in the Treaties on the division of competences between the EU and Member States, *de facto* circumventing the prohibition indicated under (b). Finally, (d) Art. 2 of Protocol 8 provides that the accession agreement shall not affect the situation of the Member States in relation to the European Convention (such as accession to its Protocols or any derogation or reservation that they may have made).

In any case, in light of the delicate interferences existing between national law and EU law, the European Union should be allowed to intervene in the proceedings before the European Court, together with the main respondent State, every time that its liability for violation of the ECHR arises from acts implementing EU law. Conversely, Member States should be allowed to intervene in the proceedings involving the European Union when it is the main respondent before the Strasbourg Court for actions or omissions of its bodies, organizations, or agencies that are linked to Treaty provisions for which the Member States take responsibility. In both the aforementioned cases, the Draft Agreement allowed the Union and the Member States, respectively, to intervene as additional respondents, therefore enjoying all the procedural rights connected with such position.

2.1.8.2 The Position of the European Union Toward the ECHR and the European Court of Human Rights

With such limitations, after the accession to the ECHR, the Union and EU law will be subject to an international system of review, in respect to which they are now extraneous. The purpose is clear: while the recognition of the Charter of Fundamental Rights as having the same legal status as the Treaties aims to improve the protection of fundamental rights within EU law, the access to ECHR aims to strengthen that protection externally.

Indeed, with regard to respect of fundamental rights, the accession agreement should put the European Union, with respect to its relationship with the ECHR, in a position similar to that of the Convention's Member States. Therefore, European citizens would enjoy a protection of ECHR rights against acts and actions of the European Union and its institutions equal to the one that they already enjoy against acts and actions of their own Member States and their bodies. As a consequence, similarly to what happens with regard to Member States, also with regard to the European Union, the internal control—which the victim of a violation is required to previously exhaust—and the external one—which could be invoked only if the internal one is not satisfactory—should combine, so that, as a result of that combination, human rights protection should be strengthened, albeit through more complex mechanisms. After the accession, therefore, it should be possible to resort to the European Court of Human Rights when the EU system of human rights protection should not work adequately.

2.1.8.3 The Issues Emerging from the Opinion of the Court of Justice

The accession also raises a series of especially delicate and complex issues, and the negative opinion of the Court of Justice on the Draft Agreement clearly shows the difficulty to find suitable solutions for different—and sometimes opposite—aims.

Limiting our analysis only to some general remarks, first and foremost it should not be forgotten that, after the accession, the ECHR itself is destined to become part of EU law (Art. 216.2 TFEU). This dual nature—its being a system for the protection of human rights that provides an external control on the Contracting Parties, then including also the EU, and, at the same time, also becoming an integral part of EU law itself—is very likely destined to create problems of coexistence and overlapping between such two levels. As part of EU law, the ECHR will have necessarily to be subject to the rules and the controls typical of EU law. At the same time, though, its judicial body, the European Court of Human Rights, will have to perform an external control on the EU's level of compliance with the ECHR rights. More precisely, the European Court will become the final court for the protection of ECHR rights also for EU law, as it currently is for the domestic law of the Member States.

Furthermore, it must be remembered that ECHR controls were originally conceived to be applied to States and not to a legal order like the European Union,

which, as previously pointed out, presents quite different features. Therefore, such mechanisms will necessarily have to be adjusted for this new situation.

Moreover, EU law and the exclusive competences of the Court of Justice to rule on the controversies arising under EU law—even when concerned with the ECHR that will then be part of EU law—will need to be preserved. Indeed, this exclusive competence, established by Art. 344 TFEU, will coexist with the competence assigned to the European Court of Human Rights by Art. 33 ECHR to adjudicate any violation to the Convention that a Contracting Party may claim against another Contracting Party. And this latter competence is likely to find application also with regard to controversies arising between the States and the Union. Also in this regard, suitable mechanisms of coordination will need to be established.

Furthermore, the constant overlapping of levels and the difficulty to keep them separate is destined to increase with regard to the clause of equivalence (Art. 52.3 of the Charter) between the rights protected by the Charter of Fundamental Rights and the corresponding rights protected by the ECHR (see Sect. 2.1.4). Pursuant to what is literally provided in Art. 52.3, if the 'meaning and scope' of the former are expected to be 'the same' as that of the latter, the interpretation provided by the European Court of Human Rights of these latter rights should become—and this by express choice of the EU law—binding also with regard to the corresponding rights included in the Charter. However, in its Opinion 2/13 on the Draft Accession Agreement, the Court of Justice took a different view, deeming such approach too restrictive for EU law. By referring expressly to the principle of more extensive protection (Art. 53 of the Charter and Art. 53 ECHR), the Court stated that the level of protection guaranteed by the ECHR must coordinate with the level guaranteed by the corresponding rights of the Charter, as interpreted by the Luxembourg Court. In doing so, the Court of Justice made absolute the principle of law expressed in the *Melloni* judgment (see Sect. 2.1.6), in order not to impair the Charter rights, i.e.—in other words—in order to ensure the primacy of the Charter right over the ECHR right, even when the level of protection guaranteed by the former were lower than the one of the latter.

Moreover, different mechanisms are enacted by both the ECHR and the EU to ensure a uniform interpretation: while Protocol 16 to the ECHR authorizes national judges to request to the European Court an advisory opinion on the interpretation of Conventional rights, EU law requires the same judges to activate the preliminary reference procedure before the Court of Justice when such an interpretative doubt concerns EU law. However, in its Opinion 2/13, the Court of Justice highlights that, when 'corresponding' rights are involved, the request for an advisory opinion may adversely affect the autonomy and effectiveness of the preliminary reference procedure, which is considered the keystone of the EU system of judicial protection. The two procedures, therefore, will necessarily have to be coordinated.

These few remarks already make clear the relevance and seriousness of the issues involved. Certainly, the Court of Justice's general approach toward accession to the ECHR, as emerges in Opinion 2/13, seems to be more concerned with ensuring a strong protection for EU law and for the Court of Justice's powers than with an enhancement of the European Court of Human Rights' tasks when ECHR rights are

involved, as the logic of the accession should conversely require. We shall see in which direction the projected accession will develop in the future.

2.2 Legislative Harmonization

2.2.1 The Legal Basis of Art. 82 TFEU

The most recent perspective followed by the EU with regard to the development of fundamental rights protection lies on legislative harmonization. This path—if adequately developed—may lead to important and significant results.

It should be noted, however, that harmonization represents an 'open' strategy for intervention that is not necessarily limited to fundamental rights, since it can be employed in any field. In addition, it can be achieved directly, through specific instruments, or indirectly, through various elements, such as mutual recognition of judicial decisions or case law of the two European courts. Focusing here on direct harmonization, we will address such matter specifically in this part concerning fundamental rights, as it is in this very area that the harmonizing action of the European Union in criminal proceedings has been almost totally concentrated.

We have already stressed that Art. 82.2 TFEU establishes an express legal basis for the harmonization of legislation related to criminal proceedings. Indeed, it provides that the European Parliament and the Council may adopt, through directives and in accordance with the ordinary legislative procedure, common 'minimum rules' that should take into account the differences between the legal traditions and the systems of the Member States every time that this is deemed 'necessary to facilitate the mutual recognition of judgments and judicial decisions and the police and judicial cooperation in criminal matters having transnational dimension'.

These rules should act as a 'bridge' between the general principles and the detailed domestic provisions. Their adoption is aimed at, but is also limited to, facilitating mutual recognition. Therefore, in implementing them, national laws should present some common aspects aimed at promoting that mutual 'trust' between Member States that should represent the necessary precondition of mutual recognition. Thus, a more 'targeted' result compared to the one achievable through the general guarantees fixed in the EU Charter of Fundamental Rights should be reached.

The areas of intervention indicated by Art. 82.2 TFEU include 'mutual admissibility of evidence', 'the rights of individuals in criminal procedure', 'the rights of victims of crime' and 'other aspects of criminal procedure' (to be identified by the Council).

The open expression 'rights of individuals in criminal procedure' certainly comprises any person providing statements, including witnesses, but surely it focuses, with special regard, on the suspected or accused person. This is indeed the most remarkable aspect, if we consider that judicial cooperation had been

regulated under the former Third Pillar with a markedly repressive- and security-related view, especially after the events that occurred on 11 September 2001, and the terrorist attacks in London and Madrid.

With regard to the rights of the victims, Art. 82.2 TFEU conversely embraces a consolidated approach within the judicial cooperation and certainly more consistent with its traditional repressive function. In this perspective, the 2001 Framework Decision on the standing of the victims in criminal proceedings (2001/220/JHA) had already provided a wide range of guarantees, focused not only on compensation for damages, but also on the interest of the victims in the assessment of facts and responsibilities.

Consistently with the rules established by the Lisbon Treaty with regard to the Area of Freedom Security and Justice, Art. 82.2 TFEU further specifies that such 'minimum rules' may be adopted through directives by the ordinary legislative procedure. The unanimous vote of the Member States—previously requested for measures adopted under the former Third Pillar and that had prevented any initiative regarding the guarantees of suspected and accused persons—is therefore no longer required.

Pursuant to the legal basis established by Art. 82.2 TFEU, a program of normative initiatives has been developed primarily focusing on the need to guarantee the fundamental rights of accused and suspected persons that are expression of procedural fairness.

Indeed, it must not be forgotten that some criticism has been expressed with regard to such a type of action, based on the fact that those rights were supposed to be already guaranteed by the accession to the ECHR by all the Member States of the EU, and that, as a result, even the harmonization of the procedural systems could have been achieved through the harmonizing action of the Strasbourg Court without any need for further interventions from the Union (it is the same alibi that had been invoked to develop, within the EU, a judicial cooperation in criminal matters without guarantees). However, as indicated in recital 6 of Directive 2010/64/EU, 'although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States'. Indeed, the numerous judgments against some of those States for their violations of Conventional rights show that an adequate protection of rights in criminal proceedings is still far from being achieved and that, therefore, not even an adequate level of mutual trust between all the Member States that are party to the ECHR can be considered achieved.

It should be added that the review performed by the European Court of Human Rights is characterized by some limits, since it can only operate *ex post* and can only review the procedural fairness of single cases, which are moreover considered as a whole. Furthermore, there is no instrument to ensure compliance of the Member States with the principles expressed by the European Court of Human Rights, especially when it highlights structural defects in their corresponding legal orders. Finally, above all, it should also be remembered that, unlike ECHR law, EU law enjoys stronger and more direct enforcement mechanisms and that establishing in a

directive common minimum standards of ECHR, as interpreted by the Strasbourg Court, certainly strengthens their significance and binding value.

In any case, it should not be forgotten that, in the specific area of judicial cooperation, the position of a suspected or accused person is especially sensitive as these persons are subject to the converging action of judicial bodies of different member States; also in this regard, it is important to establish some binding procedural guarantees.

2.2.2 The Directives on Fundamental Rights of Suspected and Accused Persons

On the basis of all these elements and furthermore in the wake of the previous 2004 Hague Programme, through a Resolution of the Council of 30 November 2009, a 'roadmap for the strengthening of the procedural rights of suspected and accused persons in criminal proceedings' was enacted and then integrated into the Stockholm Programme of the European Council (2010/C 115/01) at point 2.4.

The 'roadmap' provided six priorities, which, in the Council's view, could be gradually implemented in future with additional procedural rights. The priorities were (a) right to interpretation and translation; (b) right to information; (c) right to legal assistance and legal aid; (d) right to communicate with family members, employers and consular authorities; (e) special guarantees for vulnerable suspected and accused persons; (f) the adoption of a Green Paper on pretrial detention in order to regulate a very sensitive matter varying significantly from State to State, especially with regard to its length.

Completely absent from the roadmap was, conversely, any reference to the guarantees linked to the law of evidence, despite the express provision on this matter in Art. 82.2 TFEU. This absence is not surprising: the law of evidence is the area where the differences between national legal systems are greatest and, therefore, where it is most difficult to reach an agreement. Nonetheless, this is a matter together with the defense guarantees that is crucial for judicial cooperation: it cannot be bypassed in order to ensure effective procedural rights. However, for the moment, EU law has avoided dealing with harmonizing this matter, preferring the easier choice represented by mutual recognition. Indeed, for this reason, Directive 2014/41/EU on European Investigation Order was adopted (see Sect. 9.1.7).

On the basis of the 'roadmap', six directives have been adopted so far on procedural fundamental rights. They are Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings—especially important since it is the very first measure adopted by the Union on the guarantees related to procedural rights of suspected and accused persons—Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, Directive 2013/48/EU of 22 October 2013 on the right to access to a lawyer and the right to have a third party informed upon deprivation of liberty, Directive

2016/343/EU of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, and Directive 2016/1919/EU of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

By considering all these directives from a general perspective, it should be noted that they tend to replicate the solutions fixed by the case law of the European Court of Human Rights in the interpretation of Art. 6 ECHR, with the aim to 'facilitate its application in practice'; however, these directives also include further guarantees, such as the extension of the right to interpretation to some relations between the suspected/accused person and the defense lawyer (Art. 2.2 Directive 2010/64/EU).

Moreover, all six directives include a 'non-regression clause', aimed at avoiding any possible limit or derogation from higher standards of protection eventually ensured by the ECHR, the EU Charter of Fundamental Rights, international law, or domestic law. In doing so, it is established also with regard to the harmonization directives on procedural rights of the suspect or accused persons a principle of safeguard of the higher protection that is not very different from the one fixed in Art. 53 of the EU Charter of Fundamental Rights, even if the restrictive interpretation given by the Court of Justice to this last principle in the *Melloni* case (CJEU, 26 February 2013, C-399/11, *Melloni*) might lead to believe that the nonregression clause could remain ineffective and, therefore, that in the context of harmonization higher national guarantees could be unenforceable.

In addition, all six directives are applicable during the entire proceedings 'until the final decision'.

Furthermore, except the directive on the protection of the presumption of innocence, which, as it provides general principles, does not make any express reference to it, in the other directives it is specified that they expressly apply not only to domestic criminal proceedings but also to proceedings concerning the enforcement of European Arrest Warrant (Art. 1.1 Directive 2010/64/EU). In this respect, the Directive on access to a defense lawyer includes, in turn, a specific set of provisions (see Sect. 8.3.3.2).

Finally, all directives, with the sole exception of the directive on the presumption of innocence, are subject to a common limit in the application to less serious crimes. In fact, when such crimes are assigned, pursuant to national law, to the competence of a nonjudicial authority whose decisions can be challenged before a criminal court, the directives will only find application to such a jurisdictional phase, unless the individual is deprived of personal liberty, in which case the directives always fully apply.

Certainly, it can be said that the overall 'roadmap' moves in a timid and reductive perspective. Indeed, as mentioned above, the aim was limited to reaffirm—through Union measures—some guarantees already developed and applied by the European Court of Human Rights. And, most importantly, these would not even represent the most significant guarantees in order to establish a mutual trust between the States. Another weakness would also be represented—in some scholars' view—by the lack

of connection between 'roadmap' actions of the European Union in the area of fundamental rights' protection and the situations of effective transnational cooperation with their specific features, especially with regard to the gathering of evidence. This would indeed represent the real testing ground of a non-merely-repressing conception of judicial cooperation. The guarantees of the 'roadmap' appear, conversely, far from this perspective since they aim essentially to harmonize treatment within the domestic procedural systems, with the sole exception of the applicability of these directives to the enforcement procedure of the European Arrest Warrant.

Not even Directive 2013/48/EU on the right to defense and the right to communicate with third persons upon deprivation of liberty, whose approval had been enthusiastically welcomed, have seemed to offer especially incisive guarantees. Irrespective of the contents of such directive, which will be addressed elsewhere (see Sects. 3.2.5.2 and 8.3.3.2), it is important to highlight that, despite the importance of the matter addressed, not always sufficiently clear or courageous choices have been made. Furthermore, the directive usually leaves to domestic laws to identify the measures to be adopted for the application of the guarantees. This should not be surprising, since there is still no shared vision by all Member States on the right to legal defense; such a circumstance demonstrates the difficulties to conceive a program of harmonization when the most sensitive issues are addressed.

That said, some methodological remarks on these directives should be in any case highlighted.

First of all, as a consequence that they are modeled on the ECHR safeguards, it is provided that they must guarantee the fairness of the trial. Consequently, even the application of any possible derogation of the rights they provide should not prejudice this fundamental value.

The procedural fairness, employed by the case law of the European Court, both with regard to a constellation of guarantees that must inform the proceedings (see Sect. 3.1.2) and with regard to their special methodological and operational dimension, which is based on a case-by-case analysis referring to a specific judicial case, which is considered *ex post* and as a whole, is encompassed in these directives for the first time as a legislative parameter; however, such parameter shall be undoubtedly intended as 'open' and 'flexible'. On one hand, national legislators will have to comply with it upon implementation of the directives on the basis of an abstract balancing exercise, of course in the (very limited) area in which such parameter can support legislative choices (for example, prescribing the respect of certain conditions). On the other hand, the parameter is directed first and foremost to internal judicial authorities, vested with the delicate task of applying it concretely through decisions balanced on the basis of the proportionality principle. This means that the harmonization directives on the rights of the suspected or accused persons grant the judge broad discretional powers, in respect to which the only possible protection against arbitrary choices can be represented by a rigorous use of rational criteria for comparison, a sufficient motivation that makes them transparent, and the possibility of a review of them. In this regard, the directives show a typical example of judicial legality that is characteristic of European law and that refers both to common law approach and, furthermore, to the modules of the ancient and medieval rhetoric

tradition that was characterized by a high degree of hybridization between law and the concrete case to be adjudicated (see Sect. 1.4.2). Such an approach can determine deep changes for judges of civil law systems, which are used to deal with strictly legislative rules. Having said that, it is still necessary to point out that, in light of these directives, the powers of the judge we are talking about might be exercised both in the direction of a restriction of safeguards as well as in the direction of a possible extension thereof.

Undoubtedly, more frequent and relevant are the examples of the first type. Let us think of the temporary derogations to the right to access to a lawyer in particular cases, which will have to respect the 'overall fairness of the trial' (Arts. 3.5, 6 and 8 Directive 2013/48/EU).

Instead, a significant example of the second type can be found in Art. 3.1 of Directive 2010/64/EU on the right to interpretation and translation. It establishes that Member States shall ensure that the suspected or accused persons who do not understand the language of the 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 and to safeguard the fairness of the proceedings'. This rule (Art. 3.3) adds that, notwithstanding the fact that these documents shall include any decision depriving a person of his/her liberty, any charge or indictment, and any judgment, 'in any given case' the decision on whether any other document is 'essential' belongs to the 'competent authorities'. The CJEU, 15 October 2015, C-216/14, *Covaci*, has acknowledged that, on the basis of this criteria, the national judge will have the possibility to widen the scope of applicability of the right to a translation, even when the national legislator had made more limitative choices (in this case, what was at stake was the lack of a provision in the German law granting the right to translation of the opposition to the criminal decree of conviction, drafted in a language different from the one of the trial; such act, being crucial for the rights of defense, as pointed out by the Court, can rightly be considered 'essential' to safeguard the fairness of the trial).

From a different perspective, it must be remembered that, since Directive 2012/13/EU on the right to information in criminal proceedings, it is provided that Member States will have to 'explicitly' implement the content of the European instrument. In other words, they are requested to directly include in the implementing legislation (or at the time of its publication) an express reference to the transposition of the European rules. The aim is to make the States more accountable in order to identify easily their possible non-compliance.

Finally, a more general remark concerns the method adopted by the roadmap: while the choice to proceed step by step is able to design more specific rules for each single measure (even if—unavoidably—characterized by some degree of genericity), thereby restricting the discretion of national legislators, such a choice determines a certain degree of fragmentation of procedural rights that are, conversely, strictly connected among themselves, ultimately preventing an organic intervention and creating problems in the coordination and coherence of the measures adopted from time to time.

Some examples are sufficient to demonstrate it. The notice of the right to remain silent is indicated in Art. 3 of the Directive on the right to information of the suspected or accused person (2012/13/EU), but it is not expressly prescribed either in the Directive on the access to a lawyer (2013/48/EU) or in the one concerning the safeguards of children who are suspected or accused persons (2016/800/EU), nor can any specific reference on this point be found in the Directive on the strengthening of the presumption of innocence (2016/343/EU): therefore, such a notice seems to not be specifically required when it is necessary to carry out a questioning. The information on the nature and the grounds of the accusation is provided by Art. 6 of the Directive on the right to information (2012/13/EU) but not in the one on the access to a lawyer (2013/48/EU). Moreover, the choice to have incongruously put together completely heterogeneous safeguards within the same directive, such as in Directive 2016/343/EU, which deals with both certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, leads to additional defects of coordination and interpretive doubts: for example, while Art. 2 extends the application of the whole directive to all the stages of the proceedings until the 'final' decision, Art. 3, dedicated specifically to the presumption of innocence, grants it until the suspected or accused person is proven guilty 'according to law', an expression that can also indicate a non-final sentence decision.

Much will depend of course on the way in which the States will implement such directives (and those that will be adopted in the future): an implementation based on a 'national vision' of the European guarantees, which is their interpretation in the logic of internal systems, or a minimalist approach, in order to change as little as possible the national rules, could lead to sterilize the most qualifying aspects of the 'minimum common rules'.

2.2.3 The Directives Concerning Victims' Rights

An intervention of normative harmonization that runs parallel to that on the rights of accused and suspected persons is ascribable, conversely, to a different resolution of the Council approved on 10 June 2011, which established a parallel 'roadmap' for the strengthening of rights and the protection of victims. This roadmap envisages a legislative harmonization through a set of measures aimed to establish 'minimum standards' to strengthen victims' rights, either in general, or in light of special features of the victim, or with reference to specific crimes.

The first instrument enacted to implement this second 'roadmap' is represented by Directive 2012/29/EU providing 'minimum standards on rights, support and protection of victims of crime', which replaced the previous Framework Decision 2001/220/JHA on the role of the victim in criminal proceedings. The Directive establishes a global protection for victims through an articulated series of provisions, including right to information, support for victims, procedural rights, and dynamics of protection (see Sect. 3.3.3.4).

The 'roadmap' also includes other measures, among which we must remember: one or more proposals of recommendation on best practices to be employed in the support and protection of victims of crime, in order to facilitate the application of Directive 2012/29/EU at the national level; the adoption of a regulation on mutual recognition of protection measures in civil matters; the revision of Directive 2004/80/EC on compensation to crime victims; the enactment of legislations aimed at protecting victims of special types of crimes, such as terrorism, organized crime, human trafficking and sexual exploitation of minors. Moreover, with regard to these two latter types of crimes, two directives have already been adopted: Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and Directive 2011/93/EU on the fight against the abuse and sexual exploitation of minors and child pornography (see Sect. 3.3.3.5). Finally, even if not included among the instruments of legislative harmonization—being, conversely, a measure of mutual recognition—Directive 2011/99/EU on the European Protection Order (EPO) completes the broad set of measures adopted by the Union to protect victims (see Sect. 3.3.3.7).

2.2.4 The Five-Year Strategic Plan for the Period 2015–2020

The conclusions adopted by the European Council of Ypres of 26–27 June 2014 outline the European Union's strategy for the five-year period of 2015–2020 (the Stockholm Programme was no longer operational since December 1, 2014).

Their title—'New strategic guidelines for the European Space of Freedom, Security and Justice'—shows by itself very modest ambitions. Indeed, while their duration is analogous to that of the previous programs, these guidelines do not provide an articulated and detailed 'program' being, conversely, rather concise and generic. The need for a common policy in the management of migratory flows and border control and the fight against international terrorism is emphasized. The desire to create a database collecting all the information on airline passengers, together with a hint at the need for a global approach to cybercrime, is also expressed. Apart from this, the guidelines mainly express the idea to focus the Union's future action only on the strengthening, reorganization and completion of the existing legal instruments. The driving force that had characterized the previous long-term programs—and that had prompted the path toward the harmonization of the guarantees for accused and suspected persons—is therefore missing.

2.3 Judicial Protection

2.3.1 Charters, Judges, and Courts

Having described the legislative instruments establishing a European multilevel protection of rights, it is now time to address the—rather complex—dynamics characterizing the judicial controls in this field. These controls are articulated in at least three levels (the State-constitutional one, the Conventional one and the Union one); they outline a framework that is far from being consolidated, and that is characterized by the competition between the top courts for primacy in this field, with the risk of the development of an inconsistent and fractioned protection of fundamental rights that lacks certainty and foreseeability; aims that are as frequently invoked as less concretely achieved.

Let us summarize the scenarios in which judges and courts operate in the protection of fundamental rights.

Starting from the ECHR, it entertains a 'linear' relationship directly with each one of the 47 States that are party to the Council of Europe and their legal orders. Its system of fundamental rights protection remains separate from the one of the Union for the States that are a party to both systems. Moreover, it applies also to areas that fall within the concurring competence pursuant to Art. 2.2 TFEU 'until when and to the extent that' the Union decides not to intervene. This means, for example, that in a field like judicial cooperation in criminal matters, until the Union has concretely exercised its competences, the Member States will remain subject to the rules and the system of control of the ECHR: first of all, with regard to the need to respect Art. 6 ECHR; then, after the Union has exercised its competence, the States will remain subject to both systems of control, even if the result of the ECHR control would probably be a negative one, pursuant to the '*Bosphorous* doctrine'.

On the other hand, the types of relationship established within the European Union are even more complex, EU law being based on a higher number of sources. First of all, it must be remembered that within the Union a hierarchical relationship between primary law and secondary law is established, as the latter needs to comply with the former. Furthermore, they both must comply with fundamental rights: first and foremost, with those established by the EU Charter of Fundamental Rights (Art. 6.1 TEU). Both have primacy over the domestic law in the subjects governed by EU law; therefore, every national system of guarantees is subject to both EU primary and secondary law. Furthermore, multiple elements concur to make this interplay even more complex: the very generic nature that sometimes characterizes the provisions of the EU Charter that leaves wide interpretative room; the distinction in the Charter between rights and principles, which, while should not be overestimated, could create problems in the relationships between different provisions of guarantees; the relationships—and the possible conflicts—that may occur in the area of protection of rights between the Charter and EU secondary legislation and also between the rights protected by the Charter and the 'other' rights guaranteed by the Treaties pursuant to Art. 52.2 of the Charter, which are destined to interact with them; and, finally, the

interpretative criteria of the Charter's rights that must be derived from external and heterogeneous normative elements, such as the ECHR and the 'common constitutional traditions' of the Member States.

Within these two general contexts, represented by the ECHR and EU law, various judicial bodies compete to control fundamental rights.

The Strasbourg Court rules on a specific violation of the ECHR claimed by the applicant, and its decision is binding on the case decided. However, outside it, the principles stated by the Court represent very authoritative, although not binding, indications for the Member States, which, in any case, enjoy a 'margin of appreciation', which must be considered a space of autonomy in the application of conventional principles. This margin, for its part, can determine the extent of a possible long-distance dialog between the national constitutional courts and the European Court of Human Rights. The former, within the balance allowed by the 'margin', may guarantee a systematic and coherent approach in the domestic application of fundamental rights through a nomophylactic action to which ordinary judges will have to conform. The latter will necessarily have to take into account such law in action in adjudicating any ECHR violation by the Member States.

The Court of Justice, on the other hand, plays a central role within the system of the European Union, which, for its part, relies on a written catalog of fundamental rights that enjoys the status of primary law, as the EU Charter of Fundamental Rights. Within such system, the Court of Justice ensures respect of fundamental rights by the entire EU law, as well as of other rights guaranteed by primary and secondary EU law, such as the directives on the rights of accused and suspected persons and the rights of the victims in criminal proceedings. Such a control is performed especially through the preliminary ruling as to the validity, which allows the Court of Justice to directly invalidate EU law that is inconsistent with those principles. So doing, the Court acts similarly to a European Constitutional Court. Naturally, this role presupposes the necessary cooperation of national judges, who, by performing their widespread control of EU law—and by being often prompted by individuals, who are excluded from requesting an annulment in matters concerned with criminal proceedings and who, therefore, do not have any other way to claim the violation of a fundamental right by an act of the EU bearing indirect consequences on national implementing laws—should bring the matter before the Court of Justice. Should this possibility be precluded or difficult to pursue, anyway the Court of Justice could be at least resorted to through a preliminary interpretative ruling. Furthermore, if the question of interpretation concerns domestic criminal proceedings against a person in custody, it will be possible to resort to the specific urgent preliminary ruling procedure provided by Art. 267.4 TFEU.

This centralized review performed by the Court of Justice is crucial in preventing the protection of fundamental rights at the Union level from becoming disorganic and nonhomogeneous.

2.3.2 *Conflicts Between Courts in the Protection of Fundamental Rights*

The Court of Justice naturally promotes dialog with other courts but has also been involved in conflicts with them in the protection of fundamental rights.

The contrasts between the two European courts have already been described when we addressed the 'history' of fundamental rights within the European Community and the European Union (see Sect. 2.1.2); these contrasts have been settled (or at least temporarily hidden) by the Strasbourg Court by making application of the so-called *Bosphorus* doctrine, according to which the Court refrains from intervening on the basis of the presumption that fundamental rights find within the EU a level of protection that is at least 'equivalent' to that provided by the ECHR.

However, conflicts have also involved the Court of Justice and the constitutional courts of Member States when an overlapping between rights protected by the European Union and rights protected by national constitutions comes into play. The Court of Justice, since the *Stauder* case (CJEU, 12 November 1969, C-29/69), affirmed that its control prevails in light of the primacy of EU law. The constitutional courts of Italy (*Frontini* case, Judgment 183/1973 of 27 December 1973) and of Germany (*Solange I* case, Judgment of 29 May 1974), after having prompted the Court of Justice to promote the protection of fundamental rights, reacted defensively by opposing the doctrine of the so-called 'counter-limits'. A balance, even precarious and weak, may be offered today by Art. 4.2. TEU**,** which guarantees the respect by the European Union of the 'national identity' of the Member States 'inherent in their fundamental structures, political and constitutional'; by Art. 53 of the EU Charter of Fundamental Rights, pursuant to which nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application [. . .] by the Member States' constitutions' (even if the Court of Justice has emptied this principle in CJEU, 26 February 2013, C-399/11, *Melloni*); and by the—symbolic but also merely formal—renouncement to expressly codify in the Treaties the primacy of EU law (having included this principle only in an attached declaration).

In any case, it should be noted that the Court of Justice has always been sensitive to the constitutional heritage of the Member States. From this perspective, it has enhanced the value of the fundamental rights deriving from the 'common constitutional traditions', elevating them—together with the rights guaranteed by the ECHR—to the level of general principles of EU law, a role today expressly sanctioned by Art. 6.3 TEU.

Apart from this, the Court has enhanced, in the broader context of a balancing between the interests of the Union and the imperative needs of the States, even the rights not included in that although vague and generic category, but concerning a specific national legal order. In doing so, the Court has overcome the view that these rights were in any case subject to the economic freedoms included in the Treaties. Indeed, the Court has allowed to overcome the prohibition for national laws to derogate to these fundamental freedoms—provided the principle of proportionality

is complied with—for example, in order to make the rights of a minor prevail over the free movement of goods.

This margin of constitutional tolerance has led the States to generally accept the principle of the primacy of the Union law. However, the prospect of EU integration cannot avoid dialog and cooperation between the Court of Justice and national constitutional courts: the latter should indicate to the Court of Justice the essential characteristics of their constitutional protections, so that it may take them into account from the perspective of its judicial review; conversely, national courts should be willing to interpret constitutional guarantees in a way that is increasingly consistent with Union aims. This way, application of the 'counter-limits' should be exclusively limited to exceptional cases.

2.3.3 The Widespread Control of National Judges and the Double Obligation to Comply with EU Law and ECHR Law

There is no doubt, in any case, that a central role in the multilevel protection of fundamental rights even with regard to criminal proceedings is played by the widespread control performed by ordinary judges in their role as first judges of the Union. The direct relationship that they can establish with the Court of Justice through the preliminary ruling procedure can by itself greatly marginalize the centralized control exercised by constitutional courts in the framework of the multilevel protection of fundamental rights. Indeed, it is sufficient that ordinary judges disapply national law to prevent constitutional courts from any kind of control. Moreover, it will depend on such national judges and from their strategy to choose whether to resort to the constitutional court first or to immediately make a reference for a preliminary ruling to the Court of Justice.

At the same time, the domestic judges are also considered the first judges of the ECHR rights. In this regard, the ECHR and EU law have in common that the first control is assigned to the domestic judge and is widespread. Indeed, the centralized review performed by the two European courts is merely ancillary.

The national judge is therefore bound to the double obligation to which its own State is subject to comply with ECHR law and with EU law. In both these roles, the judge is under the duty to perform a consistent interpretation. Only if this is not possible, the procedural mechanism will diverge, depending on the right claimed. Therefore, the double role of the domestic judge will be in principle less conflicting in proportion to the degree of homogeneity that a right presents in EU and ECHR law. A higher degree of homogeneity—which should be favored by the 'correspondence' rule between the Charter rights and the ECHR rights, but which should need an ever-greater interpretative approximation effort by the two European courts—will correspond to a higher possibility to reach a 'common' consistent interpretation without the risk for the judge to be in conflict of 'loyalty' in respect to the Charter or

the Convention. If this is not feasible, then the paths will be different. If the claimed rights are protected by the ECHR, the solution will depend on the internal rules of each State Party (someone admits the disapplication of the conflicting internal provision, some others the constitutional control of such a provision). Conversely, if directly applicable EU law provisions are involved—including, when they present such a characteristic, Charter rights—the disapplication must be performed. The solutions are different when EU law provisions cannot be applied directly. In practice, consistent interpretation is always admitted, even when it *de facto* becomes a hidden disapplication. However, if consistent interpretation is precluded, in any case the possibility to claim compensation for damage affecting individuals as a consequence of the violation of the European provision would still be available, unless other remedies at law are provided in the domestic systems (for example, the option to submit a question of constitutionality of the domestic provision not complying with EU law).

Further Reading

Alkema EA, Van Der Hulle R, Van Der Hulle R (2015) Safeguard rules in the European legal order: the relationship between Article 53 of the European Convention on Human Rights and Article 53 of the Charter of Fundamental Rights of the European Union. Hum Rights Law J, pp 8 ff

Allegrezza S (2013) The interaction between the ECJ and the ECtHR with respect to the protection of procedural safeguards after Lisbon: the accession of the EU to the ECHR. In: Ligeti K (ed) Toward a Prosecutor for the European Union. I, A comparative analysis. Hart Publishing, Oxford, pp 905 ff

Androulakis IN (2014) European perspectives on rights for victims of crime. Eucrim, pp 111 ff

Arai-Takashi Y (2002) The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR. Intersentia, Cambridge

Arangüena Fanego C (2014) El derecho a la asistencia letrada en la directiva 2013/48/UE. Revista General de Derecho Europeo, pp 1 ff

Bachmaier Winter L (2015) The EU directive on the right to access to a lawyer: a critical assessment. In: Ruggeri S (ed) Human rights in European criminal law. New developments in European legislation and case law after the Lisbon Treaty. Springer, Heidelberg

Bargis M (2012) La cooperazione giudiziaria penale nell'Unione europea tra mutuo riconoscimento e armonizzazione: analisi e prospettive. Riv. dir. proc., pp 914 ff

Benoit-Rohmer F (2005) A propos de l'arrêt Bosphorus Air Lines du 30 Juin 2005: l'adhésion contrainte de l'Union à la Convention. Rev. trim. droits de l'homme, pp 827 ff

Billis E (2016) The European Court of Justice: a "Quasi-Constitutional Court" in criminal matters? The Taricco judgment and its shortcomings. New J Eur Crim Law, pp 20 ff

Böse M (2011) The principle of proportionality and the protection of legal interests (Verhältnismäßigkeit und Rechtsgüterschutz). EuCLR, pp 35 ff

Caianiello M (2014) Il principio di proporzionalità nel procedimento penale. Dir pen cont – Riv trim 3–4, pp 143 ff

Caianiello M (2017) You can't always counterbalance what you want. Eur J Crime Crim Law Crim Justice, pp 283 ff

Cardone A (2011) Diritti fondamentali (tutela multilivello dei). Enc. dir., Annali IV, Giuffrè, Milano, pp 335 ff

Cortés Martín JM (2016) Sobre la plena vigencia de la presunción de equivalencia (Bosphorus) y su aplicación al principio de reconocimiento mutuo en el espacio de libertad, seguridad y justicia. Revista de Derecho Comunitario Europeo, pp 819 ff

Costello C (2006) The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe. Hum Rights Law Rev, pp 87 ff
Coventry T (2017) Pretrial detention. Assessing European Union Competence under Article 82 (2) TFEU. New J Eur Crim Law, pp 43 ff
Cras S (2014) The directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings. Eucrim, pp 32 ff
Cras S (2016) The directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings genesis and descriptive comments relating to selected articles. Eucrim, pp 109 ff
Cras S, Erbežnik A (2016) The directive on the presumption of innocence and the right to be present at trial. Eucrim, pp 25 ff
Cras S (2017) The directive on the right to legal aid in criminal and EAW proceedings. Genesis and description of the sixth instrument of the 2009 roadmap. Eucrim, pp 34 ff
Daniele M (2016) La triangolazione delle garanzie processuali fra diritto dell'Unione europea, CEDU e sistemi nazionali. Dir pen cont – Riv trim 4, pp 48 ff
De Bondt W, Vermeulen G (2010) The procedural rights debate. A bridge too far or still not far enough. Eucrim, pp 164 ff
De Jong F, van Lent L (2016) The presumption of innocence as a counterfactual principle. Utrecht Law Rev, pp 32 ff
Delmas Marty M (1986) Le flou du droit. Du code pénal aux droits de l'homme. PUF, Paris
Douglas-Scott S (2011) The European Union and human rights after the Treaty of Lisbon. Hum Rights Law Rev, pp 629 ff
Dzehtsiarou K, Konstadinides T, Lock T, O'Meara N (eds) (2014) Human rights law in Europe: the influence, overlaps and contradictions of the EU and the ECHR. Routledge, London-New York
Eeckhout P (2015) Opinion 2/13 on EU accession to the ECHR and judicial dialogue – autonomy or autarchy? Jean Monnet working paper 1/15, pp 36 ff
Favreau B (2016) L'Europe à la poursuite des droits fondamentaux. Eucrim, pp 104 ff
Flick GM (2015) The principle of legality: reflections on the dialogue between the Court of Justice, the European Court of Human Rights and the Italian Constitutional Court. New J Eur Crim Law, pp 553 ff
Gianfrancesco E (2010) Incroci pericolosi: Cedu, Carta dei diritti fondamentali e Costituzione italiana tra Corte costituzionale, Corte di giustizia e Corte di Strasburgo. In: Pedrazza Gorlero M (ed) Corti costituzionali e Corti europee dopo il Trattato di Lisbona. Esi, Napoli, pp 151 ff
Giannopoulos C (2015) Considerations on Protocol N° 16: can the new advisory competence of the European Court of Human Rights breathe new life into the European Convention on Human Rights? German Law J, pp 337 ff
Gless S (2013) Transnational cooperation in criminal matters and the guarantee of a fair trial: approaches to a general principle. Utrecht Law Rev, pp 90 ff
González Monje A (2016) La presunción de inocencia en la Unión Europea: Directiva 2016/343 del Parlamento Europeo y del Consejo de 9 de marzo de 2016 por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y el derecho a estar presente en el juicio. Revista General de Derecho Europeo, no. 39
Grasso G (2015) The instruments of harmonisation of national criminal law, their enforcement and the role of the court of justice. New J Eur Crim Law, pp 494 ff
Groenhuijsen MS, Pemberton A (2009) The EU framework decision for victims of crime: does hard law make a difference? Eur J Crime Crim Law Crim Just, pp 43 ff
Halberstam D (2015) "It's the Autonomy Stupid!". A modest defense of Opinion 2/13 on EU accession to the ECHR. German Law J, pp 106 ff
Halleskov Stogaard L (2015) EU law autonomy versus European fundamental rights protection — on Opinion 2/13 on EU accession to the ECHR. Hum Rights Law Rev, pp 485 ff
Hecker B (2015) The development of individual rights protection in European criminal law after the Lisbon Treaty. In: Ruggeri S (ed) Human rights in European criminal law. New developments in European legislation and case law after the Lisbon Treaty. Springer, Heidelberg, pp 1 ff

Herlin-Karnell E (2014) All roads lead to Rome: the new AFSJ package and the trajectory to Europe 2020. Eucrim, pp 27 ff
Jaeger M (2016) The judge and citizenship of the union. New J Eur Crim Law, pp 210 ff
Kargopoulos AI (2015) ECHR and the CJEU. Competing, overlapping or supplementary competences? Eucrim, pp 96 ff
Klip A (2015) On victim's rights and its impact on the rights of the accused. Eur J Crime Crim Law Crim Just, pp 177 ff
Kostoris RE (2015) Processo penale, diritto europeo e nuovi paradigmi del pluralismo giuridico post-moderno. Riv it dir e proc pen, pp 1177 ff
Kostoris RE (2016) Equità, processo penale, diritto europeo. Riflessioni di un giurista di civil law. Rivista italiana di diritto e procedura penale, pp 1653 ff
Krenn C (2015) Autonomy and effectiveness as common concerns: a path to ECHR accession after Opinion 2/13. German Law J, pp 147 ff
Laffranque J (2012) Who has the last word on the protection of human rights in Europe? Juridica Int – Law Rev Univ Tartu, pp 117 ff
Lavranos N (2008) Towards a Solange-method between international courts and tribunals? In: Dhany Y, Broude T (eds) The shifting allocation of authority in international law: considering sovereignty, supremacy and subsidiarity. Hart Publishing, Oxford, pp 217 ff
Lazowski A, Wesse RA (2015) When caveats turn into locks: Opinion 2/13 on accession of the European Union to the ECHR. German Law J, pp 179 ff
Le Bot O (2003) Charte de l'Union européenne et Convention de sauvegarde des droits de l'homme: la coexistence de deux catalogues de droits fondamentaux. Rev. trim. droits de l'homme, pp 781 ff
Lock T (2011) A critical account of the accession of the European Union to the European Convention on Human Rights. Just J 8(2):58 ff
Lonati S (2017) Fair trial and the interpretation approach adopted by the Strasbourg Court. Eur J Crime Crim Law Crim Just, pp 52 ff
Manzano MP (2013) The Spanish Constitutional Court and the multilevel protection of fundamental rights in Europe; matters relating to ACT 86/2011, of 6 June. Eur Crim Law Rev, pp 79 ff
Martín Rodríguez PJ (2016) La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia Aranyosi y Caldararu. Revista de Derecho Comunitario Europeo, pp 859 ff
Mitsilegas V (2015) Judicial concepts of trust in Europe's multi-level security governance. Eucrim, pp 90 ff
Mitsilegas V (2015) The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice. New J Eur Crim Law 6(4):457 ff
Novokmet A (2016) The right of a victim to a review of a decision not to prosecute as set out in Article 11 of Directive 2012/29/EU and an assessment of its transposition in Germany, Italy, France and Croatia. Utrecht Law Rev, pp 86 ff
Nowak C (2014) Judicial control of the prosecutors' activities in the light of the ECHR. Eucrim, pp 60 ff
Øbi Johansen S (2015) The reinterpretation of TFEU Article 344 in Opinion 2/13 and its potential consequences. German Law J, pp 169 ff
Ojanen T (2016) Making the essence of fundamental rights real: the Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter. Eur Constitut Law Rev, pp 318 ff
Peers S, Hervey T, Kenner J, Ward A (eds) (2014) The EU Charter of fundamental rights. Hart Publishing, Oxford
Peers S (2015) The EU's accession to the ECHR: the dream becomes a nightmare. German Law J, pp 213 ff
Pernice I (2008) The Treaty of Lisbon and fundamental rights. In: Griller S, Ziller J (eds) The Lisbon Treaty. EU constitutionalism without a constitutional treaty? Springer, Heidelberg, pp 235 ff

Rafaraci T (2014) Diritti fondamentali, giusto processo e primato del diritto UE. Proc pen e giust 3:1 ff
Reestman JH, Besselink LFM (2013) Editorial after Akerberg Fransson and Melloni. Eur Constitut Law Rev, pp 1 ff
Ritleng D (2014) The contribution of the Court of Justice to the structuring of the European space of fundamental rights. New J Eur Crim Law, pp 507 ff
Rosas A, Kaila H (2011) L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan. Il dir. Unione eur., pp 1 ff
Rossi LS (2008) How fundamental are fundamental principles? Primacy and fundamental rights after Lisbon. In: Eeckhout P, Tridimas T (eds) Yearbook of European law. Oxford University Press, Oxford, pp 65 ff
Ruggeri S (ed) (2013) Transnational inquiries and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg
Ruggeri S (2016) Inaudito reo proceedings, defence rights, and harmonisation goals in the EU responses of the European Courts and new perspectives of EU law. Eucrim, pp 42 ff
Salazar L (2014) EU's criminal policy and the possible contents of a new multi-annual programme. From one city to another. . . Eucrim, pp 22 ff
Sánchez MA (2016) Integración europea y legitimidad de la jurisdicción constitucional. Revista de Derecho Comunitario Europeo, pp 941 ff
Satzger H (2015) Legal effects of directives amending or repealing pre-Lisbon framework decisions. New J Eur Crim Law, pp 528 ff
Scalia V (2015) Protection of fundamental rights and criminal law. The dialogue between the EU Court of Justice and the national courts. Eucrim, pp 100 ff
Sciarabba V (2008) Tra Fonti e Corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali, Cedam, Padova
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden
Skouris V (2009) Les Rapports entre la Cour de justice et les jurisdictions constitutionnelles nationals. Dir un eur, pp 775 ff
Soo A (2017) How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed. New J Eur Crim Law, pp 64 ff
Soo A (2017) Article 12 of the Directive 2013/48/EU: a starting point for discussion on a common understanding of the criteria for effective remedies of violation of the right to counsel. Eur J Crime Crim Law Crim Just, pp 31 ff
Torres Pérez A (2014) Melloni in three acts: from dialogue to monologue. Eur Constitut Law Rev, pp 308 ff
Tsakyrakis S (2009) Proportionality: an assault on human rights? Int J Const Law, pp 468 ff
Van der Velde J (2009) The protection of fundamental rights within the European Union - a historical approach. In: Wouters J, Verhey L, Kiiver P (eds) European constitutionalism beyond Lisbon. Intersentia, Cambridge, pp 63 ff
Vervaele JAE (2014) The European arrest warrant and applicable standards of fundamental rights. In: Vervaele JAE (ed) European criminal justice in the post-Lisbon area of freedom, security and justice (with a prologue by G. Fornasari and D. Sartori). Editoriale Scientifica, Napoli, pp 235 ff
Vogler R (2014) Criminal evidence and respect for fair trial guarantees in the dialogue between the European Court of Human Right and national courts. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 181 ff
White S (2010) The EU's accession to the convention on human rights: a new era of closer cooperation between the council of Europe and the EU? New J Eur Crim Law, pp 425 ff
Zimmermann F (2015) Strafgewaltkonflikte in der Europäischen Union. Ein Regelungsvorschlag zur Wahrung materieller und prozessualer strafrechtlicher Garantien sowie staatlicher Strafinteressen. Nomos, Baden-Baden

Chapter 3
The Content of Fundamental Rights

Antonio Balsamo

Contents

A. Balsamo (✉)
General Prosecution Office of the Italian Court of Cassation, Rome, Italy
e-mail: antonio.balsamo@giustizia.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_3

3.1 General Guarantees

3.1.1 Foreword

After having discussed the forms and dynamics of the multilevel protection, we must now address the content of fundamental rights. It is a quite relevant matter because both European and national provisions must be consistent with the fundamental rights' contents.

The rights concerned here have multiple origins. However, in most cases, their original models derive from the ECHR, as interpreted by the European Court of Human Rights. As we know, EU law has also implemented these models: Art. 6.3 TEU and Art. 52.3 of the EU Charter of Fundamental Rights establish the principle according to which the meaning of the rights provided therein 'corresponds' to the analogous rights provided in the ECHR (see Sect. 2.1.3.1). The ECHR models have

also influenced the EU's law making; let it suffice to refer to the directives adopted on the basis of the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and of the roadmap for strengthening the rights and protection of victims.

For the sake of homogeneity, we will address this matter by the 'type' of right. However, we will specify the 'origin' of each analysed right, especially when such right is addressed by several legislative and case law sources, sometimes with different results and developments. We must not forget that different sources correspond to different fields of application and rules.

3.1.2 The General 'Fair Trial' Guarantees

Our analysis must necessarily start from the set of guarantees that compose the 'right to a fair trial' provided by Art. 6.1 ECHR, which states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

This provision identifies a set of procedural guarantees, which goes beyond criminal proceedings, as it also refers to civil disputes and, according to the Strasbourg Court, to some sectors of administrative procedures. These guarantees are the right of access to a court, the right to an independent and impartial tribunal established by law, the right to a public hearing and to the public pronouncement of judgment and the right to be tried within a reasonable time.

The European Court's case law has, for its part, 'multiplied' the expressions of the 'fair trial' principle. It has inferred from ECHR Art. 6.1 a series of additional rights, such as the right to adversarial proceedings, to equality of arms between the parties, to access to the case file, to a reasoned judgment, to evidence, and the principle of legal certainty.

In principle, the general rights contained explicitly or implicitly in Art. 6.1 do not only apply to criminal proceedings but also apply to those proceedings that the Strasbourg Court considers to belong to 'disputes over civil rights and obligations' as they do not involve a judgment on criminal liability. Let it suffice to refer to the proceedings for the application of *in rem* seizure and confiscation, compensation for unlawful detention, special imprisonment regimes that involve significant restrictions of the convicted persons' rights and disciplinary sanctions for judges.

This broad set of intertwined guarantees is referred to in Art. 47 of the Charter of Fundamental Rights of the European Union, which enshrines the right to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'.

Notwithstanding the different wording (provided that the Charter is more concise), a substantial correspondence between the content of the provisions respectively included in the ECHR and in the Charter (regarding their text as interpreted by

the case law of the European Court of Human Rights and the European Court of Justice) can be identified according to the Explanations relating to the Charter.

As a result, the EU legal system does not permit any restrictions to the right to a 'fair trial' that are broader than those provided for by the interpretation of the principles elaborated by the Strasbourg Court's case law. This case law has become a minimum mandatory safeguard standard. Obviously, the EU safeguards may be broader than such minimum standard.

3.1.2.1 Right to a Hearing

According to the case law of the Court of Strasbourg, even before providing for 'rights within the process', Art. 6.1 establishes the 'right to a hearing', a fundamental application of which is the 'right of access to a court'. However, this right mainly concerns civil proceedings. As far as criminal proceedings are concerned, this right can only refer to the safeguard of injured persons who act as civil parties to raise their monetary claims therein.

Some restrictions to civil parties' right to a judge in criminal proceedings may arise from situations of immunity from jurisdiction. These immunities may be granted under national law (such as those associated with the status of members of parliament) or customary international law (e.g., the immunity of States and their officials with reference to acts carried out *iure imperii).* With reference to the first type of restrictions, the European Court of Human Rights has adopted a strict criterion, according to which the right of access to a court is violated whenever a conduct is claimed to be covered by immunity and there is a lack of any clear connection with parliamentary activity (ECtHR, 30 January 2003, *Cordova v. Italy*; ECtHR, 24 May 2011, *Onorato v. Italy*). The Court has adopted a much more permissive criterion with regard to the second type of restrictions in order to safeguard the States' sovereignty to the maximum possible extent (see ECtHR, 21 November 2001, *Al-Adsani v. United Kingdom*, which held that the State is entitled to claim immunity from a foreign jurisdiction with reference to claims for damages caused by torture in a foreign territory; see also ECtHR, 14 July 2014, *Jones and Others v. United Kingdom*, which added that the State's right to immunity cannot be circumvented by summoning its officers or agents to a proceeding).

The ECtHR's case law on the 'rights of access to a court' has been shared by the European Court of Justice, which has always considered the right to a hearing as a general principle of EU law deriving from the Member States' common constitutional traditions.

This principle has found an express legal basis in Art. 47.1 of the EU Charter of Fundamental Rights, which grants every individual the 'right to an effective remedy before a tribunal'.

This right implies the need for a full judicial review on the respect for fundamental rights in the measures of EU institutions, which, in implementing the resolutions of the UN Security Council, order the freezing of assets to fight international

terrorism (CJEU, 3 September 2008, C-402/05 and C-415/05, *Kadi and Al Barakaat*).

The right to a court also implies the protection of implementation of final judicial decisions because, as the Strasbourg Court specified, this right would be illusory if a domestic legal system allowed a final, binding judicial decision to remain inoperative (ECtHR, 28 July 1999, *Immobiliare Saffi v. Italy*).

The prohibition on double jeopardy, enshrined in Art. 4 of Protocol 7 to ECHR, is considered as a specific guarantee of 'fair trial' (ECtHR, 20 July 2004, *Nikitin v. Russia*). Once all the stages of the proceedings have been exhausted, including through the system of appeals, and once the judgment has become final, be it a conviction or an acquittal, the accused person can no longer be subject to proceedings concerning the same fact.

In Art. 4 Protocol 7 to ECHR, the principle expressly refers to the *internal scope* of national systems. The possibility that new proceedings may be commenced in a different State is not ruled out. On the contrary, Art. 50 of the EU Charter of Fundamental Rights provides that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law'. This provision established the double jeopardy principle not only at a national level but also *between Member States of the European Union.*

An additional difference between the two provisions is that while Art. 50 of the EU Charter of Fundamental Rights *does not provide any exception* to the *double jeopardy* principle (see Sect. 10.1.3), Art. 4 Protocol 7 to ECHR permits reopening national proceedings in the presence of new facts or revelations or fundamental defects in the previous proceedings that can affect the decision issued.

After some uncertainty, the Court of Strasbourg clarified that the double jeopardy principle under Art. 4 Protocol 7 prohibits the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts that are substantially the same as they constitute a set of concrete factual circumstances inextricably linked together in time and space (ECtHR, 10 February 2009, *Zolotukhin v. Russia*). The Court of Strasbourg thus aligned itself with the European Court of Justice's case law, which has consistently held that the double jeopardy principle refers to cases of identity of the material facts and not to their mere legal qualification. This approach aims at ensuring European citizens' freedom of movement, preventing the risk that a person might be prosecuted more than once by the authorities of different Member States for the same conduct (see Sects. 10.1.2, 10.1.3 and 10.1.4 for broader considerations on this point). Therefore, the prohibition against a double conviction on the same material fact has been inferred in those cases in which separate proceedings result in a criminal conviction and in a penalty that the national legal system qualifies as administrative but that presents substantially criminal features according to the criteria developed by the European Court. This principle has been repeatedly reaffirmed in the areas of tax crimes (ECtHR, 10 December 2015, *Kiiveri v. Finland*) and market abuse (ECtHR, 4 March 2014, *Grande Stevens v. Italy*).

However, more recently, the Grand Chamber of the European Court held that States can legitimately choose to take a plurality of actions that are complementary

with each other against socially offensive conducts (such as violations of traffic regulations and tax crimes) through a plurality of proceedings providing a coherent system for dealing with the different aspects of the underlying social problem, provided the punishments do not amount to an excessive burden on the individual. Therefore, no duplication of judgments and punishments exists if the two proceedings commenced for the same crime show a sufficiently close substantive and temporal connection. This requires not only that the objectives pursued and the means adopted are complementary in their essence and chronologically connected but also that the possible consequences of the treatment of the socially dangerous conduct must be proportionate and foreseeable by the interested individual (ECtHR, 15 November 2016, *A and B v. Norway*).

3.1.2.2 Independence, Impartiality, and Predetermination of the Tribunal

Moving on from Art. 6.1 ECHR and Art. 47.2 EU Charter of Fundamental Rights, the central role played by judges in the functioning of procedural guarantees has led to identifying three essential requirements that they must satisfy.

The first two requirements—independence and impartiality—are the same in the two provisions. As for the third one—the predetermination of the tribunal—there is a slight difference: Art. 6.1 simply requires that the tribunal be 'established by law', while Art. 47 clarifies that it must be 'previously established', i.e., the law must establish the body that will have jurisdiction over the case before the criminal act is committed, based on general and uniform criteria, which must be predetermined. Consistent with the traditions of continental Europe, the EU Charter of Fundamental Rights sets higher standards of guarantees compared to the ECHR.

The requirement that a tribunal shall be established by law concerns not only the rules for establishing the court and determining its jurisdiction but also any national law provision that governs the composition of courts with regard to individual proceedings, from which the irregular participation of one or more judges in the proceedings can be detected. The Convention principles call for particular clarity of the rules applied in anyone's case and for clear safeguards to ensure objectivity and transparency and, above all, to avoid any appearance of arbitrariness in the assignment of particular cases to judges (ECtHR, 8 December 2009, *Previti v. Italy;* ECtHR 5, October 2010, *Dmd Group v. Slovakia*).

The contribution of the Court of Strasbourg is quite relevant to identifying the actual meaning of independence and impartiality. The Court has highlighted the nexus between these two requirements and the need for the judge to not only meet these requirements but also 'appear' to meet them.

Although independence and impartiality are inherently different notions (the former refers to the judge's position with respect to the executive branch while the latter to the judge's position with respect to individual proceedings), the European Court considers them inseparable from each other.

In assessing the judge's independence, the Court must take into account three essential aspects: the appointment procedures, the duration of the judge's term of office and the existence of any guarantees against external pressures.

Starting from a broad definition of impartiality as an 'absence of prejudices or bias' (ECtHR, 1 October 1982, *Piersack v. Belgium*), the European Court has specified that impartiality must be assessed from both subjective and objective points of view.

The 'subjective test' aims to ascertain whether the judge's conduct in the proceedings shows possible prejudices as to the accused person's liability. In applying this test, focused on the personal conviction or interest of a given judge in a particular case, the European Court has consistently held that subjective impartiality is presumed unless there is proof to the contrary.

The maximum discretion that should guide the judges' conduct should dissuade them from making use of the press, even when provoked (ECtHR, 16 September 1999, *Buscemi v. Italy*). However, the judge is not prevented from expressing, after conviction, a synthesis of the evidence and of the jury's findings for purposes of giving reasons for the serious sentences about to be imposed (ECtHR, 12 December 2002, *Stanford v. United Kingdom*).

The 'objective test' aims to establish whether, apart from the judge's personal conduct, there are ascertainable facts that may raise doubts as to his impartiality. The applicant's point of view is important but not decisive in the above assessment as the doubts must appear objectively justified in the eyes of an external observer.

In applying this principle, the Strasbourg Court's case law appears to be quite tolerant. According to the Court, the fact that a trial judge has already taken pre-trial decisions in the case, including those relating to detention, cannot in itself justify fears as to his impartiality: suspicion and formal finding of guilt are not to be treated as being the same, and a summary examination of the elements in support of the charges cannot be considered equal to the detailed analysis required to issue the final decision. However, it is necessary that the expressions used in the pre-trial decisions do not result in a substantive anticipation of the final decision by showing a preconceived opinion about the case or the judge's conviction that the accused person is liable (ECtHR, 22 April 2000, *Chesne v. France*). Furthermore, according to the Court, the impartiality requirement does not prevent the same judge either from adjudicating separate proceedings on different charges against the same person (ECtHR, 2 September 2004, *Jerinò v. Italy*) or from participating first in the proceedings on the merits and then in the enforcement proceedings (ECtHR, 12 December 2002, *Kalogeropoulou and Others v. Germany and Greece*). The fact that a judge has already tried a co-accused in separate criminal proceedings is not sufficient to cast doubt on that judge's impartiality in a subsequent case (ECtHR, 25 July 2013, *Khodorkovskiy and Lebedev v. Russia*), unless the earlier judgment contains findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings (ECtHR, 24 March 2009, *Poppe v. The Netherlands*).

The European Court of Human Rights has also identified an additional type of incompatibility by analysing the repercussions that personal links between the judge and one of the parties (e.g., family, friendship, professional, political partisanship or

others) may have on the judges' 'appearance' of impartiality (according to the idea that 'justice must not only be done, it must also be seen to be done': ECtHR, 23 April 2015, *Morice v. France*).

For example, the fact that some members of the court and the accused persons belong to the same political party should be considered relevant (ECtHR, 25 November 1993, *Holm v. Sweden*) but not the mere fact that a judge has different political ideas than the accused person, especially where there are no connections between the judge's political commitment and the subject of the proceedings (ECtHR, 8 December 2009, *Previti v. Italy*).

3.1.2.3 Publicity

Article 6.1 ECHR and Art. 47.2 EU Charter of Fundamental Rights expressly include the principle of publicity of the proceedings among the general guarantees of 'fair trial'. This principle is not explicitly recognised in some of the national constitutions (including the French, German and Italian constitutions).

The relevance of this principle is associated with the complex net of individual and collective interests that underlie the provisions of the Convention. In identifying the rationale of the publicity of the proceedings, the Strasbourg Court has highlighted the transparency that this principle grants to the administration of justice and has stressed the strong connection it has with the fundamental principles of a democratic society. The Court emphasises that this guarantee protects individuals against the administration of justice in secret with no public scrutiny. As a result, this principle contributes in maintaining confidence in the courts (ECtHR, 10 April 2012, *Lorenzetti v. Italy*).

Unlike the other procedural guarantees, in addition to providing for the publicity rule, the wording of Art. 6.1 expressly lists a series of possible exceptions, identifying several reasons that allow excluding the press and public from all or part of the trial. These exceptions can be divided into three categories: (1) general interests that go beyond the individual and even the process, such as moral, public order and national security in a democratic society; (2) specific individual interests of juveniles and of protection of the private life of the parties; and (3) special circumstances where publicity would prejudice the interests of justice.

In interpreting this provision, the European Court has left a margin of appreciation to the States in prohibiting publicity due to the nature of the dispute and the judicial powers to be exercised.

The Court has therefore held that the highly technical nature of the dispute can justify the lack of publicity, provided that the specific character of the dispute does not require that the general public be informed (ECHtR 24 June 1993, *Schuler-Zgraggen v. Switzerland*). Furthermore, the Court has admitted written proceedings on appeal essentially concerning purely legal questions where no issues with the credibility of witnesses arise, especially when the publicity principle had been complied with in one of the previous instances of the proceedings (ECtHR, 22 February 1984, *Sutter v. Switzerland*; ECtHR, 18 October 2006, *Hermi v. Italy*).

3.1.2.4 Trial Within a Reasonable Time

Among the guarantees established by Art. 6.1 ECHR and Art. 47 EU Charter of Fundamental Rights, the one that has the most relevant practical implications (it has been the most frequently used ground for application before the Court of Strasbourg) is the reasonable time guarantee. Both the sources in question consider this principle as an individual right, which can be immediately enforced through proceedings, and not as an objective standard, the implementation of which is entrusted to the law. In other words, every individual has the right to demand that his case be finally determined within a reasonable time.

Although this principle applies to all proceedings, it is particularly relevant in criminal proceedings, where the need 'that accused persons do not have to lie under a charge for too long' is at stake, with all the ensuing practical and moral consequences (ECtHR, 27 July 1968, *Wemhoff v. Germany*). In addition, Art. 5.3. ECHR establishes the right of any arrested or detained person to be brought promptly before a judge and to trial within a reasonable time.

Obviously, the principle of reasonable time must not become an incentive to summary justice. To this end, the European Court has stressed that the objectives of expediting the proceedings and shortening their duration can never justify disregarding another fundamental principle such as the right to adversarial proceedings (ECtHR, 18 February 1997 *Nideröst Huber v. Switzerland*) and, in general, the right to defence.

The beginning and the end of the period to be taken into account for the purpose of the 'reasonable time' requirement are respectively determined by the date in which the charges are formulated and the final decision is made in the criminal proceedings. However, any period for which the accused person was on the run is not included in the calculation (ECtHR, 19 February 1991, *Girolami v. Italy*).

To concretely assess the reasonableness of the length of proceedings, the Strasbourg Court has chosen not to establish strict general parameters but to refer to three criteria, used jointly in an overall assessment, which involve the complexity of the case, the conduct of the applicant and the conduct of the competent authorities.

The first criterion involves both cases of *structural complexity* (e.g., the nature of the facts that are to be established, the number of accused persons and witnesses, the joinder of the case to other cases, the formulation of different charges connected the one to the other) and *logistical difficulties* (e.g., some acts must be conducted abroad).

The second criterion takes into account the accused person's responsibility for the undue extension of the length of the proceedings through merely delaying actions. The Strasbourg Court has taken care to prevent that criterion from becoming an obstacle to the accused person's use of all available remedies to safeguard his rights; it has been excluded that the accused person should actively cooperate with the judicial authority in expediting the proceedings that might lead to his own indictment or conviction (ECtHR, 26 February 1993, *Dobbertin v. France*).

Based on the third criterion, the States are considered to have a duty to 'organise their legal systems so as to allow the courts to comply with the requirements of Art. 6.1 including that of trial within a reasonable time' (ECtHR, 13 July 1982, *Zimmerman and Steiner v. Switzerland*; ECtHR, 22 May 2003, *Kyrtatos v. Greec*e). Adequate measures to be taken can include the appointment of additional judges or administrative staff.

When applying the third criterion, the European Court also takes into account what is *at stake*: a more rigorous standard applies if the accused person is in detention, which requires a special diligence from the State.

Although the European Court of Human Rights does not provide any general or abstract indications, from a quantitative point of view, as a rule more scrutiny is given to cases where the length of the proceedings exceeds *three years for the first instance, two for the second instance and one for the proceedings before the Court of Cassation*.

As a general rule, the outcome of the proceedings is irrelevant for the purposes of compensation of damage for unreasonable length. Compensation is excluded whenever the accused person has actually taken advantage of the length of the proceedings, for example, as a result of amnesty (ECtHR, 18 July 1994 *Venditelli v. Italy*) or there has been a reduction in the applicant's sentence as a result of the statute of limitations on one of the offences of which he is charged (ECtHR, 6 March 2012 *Gagliano Giorgi v. Italy*, which held the application inadmissible due to the lack of a 'significant disadvantage').

Among the remedies for the breach of this principle, the Strasbourg Court has included an express and measurable reduction of the sentence on the ground of the excessive length of proceedings (ECtHR, 26 June 2001, *Beck v. Norway*). As a rule, however, the applicant is entitled to a fair compensation covering monetary and non-monetary damages.

3.1.2.5 Adversarial Proceedings and Equality of Arms

Among the guarantees implicitly inferred from the concept of a 'fair trial', the safeguard of the adversarial proceedings and the 'equality of arms' between the parties both play a key role. These two principles are closely connected to each other, and together they outline a procedural model that may become a benchmark in the progressive harmonisation that is in place as a result of the joint efforts of the European institutions and of the 'dialogue between the Courts'; this model overcomes the traditional dichotomy between inquisitorial and accusatorial systems.

According to the Strasbourg Court, the need to guarantee the 'equality of arms', to be intended as a fair balance between the parties, must be ensured in both civil and criminal proceedings. However, in the latter case, the need for an investigation stage, which the public authorities must conduct in secret, before the trial, must be taken into account. According to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him

at a substantial disadvantage vis-à-vis his opponent (ECtHR, 16 November 2006, *Klimentyev v. Russia*).

Moreover, the concept of a 'fair hearing' implies the right to adversarial proceedings, under which parties must have the opportunity not only to have made known any evidence needed for their claims to succeed but also to have knowledge of, and to comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (ECtHR, 18 February 1997, *Nideröst-Huber v. Switzerland*; ECtHR, 16 February 2000, *Rowe and Davis v. United Kingdom*).

In essence, the central aspect of the safeguard of the adversarial proceedings is the right 'to be heard', i.e., the fair hearing (expressed in French by the wording *entendue équitablement*), to which Art. 6.1 refers. This is the basic core of the adversarial principle, in its 'argumentative' interpretation.

3.1.2.6 Right to Evidence

From the principle of equality of arms, the case law of the European Court of Human Rights has also derived the accused's right to present evidence for the defence. Article 6.1 ECHR does not require that the defence should have the same rights as the prosecutor in finding and submitting evidence, but the former must be granted the opportunity to submit evidence in analogous conditions to those of the latter. The Strasbourg Court has specified that, as a general rule, the admissibility and assessment of evidence is a matter for regulation by national law. However, it has gone as far as criticising the refusal to admit evidence whenever it infringes the principle of equality of arms (ECtHR, 27 March 2008, *Perić v. Croatia*).

3.1.2.7 Guarantees Concerning Undercover Techniques

A further guarantee granted to the accused person is due to the case law concerning undercover operations. This issue is now crucial in security policies, in cross-border investigations into criminal organisations and in international conventions. While the use of special investigative methods—in particular, undercover techniques—cannot in itself infringe the right to a fair trial, the risk of police incitement entailed by such techniques means that their use must be kept within clear limits (ECtHR, 5 February 2008, *Ramanauskas v. Lithuania*). The European Court has drawn a distinction between the undercover agent, who, in collaboration with the police, controls and investigates the activities of a criminal organisation (ECtHR, 21 March 2002 *Calabrò v. Italy and Germany*), and the '*agent provocateur*', who, in the context of his activities, incites a person to commit offences that, without his incitement, would not have been committed. With regard to the latter case, the Strasbourg Court has held that the fairness of the overall procedure under Art. 6.1 ECHR has been violated to the detriment of the accused person, whose conviction was decisively based on the declarations of *agents provocateurs* who incited him to

commit a crime that he would not have committed otherwise (ECtHR, 9 June 1998, *Teixeira de Castro v. Portugal*; ECtHR, 21 February 2008, *Pyrgiotakis v. Greece*). The typical case is that of a suspect who is not a habitual drug dealer but has been induced by the *agent provocateur* to supply drugs. Therefore, the admission of evidence obtained by way of police incitement or entrapment can render a trial unfair (ECtHR, 8 March 2016, *Morari v. Moldova*).

Police incitement occurs where the officers involved—whether members of the security forces or persons acting on their instructions—do not confine themselves to investigating criminal activity in an essentially passive manner. In deciding whether the investigation was essentially passive, the Strasbourg Court examines the reasons underlining the covert operation and the conduct of the authorities carrying it out. The Court has relied on whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence, and has found the abandonment of a passive attitude by the investigating authorities to be associated with such conducts as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting. The European Court has also emphasised the need for a clear and foreseeable procedure for authorising investigative measures, as well as for their proper supervision. As regards the authority exercising control over covert operations, the Court has held that judicial supervision would be the most appropriate means; however, with adequate procedures and safeguards, other means may be used, such as supervision by a prosecutor (ECtHR, 4 November 2010, *Bannikova v. Russia*).

3.1.2.8 Right to a Reasoned Judgment

The implications of the fairness of the proceedings include the duty to provide the grounds for the decisions issued by courts.

The Strasbourg Court has stressed the function of the reasoning both within and outside of the proceedings by assigning judicial bodies the duty to specify with sufficient clarity the grounds on which their decisions are based so as to allow the party to exercise their right of appeal and more generally to permit a democratic control over the administration of justice.

However, the Court has underlined that the extent of the duty to provide reasoning may vary depending on the nature of the decision and that the judicial authority's duty to conduct a proper examination of the parties' evidence and arguments does not require a detailed answer in the judgment to every argument raised (ECtHR, 9 December 1994, *Hiro Balani v. Spain*; ECtHR, 19 April 1994, *Van de Hurk v. The Netherlands*). Furthermore, the Court has held that reasoning 'per relationem' is admissible (ECtHR, 10 April 2007, *Panarisi v. Italy*).

3.1.2.9 Right of Appeal

Neither Art. 6 ECHR nor the provisions of the Charter of Nice envisage the right of appeal in criminal matters, which is provided for in Art. 14 of the International Covenant on Civil and Political Rights and Art. 2 of Protocol 7 to the ECHR.

This latter provision grants to 'everyone convicted of a criminal offence by a tribunal' the right to have his conviction or sentence reviewed by a higher tribunal.

The right of appeal is therefore granted exclusively to the accused person whose criminal liability has been ascertained but not to the public prosecutor or the victim of the crime (to whom the national legislature may still grant the right, in exercising its independent law-making power).

In defining the subject of the appeal, Art. 2 of Protocol 7 refers separately to the conviction and the sentence. This distinction takes into account the two-stage structure of the decision process that is typical of criminal proceedings in common law countries, where the verdict on the liability of the accused person precedes the separate proceedings aimed at determining the sanction to be applied.

In principle, States have a wide margin in determining how the right to appeal can be exercised and defining the grounds on which first instance judgments may be appealed. The provision does not require two instances of the proceedings on the merits as the review by a higher court of a conviction or sentence may be confined solely to points of law. However, any restrictions contained in domestic legislation on the right of review must pursue a legitimate aim and not infringe the very essence of that right (ECtHR, 13 February 2001, *Krombach v. France*). To be effective, the remedy must be independent of any discretionary action by the authorities and must be directly available to those concerned (ECtHR, 6 September 2005, *Gurepka v. Ukraine*).

Article 2.2 allows limiting the scope of the right to appeal in the event of minor offences, first instance trials directly conducted by the highest tribunal or a conviction issued following an appeal submitted against the previous acquittal of the accused person.

Furthermore, the 'fair trial' guarantees also apply to second instance proceedings, in accordance with Art. 6.1 ECHR, albeit taking into account the special features of the proceedings concerned.

In cases where an appellate court is called upon to examine a case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence, the Strasbourg Court finds a breach of Art. 6.1 ECHR when the court of appeal convicts him without hearing anew the accused person and those witnesses who were decisive in the first instance proceedings, which resulted in the acquittal of the accused person (ECtHR, 5 July 2011, *Dan v. Moldova*; ECtHR, 4 June 2013, *Hanu v. Romania*; ECtHR, 29 June 2017, *Lorefice v. Italy*).

3.1.2.10 Certainty in the Case Law

From a fair trial perspective, the European Court of Human Rights attaches great value to the principle of legal certainty, which 'is implicit in all the Articles of the Convention and constitutes one of the basic elements of the rule of law' (ECtHR, 6 December 2007, *Beian v. Romania*). On the one hand, that principle does not confer a right to consistency of case law: the Strasbourg Court recognises that case law development is not, in itself, contrary to the proper administration of justice since failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement. But, on the other hand, the persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is one of the essential components of a State based on the rule of law (ECtHR, 12 July 2016, *Cupara v. Serbia*). Such a judicial uncertainty may deprive the parties of a fair hearing and result in a violation of Art. 6.1 ECHR.

Albeit usually applied in civil proceedings, the concept of certainty is also quite relevant in assessing the overall fairness of criminal proceedings. Accordingly, the European Court has held, in the context of Art. 6.1, that the Contracting States have an obligation to organise their legal system so as to avoid the adoption of discordant judgments (ECtHR, 29 March 2011, *Brezovec v. Croatia*).

Moving from the premise that the possibility of conflicting court decisions is an inherent trait of any judicial system based on the existence of various courts having different jurisdictions, the Strasbourg Court has stressed that the role of a supreme court is precisely to resolve such conflicts (ECtHR, 6 December 2007, *Beian v. Romania*). Therefore, the Court has found a breach of the fair-trial requirement enshrined in Art. 6.1 ECHR whenever profound and longstanding differences exist in the case law of the final instance courts and domestic law does not provide for a machinery capable of overcoming those inconsistencies or that machinery has not been successfully applied to ensure a uniform interpretation (ECtHR, 2 July 2009, *Iordan Iordanov and Others v. Bulgaria*; ECtHR, 2 November 2010, *Ştefănică and Others v. Romania*; ECtHR, 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Turkey*).

3.1.2.11 Fairness and the 'Overall Assessment' of the Proceedings

Finally, a general issue must be addressed to understand the relevance of the right to a fair trial in the ECHR: the way in which 'fairness' is concretely assessed by the Strasbourg Court. To that end, the Court does not consider an isolated procedural defect *per se* but conducts an overall assessment of the proceedings as a whole; it considers to what extent a single breach (or a number of features) affected the overall fairness of the proceedings (ECtHR, 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*) and to what extent a reduction of the guarantees in one stage may have been somewhat offset by other guarantees offered at a different stage (ECtHR, 15 June 2000, *Pullicino v. Malta*).

3.2 The Rights of the Accused

3.2.1 Foreword

We will now address the rights that are specifically granted to the accused person. To this end, we will consider the guarantees contained in Art. 6.2 and 6.3 ECHR and a number of implied rights that have been inferred by the case law of the Strasbourg Court from the general concept of a fair trial set forth in Art. 6.1.

Article 6.2 establishes the presumption of innocence of the accused, while Art. 6.3 grants the accused person a non-exhaustive list of additional rights that are specific applications of the general principle stated in Art. 6.1 and further specifications of the right to defence: the rights to be informed of the charges, to adequate time and facilities to prepare a defence, to self-defence, to legal assistance in the proceedings, to free legal aid, to call and cross-examine witnesses, to the free assistance of an interpreter. Furthermore, the case law has consistently held that the ECHR also implies the accused person's right to participate effectively in the criminal proceedings.

The corresponding wording of Art. 48 of the EU Charter of Fundamental Rights is much more succinct and simply establishes the presumption of innocence and that 'respect for the rights of the defence of anyone who has been charged shall be guaranteed'.

Actually, this provision must be construed as a generic reference to the overall contents of Art. 6.3 ECHR as it is generally recognised that the meaning and scope of the procedural rights that these two legislative sources grant to individuals who are subject to criminal charges are identical.

Furthermore, some of the guarantees that Art. 6.3 ECHR grants to the accused person—in particular the rights to legal assistance in the proceedings and free legal aid—are explicitly provided for by Art. 47 EU Charter of Fundamental Rights, which extends these rights to all parties in the proceedings. Without prejudice to this exception, all the other rights are specific to the accused person, with the exclusion of any other subjects that may be indirectly affected by the proceedings, such as a person who is liable from a civil point of view for a monetary penalty or the third party owner of assets under seizure (ECtHR, 24 October 1986, *AGOSI v. United Kingdom*). Forfeiture measures adversely affecting the property rights of third parties in the absence of any threat of criminal proceedings against them instead fall under the provisions of Art. 6.1 (ECtHR, 5 May 1995, *Air Canada v. United Kingdom*; ECtHR, 10 April 2012, *Silickienė v. Lithuania*).

Paragraphs 2 and 3 of Art. 6 ECHR both refer to the 'person charged with a criminal offence'. Hence, there is a need to clarify the scope of this expression. The concept of a 'criminal charge' has been the subject of a complex interpretation by the Strasbourg Court, which has attributed an autonomous meaning to this expression. This meaning is independent from the legal terminology and categorisations employed by the national legal systems in order to ensure that the Convention applies a uniform minimum standard of guarantees in all States. This prevents the

scope of the rights of the accused person from depending on discretionary choices of national legislation (with the risk of facilitating 'labelling fraud').

To define the charge as 'criminal', the European Court of Human Rights has used three alternative criteria: the classification of the offence within the national legal system, the nature of the offence and the severity of the applicable penalty (ECtHR, 8 June 1976, *Engel and Others v. The Netherlands).*

The prominent place held in a democratic society by the right to a fair trial has induced the Strasbourg Court to prefer a 'substantive', rather than a 'formal', conception of the 'charge' contemplated by Art. 6.1. The concept of 'charge' may thus be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether the situation of the suspect has been substantially affected (ECtHR, 27 February 1980, *Deweer v. Belgium*). Therefore, the condition of a 'person charged with a criminal offence' refers both to the defendant and the person who has officially learnt of preliminary investigations opened against him or has begun to be affected by actions taken by the prosecuting authorities as a result of a suspicion against him (ECtHR, 22 May 1998, *Hozee v. The Netherlands*).

The European Court has held that the guarantees under Art. 6 apply, for example, in the cases of arrest, freezing, search, seizure, notification of an investigation notice (ECtHR, 15 July 1982, *Eckle v. Germany*; ECtHR 29 June 2007, *O'Halloran and Francis v. United Kingdom*; ECtHR, 17 December 2004, *Pedersen and Baadsgaard v. Denmark*); when a person is questioned by the police in circumstances that imply that the police consider him as a potential suspect, and his answers are later used against him at the trial, even though the person has not the formal status of a suspect or accused (ECtHR, 18 February 2010, *Aleksandr Zaichenko v. Russia*); in the case of a request for an authorisation to proceed against a member of parliament (ECtHR, 19 February 1991, *Frau v. Italy*).

Under Art. 48 of the Nice Charter, the defensive guarantees corresponding to those of Art. 6.2 and 6.3 ECHR are expressly granted to 'who has been charged'; this concept is equivalent to that of a person charged with a criminal offence under the broad interpretation of the Strasbourg Court.

In the following paragraphs, we will first examine the presumption of innocence and the right not to incriminate oneself, which the European Court of Human Rights has inferred from the fair trial principle under Art. 6.1. We will then analyse the individual rights provided by Art. 6.3 ECHR and the additional developments in the EU legislation.

3.2.2 The Presumption of Innocence

In establishing the presumption of innocence, Art. 6.2 ECHR is in an intermediate position between the statement of the general contents of the right to a 'fair trial' and the regulation of the individual rights of the person charged with criminal offences.

In fact, the presumption of innocence is one of the key elements of the fair criminal trial that is required by Art. 6.1 (ECtHR, 24 May 2011, *Konstas v. Greece*): it is not by chance that the European Court often examines the complaints with joint reference to the first and second paragraphs of Art. 6 by taking into consideration the procedure as a whole (ECtHR, 8 December 2009, *Previti v. Italy*).

Stated for the first time in the 'Declaration of the Rights of Man and of the Citizen' of 1789, presumption of innocence has been enshrined in several international human rights instruments, including the Universal Declaration of Human Rights, proclaimed by the United Nations in 1948. The principle has also been recognised by Art. 48 of the EU Charter of Fundamental Rights. However, before the Nice Charter was adopted, the European Court of Justice had expressly included the presumption of innocence among the fundamental rights protected in the Community legal order (CJEU, 8 July 1999, C-235/92, *Montecatini S.p.A.*).

The presumption of innocence acts first as a rule of judgment, implying that the burden of proof is on the prosecution, and any doubt should benefit the accused (ECtHR, 8 February 1996, *John Murray v. United Kingdom*; ECtHR, 20 March 2011, *Telfner v. Austria*; ECtHR, 23 February 2010, *Mangano v. Italy*).

The Strasbourg Court has held that in principle Art. 6.2 does not prohibit the use of presumptions of fact or of law that may operate against the accused person. Instead, it requires that such presumptions be confined within reasonable limits that take into account the importance of what is at stake and maintain the rights of the defence (ECtHR, 20 October 1998, *Salabiaku v. France*), especially by allowing the accused person to provide proof to the contrary. Following this approach, the European Court, for example, held that the presumption of responsibility of the publishing director of a company controlling a radio station for the broadcast of defamatory statements is compatible with Art. 6.2 ECHR insofar as the director was granted the possibility to provide evidence of his good faith (ECtHR, 30 March 2004, *Radio France v. France*).

The presumption of innocence also operates as a rule of treatment, by prohibiting that the accused person may be considered or treated as guilty during the proceedings before his guilt has been established by a court (ECtHR, 19 November 2013, *Shyti v. Romania*).

Article 6.2 ECHR specifically chose an expression, namely the 'presumption of innocence', which is certainly more incisive than the neutral 'presumption of non-liability' that characterises the provisions contained in some constitutions. However, the guarantee provided in the Convention applies until the guilt has been established by a court and therefore until a judgment finding the responsibility has been issued, including in first instance. As a result, it does not prevent the first (or second) instance imprisonment sentences from being enforceable, even if they may be appealed. The Strasbourg Court has highlighted that Art. 5.1.a ECHR, which authorises deprivation of liberty 'after conviction', cannot be interpreted as being restricted to the case of a final conviction (ECtHR, 27 June 1968, *Wemhoff v. Germany*).

Nonetheless, it is the essence of the principle of presumption of innocence that it can only be invalidated by a final conviction in accordance with the law; the

presumption cannot cease to apply in appeal proceedings simply because the accused was convicted at first instance (ECtHR, 24 May 2011, *Konstas v. Greece*). On one hand, the *in dubio pro reo* principle, on which the presumption of innocence is based, keeps applying during the entire proceedings. On the other hand, the Strasbourg Court has broadened the scope of the presumption of innocence with regard to the conduct that public authorities must maintain, including after the conclusion of criminal proceedings, in order to not present the accused person as guilty in the absence of a conviction (ECtHR, 10 February 1995, *Allenet de Ribemont v. France*). Article 6.2 does not prevent the competent authorities from referring to the applicant's existing conviction when the matter of his guilt has not been finally determined, but such reference should be made with all the discretion and restraint that respect for the presumption of innocence demands (ECtHR, 8 April 2010, *Peša v. Croatia*). The authorities may inform the public about criminal investigations in progress and voice a suspicion, but it is required that they do so with all the necessary discretion and circumspection (ECtHR, 13 December 1978, *Krause v. Switzerland*). No suspicion regarding an accused's innocence may be voiced after his acquittal (ECtHR, 21 March 2000, *Rushiti v. Austria*). Article 6.2 would be violated if, without the accused's having previously been proven guilty according to law, a judicial decision (e.g., ordering to pay part of the court cost) reflected an opinion that he was guilty (ECtHR, 25 March 1983, *Minelli v. Switzerland*).

The Strasbourg Court has highlighted the risk of stigmatisation, stemming from the fact that persons who have not been convicted of any offence and are entitled to the presumption of innocence are treated in the same way as convicted persons (ECtHR, 4 December 2008, *S. and Marper v. United Kingdom*). Therefore, the Court has offered a teleological interpretation of the presumption of innocence, underlining that it, as a procedural right, serves mainly to guarantee the rights of the defence and at the same time helps to preserve the honour and dignity of the accused. It has been pointed out that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (public prosecutors, police officers or representatives of the executive power and of the parliament: ECtHR, 28 October 2004, *Y.B. and Others v. Turkey*; ECtHR, 10 November 2015, *Slavov and Others v. Bulgaria*). Statements made by the public authorities should not encourage the public to believe the accused guilty or prejudge the assessment of the facts by the competent judicial authority (ECtHR, 10 February 1995, *Allenet de Ribemont v. France*). A public statement by which the trial judge, before conviction, assesses the quality of the defence and prospects the outcome of a criminal case serves as evidence of a violation both of Art. 6.2 and Art. 6.1, under the heading of subjective impartiality (ECtHR, 28 October 2004, *Lavents v. Latvia*).

In the European Union legal system, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings has implemented many of the principles stated by the case law of the Strasbourg Court. The Directive has extended their scope to every stage of the criminal proceedings, from the moment at which a person is under investigation for having committed an offence (even before that person is made

aware by the competent authorities of being a suspect or accused person) until the decision on his guilt or innocence has become final (Art. 3). Under this respect, the Directive represents an important step forward from the wording of Art. 6.2 ECHR.

The Directive applies only to natural persons (and not to legal persons) who are suspected or accused in criminal proceedings. These individuals are expressly granted the right to remain silent and not to self-accuse (see Sect. 3.2.3).

The States are obligated to take the necessary measures to ensure that the suspect or accused person is not presented as guilty in public statements released by public authorities or judicial decisions (other than those determining the person's guilt) or through the use of measures of physical restraint such as handcuffs, glass boxes, cages, etc. (Arts. 4 and 5). This is without prejudice to all acts of the public prosecutor aimed at proving the guilt, to the preliminary procedural decisions based on suspicion or incriminating evidence (such as decisions on pre-trial detention), to the dissemination of information on criminal proceedings to the extent strictly necessary for reasons relating to the criminal investigations (e.g., when the public is asked to help in identifying the alleged perpetrator of the criminal offence) or to the public interest (for instance, for safety reasons or for the prevention of a public order disturbance), and to the application of physical restraint measures that are necessary for security reasons or in order to prevent the risk of escape or contact with third persons (Arts. 4 and 5).

Furthermore, the Directive addresses the rule of judgment that can be inferred from the presumption of innocence. More specifically, the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. However, national legislation may provide for the judge's obligation to seek both inculpatory and exculpatory evidence. Furthermore, the States are obligated to ensure the effectiveness of the *in dubio pro reo* principle (Art. 6).

3.2.3 The Right to Remain Silent and the Privilege Against Self-Incrimination

Unlike Art. 14.3 of the International Covenant on Civil and Political Rights, the ECHR and the Charter of Nice do not expressly provide the right to remain silent and not to incriminate oneself (respectively relating to refusal to answer questions during interrogations or examinations and—more generally—to the denial to make statements or answer questions, to produce evidence or documents or to provide information that may lead to self-incrimination).

The case law of both the European Court of Human Rights and the European Court of Justice has filled the gap and acknowledged the existence of this safeguard.

This case law interpretation departed from the *Orkem* judgment, in which the European Court of Justice held that the protection of the right to remain silent and not to give evidence against oneself derives from the need to guarantee the right of defence (which is considered among the general principles of the EU law), extending

its scope to the information required of legal persons within administrative procedures that may lead to the imposition of penalties (in particular in the field of EU competition law: CJEU, 18 October 1989, C-374/87, *Orkem*).

With specific reference to criminal proceedings, the European Court of Human Rights, starting with the *Funke* case (ECtHR, 25 February 1993, *Funke v. France*), has recognised the right of anyone 'charged with a criminal offence' to remain silent and not to contribute to incriminating himself under Art. 6.1 ECHR. The Court has underlined that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards that lie at the heart of the notion of a fair procedure under Art. 6 (ECtHR, 8 February 1996, *John Murray v. United Kingdom*). Their rationale is the need to provide an accused person with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice (ECtHR, 14 October 2010, *Brusco v. France*).

Furthermore, as this right presupposes that the charges must be proven without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused, it appears to be closely related to the presumption of innocence contained in Art. 6.2 ECHR (ECtHR, 17 December 1996, *Saunders v. United Kingdom*).

As the freedom of self-determination characterises the privilege against self-incrimination, the European Court has specified that this privilege does not prevent the use in criminal proceedings of information and material that may be obtained from the accused through the use of compulsory powers but have an existence independent of the will of the suspect, such as documents acquired pursuant to a search and seizure warrant, vocal recordings, biological samples taken for the purpose of DNA testing or other analyses (ECtHR, 17 December 1996, *Saunders v. United Kingdom*; ECtHR, 29 June 2007, *O'Halloran and Francis v. United Kingdom)*.

The Strasbourg Court has clarified that the right to silence is not an absolute right. An accused's decision to remain silent throughout criminal proceedings could have implications when the trial court seeks to evaluate the evidence against him. On the one hand, a conviction must not be solely or mainly based on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the right to remain silent cannot prevent the accused's silence—in situations that clearly call for an explanation from him—from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. If the evidence against the accused 'calls' for an explanation that the accused ought to be in a position to give, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide any explanation may be considered as a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. Furthermore, the drawing of adverse inferences from an accused's silence has been admitted when it is subject to an important series of safeguards designed to respect the rights of the defence, such as appropriate warnings given to the accused as to the legal effects of maintaining silence (ECtHR, 8 February 1996, *John Murray v. United Kingdom*).

The European Court has identified the key factors for determining whether the essence of the right to remain silent and the privilege against self-incrimination have been infringed, in breach of Art. 6 ECHR. To this end, it is necessary to focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure and the use to which any material so obtained was put (ECtHR, 10 March 2009, *Bykov v. Russia*).

As a consequence, the European Court found that the use of evidence in the form of drugs hidden in the applicant's body, which were obtained by the forcible administration of emetics, infringed the accused person's right not to incriminate himself and rendered his trial as a whole unfair (ECtHR, 11 June 2006, *Jalloh v. Germany*). On the contrary, the Court has held admissible applying a fine against the owner of a vehicle who refuses to provide the identity of the driver at the time of a suspected traffic offence, having regard to the limited nature of the information sought and to the special nature of the regulatory regime, under which the registered keeper of a motor vehicle can be taken to have accepted certain responsibilities, including the obligation to inform the authorities of the identity of the driver (ECtHR, 29 June 2007, *O'Halloran and Francis v. United Kingdom)*. Moreover, obliging drivers to submit to a breathalyser or blood test is not contrary to the principle of presumption of innocence (ECtHR, 15 June 1999, *Tirado Ortiz and Lozano Martin v. Spain*).

In the EU legal system, Art. 7 of Directive 2016/343/EU expressly recognised the right to remain silent (with regard to the offence charged) and the privilege against self-incrimination. This implies that suspects and accused persons should not be forced to produce evidence or documents or to provide information that may lead to self-incrimination. The judicial authorities are not prevented from using legal powers of compulsion to gather evidence that has an existence independent of the will of the suspect or accused person (e.g., bodily tissue for the purpose of DNA testing).

The evidentiary implications of granting the right to remain silent and the privilege against self-incrimination are particularly relevant.

Under Art. 7.5, the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned. This should be without prejudice to national rules concerning the assessment of evidence by courts, provided that the rights of the defence are respected (as recital 28 specifies).

In any case, under Art. 10.2, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, judges should respect the rights of the defence and the fairness of the proceedings. This provision seems to refer to the use of such statements or evidence against other defendants. Consistently with this interpretation, recital 45 outlines the need to have regard to 'the case-law of the European Court of Human Rights, according to which the admission of statements obtained as a result of torture or of other ill-treatment in breach of Art. 3 ECHR as evidence to establish the relevant facts in criminal proceedings would render the proceedings as a whole unfair', and recalls that, according to the UN Convention Against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment, any statement made as a result of torture should not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Finally, Art. 7.4 states that Member States may still 'allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons' (albeit obviously only in their favour).

3.2.4 The Right to be Informed of the Charges

3.2.4.1 The Guarantees in the Framework of the ECHR

The set of guarantees, which Art. 6.3 ECHR specifically grants to the person charged with criminal offences, also appears to be both an expression of the fair trial principle and a specification of the individual's right of defence.

The first guarantee is the right to 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'.

The interest in being informed of the accusation is relevant for the effective entire conduct of the defence: for this purpose, Art. 6.3.a establishes the right to full, detailed information concerning the charges. The Strasbourg Court's case law is also consistent in holding that the information must include both the cause of the accusation, i.e. the material facts alleged against the accused, and the nature of the accusation, namely the legal qualification of these material facts (ECtHR, 25 July 2000, *Mattoccia v. Italy*).

The ECHR neither imposes that the prosecution remains static during the course of the proceedings nor prevents the judge from giving a new legal characterisation to the acts on which the accusation is based. However, the accused must be duly and fully informed of any changes in the accusation, including reclassification of facts, and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation (ECtHR, 5 September 2006, *Bäckström and Andersson v. Sweden*). Thus, he must be afforded the possibility of exercising his defence rights in a practical and effective manner and in good time (ECtHR, 25 March 1999, *Pélissier and Sassi v. France*).

The Strasbourg Court has found a breach of Art. 6.1 and 6.3.b–c ECHR in cases in which, in its final decision, the last instance judge (the Supreme Court of Cassation) changed the legal characterisation of the alleged offence without the accused person being informed of the possibility of this change and having the opportunity to defend himself against the new charge (ECtHR, 11 December 2007, *Drassich v. Italy*). In such cases, the Supreme Court of Cassation should, for example, adjourn the hearing for further argument or, alternatively, allow the applicant to make written submissions on the new charge (ECtHR, 7 January 2010, *Penev v. Bulgaria*).

In addition to the right to be informed of the accusation, the person charged with a criminal offence has the right to access the case file, which the Strasbourg Court

derives from the principles of adversarial proceedings and 'equality of arms', specifying that Art. 6.1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (ECtHR, 16 December 1992, *Edwards v. United Kingdom*; ECtHR, 16 February 2000, *Rowe and Davis v. United Kingdom*). Not only should the evidence directly relevant to the facts of the case be examined in an adversarial procedure but also other evidence that might relate to the admissibility, reliability and completeness of the former (ECtHR, 11 December 2008, *Mirilashvili v. Russia*).

The entitlement to disclosure of relevant evidence is not an absolute right. The case law of the European Court has held that measures restricting the rights of the defence are permissible if strictly necessary to preserve the fundamental rights of other individuals (e.g., the protection of witnesses) or to safeguard an important public interest (e.g., national security or secrecy of the investigative methods). Moreover, such limitations must be sufficiently counterbalanced by the procedures followed by the judicial authorities (ECtHR, 26 May 1996, *Doorson v. The Netherlands*; ECtHR, 23 April 1997, *Van Mechelen and Others v. The Netherlands*, par. 54).

A procedure where the prosecution itself assesses the importance of concealed information to the defence and weighs this against the public interest in keeping the information secret cannot comply with the requirements of Art. 6.1 (ECtHR, 16 February 2000, *Rowe and Davis v. United Kingdom*). Conversely, the Strasbourg Court held that the decision-making procedure applied to withhold certain evidence from the defence on public interest grounds complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused in cases where (a) the defence was kept informed and permitted to make submissions and participate in the procedure even if without being informed of the category of material that the prosecution sought to withhold; (b) the need for disclosure was assessed by the trial judge who examined the material in question, was fully versed in all the evidence and was in a position to monitor the relevance to the defence of the withheld information; (c) the undisclosed material was not used to found the conviction (ECtHR, 16 February 2000, *Jasper v. United Kingdom*).

3.2.4.2 The Guarantees in EU Law: Directive 2012/13/EU

In EU law, both the above aspects, information on the charges and access to the case file, have been the object of harmonisation by Directive 2012/13/EU on the 'right to information in criminal proceedings'.

The Directive gives the right to information a triple function: informing the suspects or accused persons about their procedural rights, informing them on the accusation and allowing their access to the materials of the case.

Regarding the first function, Art. 3 of the Directive states that national authorities must provide suspects and accused persons, either orally or in writing, in simple and non-technical language that can be easily understood by them, with the essential

information on a minimum core of procedural rights, as they apply under national law: namely, the right of access to a lawyer, the conditions for obtaining free legal advice, the right to be informed of the accusation, the right to interpretation and translation, the right to remain silent.

This information must be given 'promptly' and therefore at the latest before the first official interview of the suspect or accused person by the police or by another competent authority (as specified in recital 19).

Article 4 of the Directive introduces an informative document that has an enhanced protective value. It is addressed to suspected or accused persons under arrest or detention, to whom a written 'Letter of Rights' must be delivered. In addition to the above-mentioned guarantees, the letter must contain information about a series of further procedural rights and remedies to which the person concerned is entitled.

Furthermore, an appropriate 'Letter of Rights' must be provided with reference to the guarantees concerning the European arrest warrant (Art. 5).

With regard to the second function, Art. 6 of the Directive provides for the Member State's obligation to ensure that the suspects or accused persons be provided with information about the accusation.

Under Art. 6.1 of the Directive, the information about the criminal acts, which those persons are suspected or accused of having committed, must be given promptly, at the latest before their first official interview by the police or another competent authority (as specified in recital 28), and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

With specific regard to the cases of deprivation of liberty, Art. 6.2 of the Directive contains a further provision on the right to information about the reasons for the arrest or detention, including the criminal act that the arrested or detained persons are suspected or accused of having committed.

The due information increases at a later stage of the criminal proceedings. Under Art. 6.3 of the Directive, it is necessary to provide the accused person with detailed information on the charges, including the nature and legal classification of the criminal offence, as well as the nature of his participation, at the latest on submission of the merits of the accusation to a court.

Regarding the third function, the obligation of the States to ensure the right of access to the materials of the case takes different forms according to Art. 7 of the Directive.

Firstly, if the suspect or the accused person is arrested or detained, all the evidentiary materials related to the specific case, which are essential to challenging effectively the lawfulness of the arrest or detention (e.g., documents, photographs, audio and video recordings, etc.), must be made available to the concerned person or his lawyer.

Secondly, a complete discovery, granting access 'to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons', must be performed 'in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the

judgment of a court'. The deadline seems to be the moment of the indictment. Additionally, if further material evidence comes into the possession of the competent authorities, access must be granted to it in due time to allow its consideration.

Access to certain materials may be refused if it may lead to a serious threat to the life or the fundamental rights of another person or if the refusal is strictly necessary to safeguard an important public interest (such as in cases where the access could prejudice an ongoing investigation or seriously harm the national security). These restrictions should be interpreted strictly and in accordance with the principle of the right to a fair trial, as interpreted by the case law of the Strasbourg Court. Any decision to refuse access to the material evidence in the possession of the competent authorities must be taken by a judicial authority or, at least, must be subject to judicial review.

3.2.5 The Right to Have Time and Facilities to Prepare a Defence and the Right to Legal Assistance

3.2.5.1 The ECHR Framework

The right to have time and facilities to prepare the defence – the provision contained in Art. 6.3.b ECHR, which grants the accused person the right 'to have adequate time and facilities for the preparation of his defence', is closely connected to the subjective aspects of the right of defence, regulated by the following letter c). It implies that the substantive defence activity on the accused's behalf may comprise everything that is 'necessary' to prepare the trial (ECtHR, 9 October 2008, *Moiseyev v. Russia*) and represents a balancing factor that aims to prevent any excess in applying the need to ensure trial within a reasonable time, protecting the accused against a hasty trial (ECtHR, 9 July 1981, *Kröcher and Möller v. Switzerland*). Even though it is undoubtedly important to conduct proceedings at good speed, this should not be done at the expense of the procedural rights of one of the parties (ECtHR, 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*).

Article 6.3.b ECHR specifies two elements that are necessary for an effective defence: facilities and time. The issue of adequacy of the time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case (ECtHR, 21 October 2010, *Kornev and Karpenko v. Ukraine*). To this end, the time standards set by the code of criminal procedure may turn out to be scarcely relevant to assess whether this provision of the ECHR has been concretely complied with.

The right to legal assistance and free legal aid – Art. 6.3.c regulates certain fundamental subjective aspects of the right of defence. It comprises three rights of any person subject to a criminal charge: to defend himself in person, to have legal assistance through a lawyer of his choice and to be given free legal aid under certain conditions.

As for the relations between these rights, the Strasbourg Court has specified that the choice between defence in person and legal representation depends upon the national legislation (ECtHR, 20 January 2005, *Mayzit v. Russia*). Therefore, the legal requirement that a defendant be assisted by counsel at all stages of the proceedings cannot be deemed incompatible with the Convention (ECtHR, 25 September 1992, *Croissant v. Germany*; ECtHR, 15 November 2001, *Correia de Matos v. Portugal*). The Court has further clarified that the right to free legal aid must be guaranteed in all cases in which the accused person does not have sufficient means to pay for legal assistance and the interests of justice so require, even when he would be entitled to defend himself in person (ECtHR, 25 April 1983, *Pakelli v. Germany*).

Regarding the moment when the right to legal assistance arises, the Strasbourg Court's case law has developed an extensive interpretation that aims at enhancing the guarantees provided by Art. 6.3.c ECHR.

The Court first recognised that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police. This also applies in proceedings for the execution of a European arrest warrant (ECtHR, 9 April 2015, *A.T. v. Luxembourg*).

This right may only be subject to restrictions in exceptional circumstances, in the presence of compelling reasons. However, even where compelling reasons may justify denial of access to a lawyer, such restriction must not unduly prejudice the rights of the accused under Art. 6 ECHR. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

In this respect, the Court has underlined the importance of the investigation stage for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial. At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task is, among other things, to help ensure respect of the right of an accused not to incriminate himself (ECtHR, 27 November 2008, *Salduz v. Turkey*).

Furthermore, the European Court has held that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention and not only while being questioned (ECtHR, 13 October 2009, *Dayanan v. Turkey*).

The Court has included the accused's right to communicate with his lawyer confidentially (i.e., without the risk of being overheard by a third party) among the basic requirements of a fair trial. This right should be effectively ensured also in the case of participation of the defendant in the proceedings by means of a video link (ECtHR, 2 November 2010, *Sakhnovskiy v. Russia*). The tapping of telephone

conversations between an accused and his lawyer and the restriction on the number and length of the defendant's meetings with his lawyers represent possible breaches of the requirement to ensure effective assistance (ECtHR, 27 November 2007, *Zagaria v. Italy*; ECtHR, 12 May 2005, *Ocalan v. Turkey*).

The European Court has devoted significant attention to the issue of the quality of defence, which has been hardly addressed within the national legal systems.

Based on the principle that the mere appointment of a lawyer does not in itself ensure the effectiveness of the assistance he may afford an accused, the Court has repeatedly criticised the failure of judicial authorities to adopt measures that ensure an effective defence.

Owing to the legal profession's independence, the State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or chosen by the accused. The conduct of the defence is essentially a matter between the defendant and his representative. Article 6.3.c obliges the national competent authorities to intervene only if a failure by counsel to provide effective representation is manifest (ECtHR, 18 October 2006, *Hermi v. Italy*) or is sufficiently brought to their attention (ECtHR, 13 May 1980, *Artico v. Italy*). The authorities' intervention can consist in inducing the accused's chosen lawyer to fulfil his duty or replacing him with an officially appointed lawyer, but they cannot force the counsel to act (ECtHR, 16 May 2005, *Balliu v. Albania*).

Article 6.3.c ECHR provides that the accused person has the right to free legal aid only if he lacks sufficient means to pay for legal assistance and the interests of justice so require. As to whether the interests of justice require that the accused receive free legal assistance, it is necessary to have regard to the seriousness of the offence, the severity of the sanction that he might incur, the complexity of the case and his personal situation. Where deprivation of liberty is at stake, the interests of justice in principle call for legal representation, and if the defendant cannot pay for it himself, public funds must be available (ECtHR, 6 November 2012, *Zdravko Stanev v. Bulgaria*).

3.2.5.2 The Right in EU Law: Directive 2013/48/EU and Directive 2016/1919/EU

In the EU legal framework, the right to legal assistance and free legal aid are first and foremost granted to all parties to the proceedings, and not only to the accused person, by Arts. 47.2 and 47.3 of the Nice Charter, which applies, beyond the criminal matter, to all judicial proceedings relating to rights and freedoms arising from EU law.

The scope of free legal aid in the Nice Charter appears to be broader than that in the ECHR because in order to apply for free legal aid, in addition to the lack of sufficient resources, the party concerned only needs to prove the necessity to 'ensure effective access to justice'.

In order to establish minimum common standards, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty was adopted. The Directive sets some regulatory principles, which are subject, however, to derogations that are anything but specific and limited in number and that, as such, risk significantly limiting its effectiveness. In addition, Art. 2.4 excludes, as a rule, that the rights granted by the Directive fully apply to certain proceedings for minor offences before an authority other than a court having jurisdiction in criminal matters.

From a subjective point of view, the right of access to a lawyer is granted to suspects and accused persons in criminal proceedings (and to other individuals, such as witnesses, who become suspects or accused persons in the course of police questioning), starting from the time when they are made aware of their condition as suspects or accused persons by the competent authorities, until the conclusion of the proceedings (Art. 2). Furthermore, this right is attributed to the persons who are subject to European arrest warrant proceedings (see Sect. 8.3.3.2).

Unless the national legislation provides for mandatory legal assistance, Member States must ensure that any waiver of the right of access to a lawyer is the result of an informed choice, made after receiving appropriate and understandable information from the authorities (Art. 9). Therefore, the Directive does not intend to provide a general principle preventing self-defence, but it leaves each Member State free to govern this matter.

The rights to have a third party informed and to communicate with third persons are provided only for those accused persons who are deprived of their liberty.

From an objective point of view, the right of access to a lawyer entails (a) the right to meet in private and communicate with the lawyer confidentially (including by means of correspondence and telephone conversations); (b) the right to the presence and effective participation of the lawyer during questioning; (c) the right to the attendance of the lawyer at investigative or evidence-gathering acts concerning identity parades, confrontations and reconstructions of the scene of a crime, if the suspect or accused person is required or permitted to attend the same acts (Art. 3).

In addition, the Directive requires the States to endeavour to make general information available (for instance, on a website or by means of a leaflet accessible at police stations) to facilitate the obtaining of a lawyer by suspects or accused persons.

As for the further guarantees provided by Arts. 5, 6 and 7 of the Directive, suspects or accused persons who are deprived of liberty are granted: (a) the right to have at least one third person (such as a relative or an employer) nominated by them informed of their deprivation of liberty and the right to communicate with at least one third person during their detention without undue delay; (b) if they are non-nationals, the right to have the consular authorities of their State of nationality informed of their deprivation of liberty without undue delay and to communicate with those authorities.

In implementing the Directive, Member States must ensure that the particular needs of vulnerable suspects and accused persons are taken into account (Art. 13).

Under Art. 3, the right of access to a lawyer arises before the questioning of suspects or accused persons by the police or by another law enforcement or judicial authority or upon the carrying out, by investigating or other competent authorities, of investigative or other evidence-gathering acts that the suspects or accused persons are required or permitted to attend. Such acts should at least include (a) identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; (b) confrontations, where suspects or accused persons are brought together with witnesses or victims, in case of disagreement between them on important facts or issues; (c) reconstructions of the scene of a crime in the presence of the suspect or accused person, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person. Furthermore, the right of access to a lawyer must be ensured without undue delay after deprivation of liberty (unless the immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, which may justify a temporary derogation from this right) and in due time before appearing before a court having jurisdiction in criminal matters, where the suspects or accused persons have been summoned to appear.

Moreover, Arts. 3.6 and 5.3 provide for the possibility of temporary 'open' derogations from the right of access to a lawyer and right to have a third person informed of the deprivation of liberty on the basis of the following compelling reasons: (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings (in particular to prevent destruction or alteration of essential evidence or to prevent interference with witnesses).

Such derogations may be authorised only on a case-by-case basis, either by a judicial authority or by another competent authority on the condition that the decision can be submitted to judicial review. They must comply with the principle of proportionality, be strictly limited in time and not prejudice the overall fairness of the proceedings.

Under Art. 6, the right to communicate with third persons may be limited or deferred in view of imperative requirements or proportionate operational requirements.

In accordance with the principle of effectiveness of EU law, national legal systems must grant adequate remedies in the event of a breach of the rights provided by the Directive. As for the consequences of the impossibility to exercise the right of access to a lawyer, a clearly 'open' provision has been introduced, which may be specified only through the complex efforts by national judges involving an 'EU law and ECHR compliant interpretation'. Member States have the duty to ensure that 'in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Art. 3.6, the rights of the defence and the

fairness of the proceedings are respected' (Art. 12.2). Recital 50 highlights the need to have regard 'to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'.

Finally, with the purpose of ensuring the effectiveness of the right of access to a lawyer, Directive 2016/1919/EU of 26 October 2016 on legal aid (i.e., funding by a Member State of the assistance of a lawyer) for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings was adopted.

The Directive lays down common minimum rules concerning the right to legal aid and applies to suspects and accused persons in criminal proceedings (and to other individuals, such as witnesses, who become suspects or accused persons in the course of police questioning) who have a right of access to a lawyer and are deprived of liberty or required to be assisted by a lawyer or required or permitted to attend certain investigative or evidence-gathering act (e.g., identity parades, confrontations, reconstructions of the scene of a crime). In addition, the Directive applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer, in European arrest warrant proceedings, until they are surrendered or until the decision not to surrender them becomes final; the right to legal aid will apply both in the executing and in the issuing Member States (Arts. 1–5).

In respect of minor offences, where deprivation of liberty cannot be imposed as a sanction, the Directive applies only to the proceedings before a court having jurisdiction in criminal matters (Art. 2).

Member States shall ensure that legal aid is granted in criminal proceedings without undue delay and at the latest before the questioning of the person concerned by the police, by another law enforcement authority or by a judicial authority or before the specific investigative or evidence-gathering acts, to which the suspect or accused person is required or permitted to attend, are carried out (Art. 4.5).

Member States may apply different tests to determine whether to grant legal aid in criminal proceedings: a means test (related to the resources of the person concerned), a merits test (related to necessity to ensure effective access to justice in the circumstances of the case) or both. The right to legal aid in European arrest warrant proceedings may be subject to a means test as well.

The Directive sets out the criteria to establish these tests. In particular, if a Member State applies a means test, it should take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living, in order to determine whether a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer. If a Member State applies a merits test, it should take into account the seriousness of the offence, the complexity of the case and the severity of the sanction at stake in order to determine whether the interests of justice require granting legal aid. In any case, the suspect or accused person should benefit from legal aid as soon as he is brought before a court for a decision on detention and during detention.

Article 7 sets out rules on quality of legal aid services, as well as on training both of staff involved in the decision-making process and of lawyers.

One way of ensuring the effectiveness and quality of legal aid is to facilitate continuity of legal representation throughout the criminal proceedings, as well as in European arrest warrant proceedings (recital 25). However, suspects, accused persons and requested persons must be granted the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify (Art. 7.4).

In compliance with the principle of effectiveness of EU law, national legal systems must grant adequate remedies in the event of a breach of the rights conferred upon individuals by the Directive, especially when the provision of legal aid is delayed or refused in full or in part (Art. 8 and recital 27).

3.2.6 The Right to Call and Cross-Examine Witnesses

Article 6.3.d ECHR establishes a principle of great importance in the context of the right to defence by granting the accused person the right 'to examine or have examined witnesses against him' and to obtain 'the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

Two issues need be specified: on one hand, the right 'to examine or have examined', intentionally broad and generic, shows that the ECHR does not intend to prefer any specific examination method. On the other hand, as the Strasbourg Court highlights, to understand the meaning of this provision, it is necessary to resort to an autonomous and broad interpretation of the term 'witness', which refers to any person who makes statements used in evidence by the domestic courts (ECtHR, 27 January 2009, *Mika v. Sweden*; ECtHR, 27 February 2001, *Lucà v. Italy*).

Therefore, this notion includes, in addition to witnesses in the strict sense, co-accused persons, police informants, original sources of hearsay evidence, victims of offences, civil parties, expert witnesses and other analogous individuals. To be regarded as a witness, it is not even necessary that the individual testify at a court hearing or that his statements be read out in court: it is sufficient that his deposition may serve to a material degree as the basis for a conviction.

This autonomous meaning of the term 'witness' is particularly relevant as it operates regardless of classifications under national law, thus preventing the application of the safeguards provided by Art. 6.3 from being limited by Member States' discretionary choices. Furthermore, the Strasbourg Court's case law has broadened the scope of this provision, which can be applied to evidence other than 'witnesses', such as documentary evidence and computer files (ECtHR, 11 December 2008, *Mirilashvili v. Russia*; ECtHR, 9 May 2003, *Georgios Papageorgiou v. Greece*; ECtHR, 6 May 2003, *Perna v. Italy*).

According to the well-established case law of the European Court, Art. 6.3.d enshrines the principle that all evidence against the accused person must normally be produced in his presence at a public hearing with a view to adversarial argument.

Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (ECtHR, 20 April 2006, *Carta v. Italy*; ECtHR, 19 July 2012, *Hümmer v. Germany*; ECtHR, 12 December 2017, *Zadumov v. Russia*).

There are two requirements that follow from the above general principle. Firstly, there must be a good reason for the non-attendance of a witness. Secondly, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Art. 6 (the so-called sole or decisive rule: ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*).

In addition to the difficulty to define the concept of 'decisive' evidence, two aspects must be stressed.

First, the notion of adversarial proceedings according to the interpretation of the Strasbourg Court does not envisage the 'principle of functional separation between the proceedings stages', which is typical of those procedural systems that rule out the possibility to use the outcomes of preliminary investigations as evidence at trial unless they cannot be repeated.

The Court has admitted that the accused person's conviction may be based solely on the statements that a witness made at the stage of the police inquiry and the judicial investigation and later retracted and refuted in open court, provided that the defence had the opportunity to call and to cross-examine the witness at the trial (ECtHR, 16 May 2000, *Camilleri v. Malta*; ECtHR, 13 November 2014, *Bosti v. Italy*). The judge would be free to make a choice between competing versions of the truth because it cannot be held in the abstract that evidence given by a witness in open court and on oath should always be relied on in preference to other statements made by the same witness in the course of criminal proceedings.

A second aspect that needs to be highlighted is that the sole or decisive rule cannot be considered as an absolute rule because it is necessary to carry out an examination of the overall fairness of the proceedings, including an examination of both the significance of the untested evidence for the case against the accused and of the counterbalancing measures taken by the judicial authorities to compensate for the handicaps under which the defence laboured (ECtHR, 19 February 2013, *Gani v. Spain*). The use of the evidence of absent witnesses would require sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable, given its importance in the case (ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*).

Examples of such counterbalancing factors, both when the testimony was the sole or the decisive basis for the defendant's conviction and when, conversely, it carried significant weight and its admission handicapped the defence, have been identified by the European Court in the following: (a) a detailed reasoning as to why the court

considered that evidence to be reliable while having regard also to the other evidence available; (b) the showing, at the trial hearing, of a video recording of the absent witness's questioning at the investigation stage in order to allow the court, the prosecution and the defence to observe the witness's demeanour under questioning and to form their own impression of his reliability; (c) the availability at the trial of corroborative evidence supporting the untested witness statement; (d) the possibility offered to the defence to put its own questions to the witness indirectly, for instance in writing, in the course of the trial; e) the opportunity for the accused person to give his own version of the events and to cast doubt on the credibility of the absent witness (ECtHR, 15 December 2015, *Schatschaschwili v. Germany*). However, a careful examination of the witnesses' statements, undertaken by the domestic courts, cannot alone compensate for the defence's lack of opportunity to question the witnesses (ECtHR, 12 October 2017, *Cafagna v. Italy*).

Considering that many of the examples that have been mentioned refer substantially to the type of scrutiny to which, at least in principle, every testimony (even if collected by means of cross-examination) should be subject, it is possible to infer that recent court decisions have significantly narrowed the *sole or decisive rule* and its guarantees.

The case law of the Strasbourg Court has focused on three categories of declarants whose admission entails significant departures from the paradigm based on the adversarial principle: respectively, absent, anonymous and vulnerable witnesses.

Absent witnesses are those who, after having made statements (admitted as evidence) in the pre-trial stages, do not give testimony at the trial because they are dead, ill, missing, a resident abroad or refuse to give evidence due to fear or exercise their right to silence.

Anonymous witnesses are those whose identity is concealed from the accused. They, however, give testimony at the trial. Anonymity has been considered by the Strasbourg Court as a measure that may be necessary in certain situations to protect not only undercover agents but also threatened witnesses. This safeguard is thus instrumental to both the 'police secrecy' and the protection of the victims and witnesses. According to the European Court, Art. 6 ECHR does not preclude either reliance, at the investigation stage, on sources such as anonymous informants or the subsequent use of their statements by the trial court. The State should organise criminal proceedings in such a way that the interests, and in particular the rights to life, liberty or security, of witnesses and victims are not unjustifiably imperilled (ECtHR, 26 March 1996, *Doorson v. The Netherlands*). The principle of a fair trial requires that, in appropriate cases, the interests of the defence are balanced against the interests of testifying witnesses or victims, notably their life and liberty, as guaranteed by Art. 8 ECHR. However, the anonymity of prosecution witnesses presents the defence with difficulties that criminal proceedings should not normally involve: due to the non-disclosure of the witnesses' identity, the defence lacks information permitting it to test their reliability or cast doubts on their credibility (ECtHR, 17 November 2005, *Haas v. Germany*; ECtHR, 20 November 1989, *Kostovski v. The Netherlands*). Consequently, in such cases, Arts. 6.1 and 6.3.d require that the handicaps under which the defence operates should be sufficiently

counterbalanced by the procedures followed by the judicial authorities (ECtHR, 14 February 2002, *Visser v. The Netherlands*), with specific reference to the admission, the examination and the assessment of anonymous witnesses (ECtHR, 23 May 2017, *Van Wesenbeeck c. Belgio*).

Firstly, the admission of anonymous witnesses should be based on the proportionality principle. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice, then that measure should be applied (ECtHR, 23 April 1997, *Van Mechelen and Others v. The Netherlands*; ECtHR, 23 June 2015, *Balta and Demir v. Turkey*). In assessing the fairness of a trial involving anonymous witnesses, it is necessary to examine, first, whether there are good reasons to keep secret their identity, such as the fear of repercussions for their own safety and that of their families. However, a subjective fear is not sufficient, and appropriate inquiries must be conducted by the trial court to determine whether there are objective grounds for the fear in question (ECtHR, 10 April 2012, *Ellis, Simms and Martin v. United Kingdom*). With regard to members of police forces or intelligence services, their use as anonymous witnesses should be confined to exceptional circumstances but could be justified by the needs both to ensure their protection and not to impair their usefulness for future operations (ECtHR, 23 April 1997, *Van Mechelen and Others v. The Netherlands*).

With regard to the method of collection of the anonymous witness evidence, it has been held that the defence's disadvantaged position could be counterbalanced by a procedure where the hearing of the witness takes place without the presence of the accused but with the active participation of the defence counsel and before the judge. However, while earlier judgments required the judge to be informed of the identity of the individual so that his credibility could be verified (ECtHR, 23 April 1997, *Van Mechelen and Others v. The Netherlands*), more recently this condition has no longer been requested since the possibility given to the judge and the defence counsel to see and hear the anonymous witness give evidence in court is considered a sufficient guarantee (ECtHR, 10 April 2012, *Ellis, Simms and Martin v. United Kingdom*).

Finally, the Strasbourg Court has highlighted the need for extreme care in the evaluation of evidence obtained from anonymous witnesses, which remains subject to the 'sole or decisive rule' (ECtHR, 26 March 1996, *Doorson v. The Netherlands*; ECtHR, 14 February 2002, *Visser v. The Netherlands*). The principle according to which no conviction should be based either solely or to a decisive extent on anonymous statements was formerly considered as a sort of closing rule of the system, which also applied when the other requirements (concerning the admission and the examination of the witnesses) were complied with (ECtHR, 28 February 2006, *Krasniki v. Czech Republic*). More recently, where a conviction is based solely or decisively on the evidence of anonymous witnesses, the Strasbourg Court subjects the proceedings to the most searching scrutiny in order to examine whether there were sufficient counterbalancing factors, including strong procedural safeguards, to ensure that the trial as a whole was fair within the meaning of Art. 6 ECHR (ECtHR, 10 April 2012, *Ellis, Simms and Martin v. United Kingdom*).

While the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him (ECtHR, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*).

A significant departure from the 'typical' adversarial trial model for the collection of evidence, based on the full implementation of the right to examine the declarants, can be found in the case of 'vulnerable witnesses', i.e. those individuals whose physical and mental health and development could be harmed by their participation in the proceedings and their confrontation with the defendant, as is the case of victims of sexual abuse and even more so of minors.

The Strasbourg Court has held that Art. 6 cannot be interpreted as requiring in all cases that questions be put directly by the accused or his counsel. In criminal proceedings concerning sexual abuse, account must be taken of the right to respect for the private life of the victim; consequently, certain specific measures may be taken for the purpose of protecting the victim, provided that they can be reconciled with an adequate and effective exercise of the rights of the defence (ECtHR, 10 May 2012, *Aigner v. Austria*). In these situations, it is sufficient that a 'mediated' relationship is established between the defence and the witness. The defence's rights would be safeguarded by the right to be shown the videotape or listen to the audiotape recording of the police interviews with the victims; by the possibility of having the victims asked through the intermediary of a judge, a police officer or a psychologist; by the opportunity to observe the demeanour of the witnesses under examination without being seen (thanks to a two-way mirror or a video link) and to challenge their statements and credibility (ECtHR, 20 January 2005, *Accardi and Others v. Italy*; ECtHR, 16 December 2003, *Magnusson v. Sweden*). On the contrary, the use of the victim's videotaped account as essential evidence, without an adequate and timely opportunity to put questions to him on the basis of sufficient background information, involves limitations on the rights of the defence that are irreconcilable with the guarantees contained in Art. 6 (ECtHR, 18 July 2013, *Vronchenko v. Estonia*; ECtHR, 7 July 2009, *D. v. Finland*).

Obviously, in such cases, the evidence, obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention, should be treated with extreme care (ECtHR, 2 July 2002, *S.N. v. Sweden*; ECtHR, 16 December 2003, *Magnusson v. Sweden*).

Among the factors to be considered in assessing the overall fairness of the proceedings, the Strasbourg Court has included the promptness with which a forensic psychiatric evaluation is carried out to assess the victim's credibility (ECtHR, 14 January 2003, *Lemasson and Achat v. France*) and forensic medical experiments are carried out to verify the existence of abuse.

The second part of Art. 6.3.d, which grants the accused person the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, aims to ensure a full 'equality of arms' between the parties. It does not require the attendance and examination of every witness on the accused's behalf and leaves it to national courts to assess the relevance of the evidence

(ECtHR, 31 October 2001, *Solakov v. FYROM*). However, when the defendant has made a request to hear witnesses that is not vexatious, is sufficiently reasoned, is relevant to the subject matter of the accusation and could arguably have strengthened the position of the defence or even led to the acquittal, the domestic authorities must provide relevant reasons for dismissing such a request (ECtHR, 10 October 2013, *Topić v. Croatia*; ECtHR, 19 December 2017, *Kuveydar v. Turchia*).

The right to examine witnesses overlaps with the principle of immediacy. The Strasbourg Court has held that under Art. 6.1 ECHR, an important element of fair criminal proceedings is the possibility of the accused to be confronted with the witness in the presence of the judge who ultimately decides the case. Indeed, the observations made by the court about the demeanour and credibility of a witness may have significant consequences for the accused (ECtHR, 30 November 2006, *Grecu v. Romania*). Therefore, normally a change in the composition of the trial court after the hearing of an important witness should lead to the rehearing of that witness. However, exceptions may be allowed, in particular in cases in which only one judge was changed while the other judges remained the same, there was no indication in the file justifying doubts about the credibility of the witness in question and the conviction was not based only on the evidence of the witness (ECtHR, 9 July 2002, *P.K. v. Finland*).

3.2.7 The Right to an Interpreter and to Translation

3.2.7.1 The Right in the Framework of the ECHR

Article 6.3.e ECHR establishes the accused person's right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. This right is aimed at ensuring an informed exercise of the right of defence under equal conditions, and is a specification of the accused person's right to be informed of the charges 'in a language which he understands', in accordance with Art. 6.3.a. The interpretation assistance provided must 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 (ECtHR, 17 May 2001, *Güngör v. Germany*; ECtHR, 24 February 2009, *Protopapa v. Turkey*). In addition, the European Court has held that the rule of non-discrimination laid down in Art. 14 ECHR is embodied in Art. 6.3.e (ECtHR, 19 December 1989, *Kamasinski v. Austria*).

The Strasbourg Court has extensively interpreted the scope of this provision, which 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, 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 (ECtHR, 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*; ECtHR, 24 February 2009, *Protopapa v. Turkey*).

Therefore, the right to an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. The assistance of an interpreter should be provided during the investigation stage (which has crucial importance for the preparation of the criminal proceedings as the evidence obtained during this stage determines the framework in which the offence charged will be considered), unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right (ECtHR, 5 January 2010, *Diallo v. Sweden*).

The text of the provisions refers to an 'interpreter', not a 'translator'. This suggests that oral linguistic assistance may satisfy the requirements of the Convention. Consequently, it is not required a written translation of all items of written evidence or official documents in the procedure (ECtHR, 18 October 2006, *Hermi v. Italy*). In particular, the absence of a written translation of a judgment does not in itself entail violation of Art. 6.3.e, in cases in which the defendant, as a result of the oral explanations given to him, sufficiently understood its reasoning to be able to lodge an appeal with the assistance of his defence counsel (ECtHR, 19 December 1989, *Kamasinski v. Austria*).

The European Commission of Human Rights adopted a restrictive interpretation, according to which Art. 6.3.e ECHR does not cover the relations between the accused and his counsel but only applies to the relations between the accused and the judge (ECHR, 29 March 1975, *X. v. Austria*).

The right to receive the free assistance of an interpreter is not dependent upon the accused's means, or on a discretionary assessment of the interests of justice. The Strasbourg Court has made it clear that this is not a temporary or conditional exemption but a once and for all an exoneration from payment of all costs of interpretation, which cannot be subsequently claimed back from the accused (ECtHR, 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*; ECtHR, 20 November 2008, *Isyar v. Bulgaria*).

Finally, in view of the need for the right in question 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 (ECtHR, 19 December 1989, *Kamasinski v. Austria*).

3.2.7.2 The Right in EU Law: Directive 2010/64/EU

In the European Union legal system, the right to be assisted by an interpreter has become increasingly important as a result of the growth in migratory flows and the enhancement of international judicial cooperation. This is confirmed by the fact that this right ranks as first among the list of priorities identified by the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which forms part of the Stockholm Programme.

Aiming to harmonise national legislation, the first legal instrument issued in implementing the 'roadmap' is the Directive 2010/64/EU on the right to

interpretation and translation in criminal proceedings, which has developed the interpretative approaches adopted by the European Court of Human Rights, extending their scope of application to a fundamental sector of judicial cooperation such as the execution of European arrest warrants.

According to the 'non-regression clause' established by Art. 8 of the Directive, the rights and procedural safeguards arising from the ECHR represent minimum standard that cannot be derogated from to the detriment of the accused person.

The Directive draws a distinction between the right to interpretation and the right to translation based on whether the communication is oral or in writing. In this respect, the European Court of Justice has clarified that Art. 2 refers to the oral interpretation of oral statements, while Art. 3 regards the written translation of documents (CJEU, 15 October 2015, C-216/14, *Covaci*). The latter right is not provided for by Art. 6.3.e ECHR.

Article 2 of the Directive grants the suspected or accused persons who do not understand the language of the criminal proceedings before investigative and judicial authorities the right to interpretation, with reference to two types of communications: with the authorities and with the legal counsel.

From the first point of view, to ensure a comprehensive and continuous protection of the right to interpretation, Art. 2.1 includes in its scope any police questioning, as well as all court hearings and any necessary interim hearings.

Under the second point of view, the States must ensure that interpretation is available for the communications between suspected or accused persons and their legal counsel that are in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications. This is an important step forward taken by the EU legislation with respect to the case law of the Court of Strasbourg.

Article 2.7 of the Directive extends the assistance of an interpreter to the proceedings for the execution of a European arrest warrant, to be ensured by the executing Member State's competent authorities.

Article 3 of the Directive regulates the right to translation, attributed to the suspected or accused persons who do not understand the language of the criminal proceedings; under this provision, the written translation must include 'all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings'.

In particular, Art. 3.2 expressly considers as essential certain documents drawn up by competent authorities, for which a translation is therefore necessary. The list of such documents, though not exhaustive, includes any decision depriving a person of his liberty, any charge or indictment, and any judgment.

With regard to other documents—including those drawn up by suspected or accused persons (such as an objection lodged against a penalty order: CJEU, 15 October 2015, C-216/14, *Covaci*; CJEU, 12 October 2017, C-278/16, *Sleutjes*)—their qualification as essential, for translation purposes, depends on a case-by-case assessment by the competent authorities, to which the suspected or accused persons or their legal counsel may submit a reasoned request to that effect (Art. 3.3).

Under Art. 3.7, as an exception to the above-said general rules, an oral translation or oral summary of essential documents may be provided instead of a written translation on the condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

Articles 2.8 and 3.9 of the Directive regulate the adequacy standards for the interpretation and translation, which must 'be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence'.

Consistently with the principle granting the right to the free assistance of an interpreter or translator under Art. 6.3.e ECHR, Art. 4 of the Directive obliges member States to meet the costs of interpretation and translation, irrespective of the outcome of the proceedings.

3.2.8 The Right to be Present at Trial

3.2.8.1 The Right in the Framework of the ECHR

Although the ECHR does not contain a provision similar to that of Art. 14.3.d of the International Covenant on Civil and Political Rights, which established the right of the accused person to be tried in his presence, the case law of the European Court has consistently held that the right of a criminal defendant to be present in the courtroom ranks as one of the essential requirements of Art. 6 ECHR. Indeed, Art. 6.3 provides for a number of rights (to defend himself in person, to examine or have examined witnesses, to have the free assistance of an interpreter) that the accused person could hardly exercise without being present (ECtHR, 1 March 2006, *Sejdovic v. Italy*).

In this perspective, the European Court of Human Rights has also considered the right to be present at the trial of the defendant in two different situations: the participation through a video link and the absentia at the trial.

On the first point, the Court has stated that the use of a video link as a form of participation in proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the accused person is able to follow the proceedings and to be heard without technical impediments and that effective and confidential communication with a lawyer is provided for (ECtHR, 5 October 2006, *Marcello Viola v. Italy*; ECtHR, 2 November 2010, *Sakhnovskiy v. Russia*).

On the second point, the European Court has clarified that the fact that the accused person is entitled to participate in the proceedings does not imply that trials *in absentia* are completely prohibited, also because 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 (ECtHR, 12 February 2015, *Sanader v. Croatia*; ECtHR, 12 February 1985, *Colozza v. Italy*). However, proceedings by default must be rigorously balanced by adequate safeguards.

Thus, the Court has held that the fair trial principle is breached where a person who was convicted *in absentia* and later became aware of the proceedings has been unable subsequently to obtain from a court that has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he waived his right to appear and to defend himself or that he intended to escape trial (ECtHR, 18 May 2004, *Somogyi v. Italy*; ECtHR, 1 March 2006, *Sejdovic v. Italy*; ECtHR, 13 February 2001, *Krombach v. France*).

The two latter circumstances must be proven in an unequivocal manner. The Strasbourg Court has pointed out clearly that where the accused person did not have sufficient knowledge of his prosecution and of the charges against him, it could not be inferred merely from his status as a 'fugitive', which was founded on a presumption with an insufficient factual basis, that he sought to evade trial or unequivocally waived his right to appear in court (ECtHR, 1 March 2006, *Sejdovic v. Italy*). The Court has also clarified that while the appointment of a lawyer by the accused person leads to believe that the he was aware of the proceedings (ECtHR, 14 September 2006, *Booker v. Italy*), this conclusion cannot be reached when he is defended by a lawyer appointed by the judge in his absence as this lawyer may have not had any contact with the defaulting accused person (ECtHR, 21 December 2006, *Zunic v. Italy*; ECtHR, 12 June 2007, *Pititto v. Italy*).

3.2.8.2 The Right in EU Law: Framework Decision 2009/299/JHA and Directive 2016/343/EU

In the EU legal system, proceedings by default were regulated by Framework Decision 2009/299/JHA of 26 February 2009 enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

The Framework Decision enhanced the current models of judicial cooperation by defining the scope of operation of the refusals of execution of European arrest warrants, financial penalties, confiscation orders, judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, probation decisions (see Sect. 8.3.2.2).

The decision aimed to support a 'mirrored' harmonisation of the minimum *standards* for proceedings by default, considering that ensuring basically uniform conditions, which are consistent with the indications of the European Court of Human Rights, is the premise for recognition and execution of judgments issued *in absentia*.

More specifically, the Framework Decision requires, alternatively, that

(a) the person concerned was summoned in person and thereby informed or by other means actually received official information of the scheduled date and place of the trial in due time so as to permit his participation and effective exercise of his right of defence and was informed that a decision may be handed down if he does not appear for the trial;

(b) the person concerned, being aware of the scheduled trial, gave a mandate to a legal counsellor, appointed either by that person or by the State, and was indeed defended by that counsellor at the trial;
(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed, the person concerned either expressly states that he does not contest the decision or does not request a retrial or appeal within the applicable time frame;
(d) the person concerned will be personally served with the decision without delay after the surrender and will be informed both of his right to a retrial or an appeal with the above-said features and of the time frame within which he has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

This matter has recently been regulated by Art. 8 of Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.

That provision expressly entitles all the suspected and accused persons to 'be present at their trial' provided that the proceedings involve one or more hearings being held (as specified in recital 41). This is without prejudice to the possibility for national legislation to establish that the proceedings or certain stages thereof be conducted in writing, provided that this complies with the right to a fair trial.

The right to be present at trial is not an absolute right. In addition to the possibility of expressly or tacitly waiving that right, provided that the waiver is unequivocal (recital 35), the Directive permits trials *in absentia*, which may result in an enforceable decision on guilt or innocence. To this end, the two alternative conditions provided for by Art. 8.2 must be satisfied:

(a) the suspect or accused person has been officially informed (by a personal summon or other means), in due time, of the trial (indicating its date and place) and of the consequences of non-appearance (and, specifically, that a decision might be handed down if he does not appear at the trial: see recital 36);
(b) the suspect or accused person, having been informed of the trial, has given a mandate to a lawyer who has been appointed by that person or by the State and has represented the same person at the trial (see recital 37);

Article 8.4 allows holding trials *in absentia* whenever it is not possible to comply with the conditions under points (a) and (b) because a suspect or accused person cannot be located despite reasonable efforts having been made.

Conversely, if the proceedings are held in the absence of the accused person, and without satisfying the above conditions, the accused person would be entitled to 'a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence', ensuring that the accused person has the right to be present, to participate effectively and to exercise the rights of the defence (Art. 9). When suspects or accused persons are informed of a decision taken in their absence under Art. 8.4, and in particular when they are apprehended, they should also be informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy.

3.2.9 The Right to Personal Liberty

3.2.9.1 Right to Liberty and Security

Among those rights that contribute to outline the shape of criminal proceedings, a key role is played by the 'right to liberty and security', under Art. 5 ECHR and Art. 6 of the EU Charter of Fundamental Rights.

As in the case of the 'fair trial' principle, there is full correspondence between the rights granted by the two above provisions. The rights, thus, have the same meaning and scope; as a consequence, the 'right to liberty and security' in the EU legislation cannot be subject to further restrictions than those permitted by Art. 5 ECHR.

According to the prevailing interpretation, the provisions contained in Art. 5 ECHR and Art. 6 of the EU Charter of Fundamental Rights protect the most 'classic' of the meanings of liberty, i.e. the physical liberty of the individual against arbitrary coercive measures.

From this point of view, the reference to 'security' has a completely different meaning from that referred to by the expression 'Space of Security' under Art. 67 TFEU. This provision refers, in a collective perspective, to a substantial notion of security that evokes the need for protection against the threats of criminality. Conversely, the ECHR and the Charter of Nice provisions refer to an auxiliary and procedural notion of security, to be construed as an 'instrumental' safeguard against arbitrary deprivation of personal liberty.

The Strasbourg Court has held that there is a flagrant breach of the right to liberty and security in cases of extraordinary rendition (i.e., an extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment). The unacknowledged detention of an individual is a complete negation of the guarantees contained in Art. 5, which requires the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (ECtHR, 23 September 2010, *Iskandarov v. Russia*; ECtHR, 24 July 2014, *Al Nashiri v. Poland;* ECtHR, 23 February 2016, *Nasr and Ghali v. Italy*, which also found a violation of Arts. 3 and 8). The State has an obligation not only to refrain from active infringements of the rights protected by Art. 5 ECHR but also to take appropriate steps to provide protection against an unlawful interference with those rights by everyone within its jurisdiction (ECtHR, 13 December 2012, *El-Masri v. FYROM*).

To achieve full protection of the right to liberty and security, the ECHR provides for two types of safeguards: on the one hand, Art. 5.1 circumscribes the circumstances in which an individual may be lawfully deprived of his personal liberty; on the other hand, Arts. 5.3, 5.4 and 5.5 grant him a corpus of substantive rights that are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act (ECtHR, 13 December 2012, *El-Masri v. FYROM*).

3.2.9.2 The Cases of Lawful Deprivation of Liberty

The list of permissible grounds for deprivation of liberty contained in Art. 5.1 is considered as exhaustive and subject to a narrow interpretation by the Strasbourg Court (ECtHR, 6 April 2000, *Labita v. Italy*). Detention must be lawful in both domestic and Convention terms: the Convention lays down an obligation to comply with the substantive and procedural rules of national law. The European Court of Human Rights has interpreted the concept of lawfulness as requiring not only conformity with domestic law but also qualitative requirements in the national law authorising deprivation of liberty, which must be sufficiently accessible and precise, in order to avoid all risks of arbitrariness (ECtHR, 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*). The most relevant cases include the following.

– *The lawful detention of a person after conviction (including in first instance proceedings) by a competent court* – the term 'after conviction' cannot be interpreted as being restricted to the case of a final conviction (ECtHR, 27 June 1968, *Wemhoff v. Germany*).

  The Strasbourg Court has highlighted that deprivation of liberty may be justified in the event of a conviction issued by another State's judicial authority (ECtHR, 26 June 1992, *Drozd and Janousek v. France and Spain*). This may occur, for example, in the cases listed in Framework Decision 2008/909/JHA, concerning the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

  The requirement that a person be lawfully detained after 'conviction by a competent court' does not imply the necessity to subject the proceedings leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with all the requirements of Art. 6 ECHR. However, if a conviction is the result of proceedings that were a flagrant denial of justice, i.e. were manifestly contrary to the provisions of Art. 6 or the principles embodied therein, the resulting deprivation of liberty would not be justified under Art. 5.1. For instance, a denial of justice undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court that has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself (ECtHR, 24 March 2005, *Stoichkov v. Bulgaria*).

– *The lawful arrest or detention effected for the purpose of bringing a person before the competent legal authority on reasonable suspicion of having committed an offence (based on a standard of proof which is lower than that required to formulate an indictment) or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so* – this provision permits deprivation of liberty only in connection with criminal proceedings. It governs pre-trial detention (ECtHR, 7 June 2013, *Ostendorf v. Germany*).

  The European Union has introduced a higher standard of guarantees with reference to detention for judicial cooperation purposes, with Framework

Decision 2002/584/JHA concerning the European arrest warrant; under Art. 12, the requested person may be released provisionally, provided that the competent authority of the executing State takes all the measures it deems necessary to prevent the risk of absconding.

– *The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the State*'s *territory or of a person against whom action is being taken with a view to deportation or extradition* – with regard to this latter case, the Strasbourg Court has highlighted that Art. 5.1.f ECHR grants the States an undeniable sovereign right to control aliens' entry into and residence in their territory and, accordingly, to order the detention of potential immigrants. To avoid being branded as arbitrary, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued (ECtHR, 29 January 2008, *Saadi v. United Kingdom*).

Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (known as the 'return directive') has introduced higher standards of safeguards. Article 12 of the Directive has established the subsidiarity principle (according to which the detention order may only be adopted when less coercive measures cannot be applied effectively) and has provided that Member States may only keep in detention a third-country national who is the subject of return procedures when there is a risk of absconding or he avoids or hampers the preparation of return. Moreover, the same provision establishes that detention shall be maintained for as long a period as necessary to ensure successful removal, which may not exceed 6 months and may be extended up to further 12 months in cases where the removal operation lasts longer, owing to a lack of cooperation by the person concerned or delays in obtaining the necessary documentation from third countries.

3.2.9.3 The Procedural Safeguards

Article 5 of the ECHR provides for a series of procedural guarantees that apply in those cases in which the deprivation of liberty is permitted.

The first one is the individual's right to be informed of the reasons for his arrest and of any charge against him: Art. 5.2 obliges the Member State to inform any arrested person promptly, in simple, non-technical language that he can understand, of the essential legal and factual grounds for his arrest (although not necessarily with a complete list of the charges held against him) so as to allow him to apply to a court to challenge its lawfulness (ECtHR, 5 February 2002, *Conka v. Belgium*; ECtHR, 8 February 2005, *Bordovskiy v. Russia*). This provision is instrumental to that established by Art. 5.4, which entitles the person concerned to take proceedings by which the lawfulness of his detention shall be decided by a court.

Furthermore, the case law of the Strasbourg Court does not require that the arrest warrant be written in a language that the arrested person understands. It is sufficient that the arrested person is subsequently interrogated, and thus made aware of the reasons for his arrest, in a language that he understands, or has the assistance of an interpreter informing him of the content of the document ordering his arrest (ECtHR, 5 February 2002, *Conka v. Belgium*; ECtHR, 26 May 2005, *Parlanti v. Germany*).

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings sets a higher standard of safeguards. Article 3 obliges Member States to ensure that suspected and accused persons who do not understand the language of the criminal proceedings receive, within a reasonable time period, a written translation of the decisions that result in a deprivation of personal liberty.

A second fundamental safeguard is the right to be brought promptly before a judge (or other officers authorised by law to exercise judicial power), to which any person under arrest or detention is entitled under Art. 5.3 ECHR.

This safeguard is historically connected to the writ of habeas corpus, which was known in the English legal system even before the Magna Charta. Such a prompt and automatic judicial control serves to provide effective safeguards against any arbitrary or unjustified deprivation of liberty, the risk of ill-treatment and the abuse of powers bestowed on law enforcement officers (ECtHR, 29 April 1999, *Aquilina v. Malta*; ECtHR, 18 March 2008, *Ladent v. Poland*). A judge (or another judicial officer) must himself hear the concerned person and have the power to order release after reviewing the lawfulness of, and justification for, the arrest and detention (ECtHR, 29 March 2010, *Medvedyev and Others v. France*). The 'officer', who is competent to decide on detention, is not identical with the 'judge' but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions that constitute a guarantee for the person arrested. The first of such conditions is independence of the executive and of the parties (ECtHR, 4 December 1979, *Schiesser v. Switzerland*). From this point of view, Art. 5.3 ECHR would be breached if the control were entrusted to a public prosecutor, which is subject to a different regime than that of the judges and is hierarchically subordinate to the Minister of Justice (ECtHR, 23 November 2010, *Moulin v. France*). In putting the requirement of prompt control into practice, the Strasbourg Court has held that, as a general rule, the appearance before a judge must take place within 4 days of the arrest (ECtHR, 29 November 1988, *Brogan and Others v. United Kingdom*; ECtHR, 3 October 2006, *McKay v. United Kingdom*).

As regards the EU law, it is worth recalling Directive 2013/48/EU (see Sect. 3.2.5.2), which provides that suspects or accused persons who are deprived of liberty are granted (a) the right of access to a lawyer without undue delay (unless such delay cannot be avoided because of the geographical remoteness of the concerned persons), (b) the right to have one third person nominated by them informed of their deprivation of liberty, (c) the right to communicate with one third person during their detention without undue delay; (d) if they are non-nationals, the right to have the consular authorities of their State of nationality informed of their deprivation of liberty without undue delay and to communicate with those authorities.

Article 5.3 also provides for the right to trial within a reasonable time or to release pending trial. The purpose of the provision is essentially to require the provisional release of the accused person once his continuing detention ceases to be reasonable (ECtHR, 27 June 1968, *Neumeister v. Austria*).

Obviously, the 'reasonable' mentioned in this provision may be distinguished from that provided for in Art. 6.1, which applies to all parties to court proceedings. On the contrary, Art. 5.3 refers only to detained persons and implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons (ECtHR, 10 November 1969, *Stögmüller v. Austria*). Consequently, some delays may constitute violations of Art. 5.3 while remaining compatible with Art. 6.1 (ECtHR, 10 November 1969, *Matznetter v. Austria*). Furthermore, the reasonable time limits to which Art. 5.3 ECHR refers are irrespective of the maximum duration terms established by national legislation for the deprivation of liberty. The reasonable time to which Art. 5.3 refers, rather, regards the need to identify the maximum term of the deprivation of liberty that, having regard to the concrete circumstances, can be reasonably imposed on a person who is presumed innocent.

In determining the length of detention pending trial, the period to be taken into consideration begins on the day the accused is arrested and ends on the day when he is convicted or sentenced by a court of first instance (ECtHR, 15 July 2002, *Kalashnikov v. Russia*; ECtHR, 16 January 2007, *Solmaz v. Turkey*).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, it is necessary to establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty (ECtHR, 3 October 2006, *McKay v. United Kingdom*). The gravity of the charges cannot by itself serve to justify long periods of detention pending trial (ECtHR, 20 June 2006, *Vayiç v. Turkey*).

In dealing with the issue whether a period of detention is reasonable, the Strasbourg Court adopts a two-stage model (the so-called Labita test) based on two different assessments: the Court must first establish whether there are relevant and sufficient reasons to justify the continued detention. If this assessment has a positive outcome, the Court must also ascertain whether the competent national authorities displayed special diligence in the conduct of the proceedings (ECtHR, 2 August 1988, *Contrada v. Italy*; ECtHR, 6 April 2000, *Contrada v. Italy*; ECtHR, 13 March 2007, *Castravet v. Moldova*).

Justification for any period of detention must be convincingly demonstrated by the national authorities (ECtHR, 8 April 2004, *Belchev v. Bulgaria*), whose assessment should result in an adequate reasoning, tailored to the specific circumstances of the case. There is little indication that a 'margin of appreciation' doctrine applies in this context.

The grounds for continued detention include the 'precautionary needs' (danger of absconding, risk of repetition of offences, risk of interference with the due course of justice) and the preservation of public order (in the exceptional circumstances in which the accused's release would actually disturb public order: it is accepted that,

by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention).

Based on the last sentence of Art. 5.3, the Strasbourg Court has held that pre-trial detention should be considered as a last resort, which is justified only when all other options are insufficient. The accused must be released if it is possible to obtain from him guarantees ensuring his appearance at trial, provided that his continued detention is no longer justified by a risk of absconding (ECtHR, 8 November 2007, *Lelièvre v. Belgium*; ECtHR, 2 July 2009, *Vafiadis v. Greece*).

A further review of the lawfulness of any form of deprivation of personal liberty is provided by Art. 5.4 ECHR, which entitles each person who is under arrest or detention to take proceedings before a court. Unlike the control under Art. 5.3, which is automatic, this review depends on an application by the detained person.

The person concerned is entitled to apply to a court having jurisdiction to decide speedily the lawfulness of his detention and to order his release if the detention is unlawful.

3.2.9.4 Right to Compensation for Unlawful Detention

The complex system for the protection of personal liberty envisaged by the ECHR is completed by the provision of Art. 5.5, which entitles any person who has been the victim of arrest or detention in breach of any of the provisions of Art. 5 to an enforceable right to compensation.

The provision of the Convention only refers to cases of '*ex ante* unlawfulness' and not to cases of '*ex post* injustice', i.e. those cases in which the assessment made in the pre-trial phase turns out to be different from the acquittal decision issued at the outcome of the proceedings. Therefore, this provision does not entitle the former suspect, who is later acquitted, to be compensated for the lawful restriction of his liberty during the proceedings (ECtHR, 28 September 1995, *Masson and Van Zon v. The Netherlands*).

Nevertheless, the broad applicability of the provision, which requires compensation in the event of breach of any of the guarantees contained in Art. 5, ascertained either by national authorities or by the Strasbourg Court, should not be underestimated.

Therefore, the scope of the right to compensation also includes cases in which the maximum duration limits of pre-trial detention were exceeded or the national judicial authorities did not give a decision speedily on the lawfulness of the detention (ECtHR, 9 June 2005, *Picaro v. Italy*; ECtHR, 23 February 1984, *Luberti v. Italy*) or the detention was ordered or prolonged in the lack of precautionary needs or the accusations against the applicant were based on evidence that, with time, became weaker rather than stronger (e.g., when the statements of collaborators of justice were not corroborated by other evidence, and hearsay was not supported by objective evidence, during the course of the investigation and the trial: ECtHR, 6 April 2000, *Labita v. Italy*).

The remedy relates primarily to financial compensation of the pecuniary or non-pecuniary damages resulting from the breach of Art. 5. Conversely, the Court has ruled out that the compensation may consist in crediting a period of pre-trial detention towards a penalty (ECtHR, 22 June 1972, *Ringeisen v. France*; ECtHR, 10 May 2011, *Włoch v. Poland*), in the release from detention (ECtHR, 15 May 1984, *Bozano v. France*), in the conviction of the person responsible (ECtHR, 10 May 2001, *Sola Castro v. Spain*).

3.2.10 The Protection of the Accused Children

Any examination of the European guarantees related to the accused persons in criminal proceedings cannot claim to be complete without reference to the special position of accused children. This subject matter is regulated by Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, which established common minimum standards in this area with a view to strengthening the mutual trust in the criminal legal systems of the Member States and therefore facilitating mutual recognition of judicial measures.

Despite the significant expansion of the juvenile criminal justice—which involves each year in Europe more than one million children and approximately half a million 'young adults'—no effort was made in the past to harmonise national laws, which were characterised by significant differences in this area.

The main quality of Directive 2016/800/EU lies in filling this gap. Despite incorporating some guarantees that were already present in other directives on the rights of suspects and accused persons, the Directive assignes directly to the accused juvenile an extensive list of rights in a unitary context and outlines a model of 'juvenile fair trial' for the EU Member States, a model that is based on the child's best interest, which, according to Art. 24.2 of the Charter of Fundamental Rights of the EU, must be considered a primary principle 'in all actions relating to children, whether taken by public authorities or private institutions'.

The Directive applies to children under the age of 18 years who are either suspects or accused persons in criminal proceedings or subject to European arrest warrant proceedings. However, the guarantees provided by the Directive (with the exception of those implying an involvement of the holder of parental responsibility) also apply when the individual subsequently has reached the age of 18 in the course of the proceedings, at least until the person concerned reaches the age of 21. With regard to its scope, the Directive—just like other guarantees for suspects or accused persons—does not apply to minor offences assigned to the competence of a non-judicial authority (for example, road traffic offences) with the exception of proceedings originating from a possible appeal before a court and cases when the children are deprived of personal freedom.

The Directive provides for the right of the children to be informed of all the procedural rights assigned to the accused person (Art. 4); the same information must be provided to the holder of parental responsibility (Art. 5).

Special emphasis is given to the right to be assisted by a lawyer once the children are made aware that they are suspects or accused persons. A limited derogation to this right is introduced for cases where assistance by a lawyer is not proportionate in the light of the circumstances of the case (Art. 6.6).

Furthermore, the Directive—analogously to Directive 2012/29/EU in case of victims of crimes—guarantees to the suspect or accused children a right to an individual assessment (Art. 7) that will have to take into account the child's personality and economic, social and family background. This individual assessment serves to provide information to the competent authorities on the need to take specific measures to the benefit of the child or to take decisions or courses of action in the criminal proceedings, including when sentencing.

A child who is deprived of liberty is also entitled to the right to a medical examination (Art. 8) with a view to assessing his general mental and physical condition in order to determine his capacity to be subject to questioning, to other investigative or evidence-gathering acts or to any other measure.

The Directive also provides for an audiovisual recording of the questioning of children by the police or other law enforcement authorities when this measure is proportionate in the circumstances of the case, taking into account the presence (or lack thereof) of the lawyer or whether the child is deprived of liberty or not.

Of special importance are the provisions concerning deprivation of liberty of the child, which must be imposed on children only as a measure of last resort, limited to the shortest period of time and subject to judicial review by a court, as well as to periodic review (Art. 10). The competent authorities must resort to measures alternative to detention whenever possible (Art. 11). Furthermore, children who are kept in detention must be held, on principle, separately from adults, with the adoption of appropriate measures to preserve the children's health and physical and mental development, their right to education and training, to family life, to access to programs that foster their reintegration into society and their freedom of religion (Art. 12).

The Directive also provides for a series of additional guarantees that apply in the conduct of the proceedings: the timely and diligent treatment of cases involving children, with any appropriate measure to ensure that they are always treated in a manner that protects their dignity and that is appropriate to their age, maturity and level of understanding (Art. 13); the right to protection of the children's privacy, which must be guaranteed by holding hearings in the absence of the public and by ensuring that the records of the children's questioning are not publicly disseminated (Art. 14); the right of the children to be accompanied by the holder of parental responsibility (or by another appropriate adult) during court hearings in which they are involved (and during the other stages of the proceedings: Art. 15); the right of children to appear in person, and to be heard, at their trial (Art. 16); finally, the children's right to legal aid to guarantee them the effective exercise of the right to be assisted by a lawyer (Art. 18).

3.3 The Other Guarantees

3.3.1 The Protection of Human Dignity and the Prohibition of Torture and Inhuman or Degrading Treatments

Although it is not expressly mentioned in the ECHR, the protection of human dignity is frequently referenced in the Strasbourg Court's case law. It represents the common background on which the specific proclamations of fundamental rights are placed. The Strasbourg Court has found that 'the very essence of the Convention is respect for human dignity and freedom' (ECtHR, 29 July 2002, *Pretty v. United Kingdom*).

The EU Charter of Fundamental Rights, instead, opens with a solemn, express affirmation of the legal relevance of human dignity, to which the entire Title I is devoted. Article 1 qualifies it as 'inviolable' and proclaims that it must be respected and protected.

This provision is modelled on Art. 1 of the Basic Law of the Federal Republic of Germany, which, in open opposition to any totalitarianism, proclaims the principle according to which 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' In the German context, the scientific thought and the judicial practice have inferred several implications of the principle of protection of human dignity, which apply in various sectors of criminal procedure, entailing the need to prove the guilt of the accused person beyond reasonable doubts and guaranteeing his right to self-determination.

In turn, the need to protect every human being's dignity is the rationale of Art. 3 ECHR, which enshrines one of the fundamental values of a democratic society (ECtHR, 18 December 1996, *Aksoy v. Turkey*) by establishing the prohibition of torture and inhuman or degrading treatment or punishment.

This provision is also literally repeated in Art. 4 of the EU Charter of Fundamental Rights, which, therefore, has the same meaning and scope. The fact that the latter provision is placed in Title I, concerning human dignity, clearly shows its essential connection with that fundamental value.

The prohibition against torture is also contained in various international treaties and conventions, which, from this point of view, are considered to reproduce a rule of customary international law. The international case law, in various significant judgments (e.g., ICTY, 10 December 1998, IT-95-17/1-T, *Furundzija*), confirms that this provision is to be considered *jus cogens*.

The Strasbourg Court's case law has clarified that the prohibition on torture and punishments or inhuman and degrading treatment is absolute and mandatory and, as a result, cannot be balanced with the protection of other values, such as the prevention of crime, the fight against terrorism and organised crime (ECtHR, 28 July 1999, *Selmouni v. France*), the prevention of unlawful immigration (ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*), the intention to save other individuals' life (ECtHR, 1 June 2010, *Gäfgen v. Germany*), the need for extraditing or expelling an individual who may pose a serious threat to the community (ECtHR, 28 February 2008, *Saadi v. Italy*).

The prohibition laid down by Art. 3 not only obliges the States to refrain from torture or inhuman or degrading treatments or punishments but also imposes a series of *positive actions* that contemporarily involve the legislative, executive and judiciary powers in order to prevent and repress the breaches of the Convention's provision committed in relations between individuals.

Therefore, Art. 3 would be infringed whenever the recourse to physical force during the arrest of individuals suspected of having committed offences (or otherwise submitted to controls by the police) turns out not to be strictly necessary or is otherwise disproportionate compared with the conduct of the person deprived of his personal liberty (ECtHR, 5 April 2011, *Sarigiannis v. Italy*). The Strasbourg Court is quite strict on this point: for example, even a single slap by a police agent to an individual under his control has been qualified as a 'degrading treatment' (ECtHR, 28 September 2015, *Bouyid v. Belgium*).

Similarly, the Court has followed a criterion based on necessity and proportionality of the use of force with regard to compulsory health measures implemented in order to carry out biological sampling. The Court has thus found a violation of the prohibition on inhuman and degrading treatment in the case of a police officer administering an emetic to a person suspected to have ingested drugs in order to have him regurgitate them even though equally adequate alternative means existed (ECtHR, 11 June 2006, *Jalloh v. Germany*). In the event of abuses carried out deliberately by agents of the State in breach of Art. 3 ECHR, the Strasbourg Court has consistently held that national authority must conduct an in-depth and effective investigation capable of leading to the identification and punishment of those responsible. The Court has highlighted the need for the prosecution of crimes to not be obstructed by the statute of limitations and State agents who have been charged with offences involving ill-treatment to be suspended from duty while being investigated or tried and dismissed if convicted (ECtHR, 1 July 2014, *Saba v. Italy*). The pardon which implies a partial extinguishment of the penalty has also been considered as a measure that may render the authorities' reaction inadequate having regard to the seriousness of the conduct (ECtHR, 7 April 2015, *Cestaro v. Italy*).

As a general rule, the Court has held that an indispensable prerequisite for the discharge of the obligation to investigate and appropriately punish ill-treatment is the concomitant obligation under Art. 3 ECHR for States to have criminal law provisions appropriately penalising acts contrary to that article (ECtHR, 7 April 2015, *Cestaro v. Italy*; ECtHR, 3 November 2015, *Myumyun v. Bulgaria*).

The Strasbourg Court has also found a violation of Art. 3 in those cases in which, notwithstanding the in-depth investigations carried out by the judicial authority, those liable for inhuman treatments have not been punished due to actions (or omissions) of the executive power, such as objecting the existence of State secret (unless it is aimed to preserve information confidentiality) or the failure to request extradition (ECtHR, 23 February 2016, *Nasr and Ghali v. Italy*).

The case law concerning the conditions of detention is particularly significant.

Based on the idea that being 'treated as an object in the power of the authorities' constitutes an assault on human dignity (ECtHR, 25 April 1978, *Tyrer v. United*

Kingdom), the Strasbourg Court has attentively examined the structural characteristics and internal organisation of prisons to verify whether the methods of detention exceed the minimum punishment threshold that should characterise any sanction, and amount, instead, to an inhuman or degrading treatment.

In order to address the issue of prisons overcrowding, the European Court has followed the practice of the European Committee for the prevention of torture and inhuman or degrading treatments or punishments, according to which each inmate is entitled, in his cell, to no less than 7 square meters' space. Based on this criterion, the Court has specified that a violation of Art. 3 can be almost automatically found whenever the inmate has a space lower than 3 square meters (ECtHR, 16/07/2009, *Sulejmanovic v. Italy*), while in the other cases the overall detention conditions must be examined.

The Strasbourg Court has recently also issued pilot judgments, by which some States where prison overcrowding represents a structural problem have been requested to adopt internal preventive and compensatory measures, suitable to ensure compliance with Art. 3 (ECtHR, 10 March 2015, *Varga and Others v. Hungary*; ECtHR, 27 January 2015, *Neshkov and Others v. Bulgaria*; ECtHR, 25 November 2014, *Vasilescu v. Belgium*; ECtHR, 08 January 2013, *Torreggiani v. Italy*; ECtHR, 10 January 2012 *Ananyev and Others v. Russia*). These measures might also involve overhauling practices and provisions that result in an excessive use of pre-trial detention.

The need to respect Art. 3 ECHR has become increasingly significant in the Strasbourg Court's case law, including as a limit to the discretion of state authorities concerning expulsion, extradition and any other form of removal of foreign nationals.

The European Court has held that the Convention's provision prevents Contracting States from adopting these measures where there are serious and proven reasons to believe that the foreign national actually risks being subject to torture or inhuman or degrading treatment in the destination State (ECtHR, 11 January 2007, *Salah Sheekh v. The Netherlands*). Therefore, even in the event of indirect refoulement of foreign nationals, the Court has held that the Contracting State is required to ensure that the person in question would not face a real risk of being subjected to treatment contrary to Art. 3 in the event of repatriation. It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced (ECtHR, 23 February 2012, *Hirsi Jamaa v. Italy*).

Finally, by interpreting the 'horizontal' dimension of Art. 3, the case law of the European Court of Human Rights has held that the State has the obligation to take some positive actions to protect vulnerable individuals (women, minors, individuals belonging to minorities, asylum seekers, etc.) against the violations of the Convention's provision made by private parties in the relations between individuals.

The main cases addressed by the European Court regard family abuses and aggressions by third parties. In this regard, the States must take positive actions to establish a legal framework that is suitable to allow national authorities to prosecute

those liable for serious violations of Art. 3 ECHR, without making the criminal investigations dependent on the pursuance of complaints by the victim (ECtHR, 9 June 2009, *Opuz v. Turkey*; ECtHR, 2 March 2017, *Talpis v. Italy*).

Recently the Grand Chamber of the Strasbourg Court has modified its previous position and has held that 'a grossly disproportionate sentence would violate Art. 3'. It has then clarified that Art. 3 requires reducibility of life sentences, in the sense of a review that allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made, as to mean that continued detention can no longer be justified on legitimate penological grounds. Comparative and international law materials show clear support for the institution of a dedicated mechanism guaranteeing a review no later than 25 years after the imposition of a life sentence, with further periodic reviews thereafter. Where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Art. 3 (ECtHR, 9 July 2013, *Vinter and Others v. United Kingdom*; ECtHR, 23 May 2017, *Matiosaitis and Others v. Lithuania*). Further specification of the circumstances in which a whole life prisoner may seek release, with reference to the legitimate penological grounds for detention, may come through domestic practice (ECtHR, 17 January 2017, *Hutchinson v. United Kingdom*).

3.3.2 The Right to Privacy

3.3.2.1 The Requisites

Over the last years, the Strasbourg Court's case law has been particularly relevant in the context of the legal and political debate on the rules governing telephone tapping. This matter raises issues that go well beyond the boundaries of criminal procedure law and concern the fundamental principles of democracy, such as the limits of the State's interference with the citizens' private life, the freedom of information, the transparency of the conduct of those persons vested with public powers.

Identifying a reasonable balance between the interests at stake necessarily includes a reference to the safeguard standards implied by Art. 8 ECHR, which establishes the right to respect for private and family life, home and correspondence.

Under Art. 8.2, these rights can be restricted, thus permitting interference by the public authorities, if three requirements are satisfied:

(a) the lawfulness of the interference: the Strasbourg Court has shown a strong focus on qualitative aspects of legality by referring to accessibility and foreseeability of the legislative sources and the relevant case law and stressing the need for the citizen to have sufficient information to choose his conduct and reasonably understand the consequences thereof (ECtHR, 26 April 1979, *Sunday Times v. United Kingdom*);

(b) the pursuit of one of the legitimate aims listed in Art. 8.2, which include a wide series of interests of the State and of the public, and the protection of other persons' rights and freedoms;
(c) the necessity of the measure in a democratic society in order to achieve any such aim: therefore, any interference by the State must be proportionate to the legitimate aims pursued.

The European Court of Human Rights has held that Art. 8 ECHR imposes on the States not only the negative obligation to refrain from arbitrarily interfering in private life (and thus from any restricting measures that do not meet the above three conditions) but also the positive obligation to ensure that the possibility to exercise the rights guaranteed by this provision is effective and protects the individual from third-party interference (the so-called indirect horizontal effect) by adopting any necessary legislative, administrative and judicial measures.

Furthermore, the Strasbourg Court has progressively developed an innovative and proactive interpretation, which has led to a wide extension of the scope of application of the provision.

In this scenario, the right to respect for private life has also been connected to personal-data protection, to which the safeguards under Art. 8 ECHR have been extended, as interpreted in light of the Convention of the Council of Europe of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (Art. 2 of the Convention adopts a quite broad definition of 'personal data', which includes any information relating to an identifiable individual). The State has both the negative obligation not to unduly disclose data against the will of the person concerned (ECtHR, 25 February 1997, *Z. v. Finland*; ECtHR, 29 June 2006, *Panteleyenko v. Ukraine)* and the positive obligation to permit that the individual accesses his personal data held by the public authority and has the right to modify them (ECtHR, 26 March 1987, *Leander v. Sweden*). The notion of personal data also includes information taken from banking data (ECtHR, 7 July 2015, *M.N. and Others v. San Marino*).

Furthermore, the case law concerning the acquisition and conservation of footprints and cell and DNA samples for the prevention or repression of crimes is quite significant. The European Court has held that a national legislation that permits the conservation of these elements for an undetermined period of time infringes Art. 8 ECHR whenever such data regard a person whose case has been dismissed or who has been acquitted (ECtHR, 18 April 2013, *M.K. v. France*; ECtHR, 4 December 2008, *S. and Marper v. United Kingdom*). Conversely, the Court has held that the conservation of cell samples of individuals convicted of serious offences in a national DNA database for a period that is limited and proportional to the sentence is legitimate insofar as it is proportionate to the objective to fight crime and protect people's rights and freedoms (ECtHR, 20 January 2009, *W.C. v. The Netherlands*).

The interpretation of the concept of correspondence is also broad and includes any private communication, such as telephone conversations, emails (ECtHR, 3 April 2007, *Copland v. United Kingdom*) and various types of messages.

With a view to avoiding any restrictive interpretation of the right to private life, the European Court of Human Rights has extended the notion of 'home' to a company's registered office, branches and other facilities belonging to a company (ECtHR, 16 April 2002, *Société Colas Est and Others v. France*).

Article 7 of the EU Charter of Fundamental Rights has a wording that is similar to Art. 8 ECHR. However, in order to take the technological evolution into account, the former provision refers to 'communications' instead of 'correspondence' and does not expressly list the conditions to which the interference of public powers is subject, although, due to the operation of the 'equivalence clause' between the two texts, those limits are the same as those indicated in Art. 8.2 ECHR, as the 'explanations' to the Charter confirm.

It is worth noting that several rights that the Strasbourg Court has inferred from the interpretation of Art. 8 ECHR have been explicitly regulated by specific provisions of the Charter.

In particular, Art. 8 of the Charter of Fundamental Rights expressly grants every individual the right to personal data protection and sets some principles on the methods for and entitlement to the processing thereof, providing for the right to access and rectify the data and to request that the control over these rules be attributed to an independent authority.

The right to personal data protection is reaffirmed by Art. 16 TFEU, which requires the adoption, through the ordinary legislative procedure, of rules relating to the protection of individuals with regard to the processing of data by European institutions when carrying out activities falling within the scope of EU law and rules relating to the free movement of such data.

In addition to the issue of protecting the public from the new challenges posed by crimes, by also developing innovative forms of cooperation based on the 'principle of availability of information' (see Sect. 6.1.7), the issue of protection of personal data security must be addressed.

Both issues have been addressed in the Prüm Treaty of 2005, which has been incorporated in the EU law by Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal proceedings.

This latter legislative instrument will be replaced by the new Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and on the free movement of such data.

The scope of the Directive is broader than the previous Framework Decision. Not only does the Directive regulate the cross-border exchange of data but also the processing of personal data carried out within each individual national legal system by the competent authorities (which may include judicial and police bodies or other bodies exercising public powers) for purposes of prevention, investigation, detection or prosecution of offences or execution of criminal penalties, including the prevention of and protection against threats to public security, provided that these activities fall within the application scope of EU law.

According to the general principles established by the Directive, personal data must be (a) processed lawfully and fairly; (b) collected for specified, explicit and legitimate purposes and processed consistently with such purposes; (c) adequate, relevant and not excessive in relation to the purposes of the processing; (d) accurate and, where necessary, updated (to this end, the States must adopt all reasonable measures to timely erase or rectify inaccurate data); (e) kept in a form that permits identification of data subjects for no longer than is necessary for the purposes of the processing; (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

Member States must establish one or more independent public authorities (supervisory authorities), responsible for monitoring the application of the Directive in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union. These supervisory authorities must be granted investigative, corrective, advisory powers, as well as the power to bring infringements of provisions adopted pursuant to the Directive to the attention of judicial authorities. However, they shall not be competent for the supervision of processing operations of judicial authorities when acting in their judicial capacity.

Member States must require that the data controller carries out a previous impact assessment on personal data protection when it is likely that a type of processing, in particular, using new technologies, results in a high risk to the individuals' rights and freedoms.

Data subjects are granted the right to information, access to, rectification or erasure of personal data. In certain cases, limitation of the processing can replace the erasure. The data subject who considers that the processing of personal data relating to him infringes provisions adopted pursuant to the Directive has the right to lodge a complaint with a single supervisory authority and the right to an effective judicial remedy against legally binding decisions of a supervisory authority concerning him.

Furthermore, data subjects are entitled to receive compensation for the material or non-material damage caused by an unlawful processing or any other act infringing national provisions adopted pursuant to the Directive.

Member States may adopt legislative measures restricting, wholly or partly, the rights to information and access, insofar as these measures are necessary and proportionate, in a democratic society, in order to avoid obstructing investigations; to avoid prejudicing the prevention, detection, prosecution of criminal offences or the execution of criminal penalties; or to protect public security, national security and other individuals' rights and freedoms.

Article 10 of the Directive provides specific rules for the processing of particular categories of personal data, and namely the 'sensitive data', which reveal ethnical or racial origin, religious or philosophical beliefs, trade union membership, political opinions, as well as genetic, biometric or health data or data concerning sexual life or sexual orientation. In such cases, the processing is permitted only if these conditions

are satisfied: (a) it is strictly necessary, (b) there are appropriate safeguards for the rights and freedoms of the data subject, (c) it is authorised by law to protect a vital interest of the data subject or of another individual, or it relates to data that are manifestly made public by the data subject.

The transfer of personal data to third countries (or international organisations) remains subject to the purposes that limit the scope of application of the Directive and to the existence of adequate guarantees to protect the purpose thereof.

3.3.2.2 Privacy and Interception of Communications

With reference to the interception of communications, the European Court of Human Rights has established stricter criteria than those usually followed in interpreting Art. 8 ECHR by identifying a minimum core of guarantees from three interconnected points of view. Such interference is justified only if it is 'in accordance with the law', pursues one or more of the legitimate aims referred to in Art. 8.2 and is 'necessary in a democratic society' in order to achieve that aim (see ECtHR, 10 February 2009, *Iordachi v. Moldova*; ECtHR, 29 May 2001, *Taylor-Sabori v. United Kingdom*).

The principles regarding the basis in domestic law are particularly significant. The awareness of the clear risk of arbitrary decisions, which is inherent in a power exercised in secret, has led the Strasbourg Court to underline the need for clear and detailed rules on interceptions, which identify the scope of discretion and the modes of exercise of the power attributed to competent authorities and provide a clear indication to citizens as to the circumstances and conditions that permit resorting to these measures.

The parameters to be used to verify the 'democratic necessity' that justifies the interference of the public authority include the proportionality and the need that it be submitted to an adequate and effective review system (ECtHR, 24 April 1990, *Kruslin v. France*). Review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out or after it has been terminated (ECtHR, 4 December 2015, *Roman Zakharov v. Russia*).

In this scenario, the minimum safeguards that national legislation must provide so as to prevent abuses of power have been held to include the following:

- indicating the nature of the offences that may give rise to an interception order;
- defining the categories of people liable to have their telephones tapped (suspects, accused persons, persons who may have information about an offence or may have other information relevant to the criminal case);
- predetermining the types of communications that may be intercepted;
- limiting the duration of the interceptions (the overall duration of interception may be left to the discretion of the relevant domestic authorities that have competence to issue and renew interception warrants, provided that adequate safeguards exist, such as a clear indication in the domestic law of the period after which an

interception warrant will expire, the conditions under which a warrant can be renewed and the circumstances in which it must be cancelled);
– indicating the procedures to be followed for storing, accessing, examining, using, communicating and destroying the intercepted data (specifically, the precautions to be taken to communicate the wiretapping entirely so as to make possible the examination thereof by the judge and the defence; the cautions to be adopted in communicating the data to other parties; the circumstances in which the intercepted material may be stored after the end of the trial; the cases in which recordings must be destroyed, in particular in the event that the accused person is acquitted): it is necessary to minimise the risk of unauthorised access or disclosure and to destroy immediately any data that are not relevant to the purpose for which they have been obtained;
– regulating the authorisation procedures (in particular, the authority competent to authorise the surveillance, its scope of review and the content of the interception authorisation), the supervision of the implementation of secret surveillance measures, the authorities' access to communications, the subsequent notification of interception of communications and the available remedies before the courts.

The authority competent to authorise telephone tapping may be a non-judicial authority, provided that it is sufficiently independent from the executive. Its scope of review must be capable of verifying the existence of a reasonable suspicion against the person concerned and the requirement of 'necessity in a democratic society', including whether the requested interception is proportionate to the legitimate aims pursued, by verifying, for example, whether it is possible to achieve the aims by less restrictive means. As regards the content of the interception authorisation, it must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered.

Although it is in principle desirable to entrust supervisory control to a judge, supervision by non-judicial bodies may be considered compatible with the Convention, provided that the supervisory body is independent of the authorities carrying out the surveillance and is vested with sufficient powers and competence to exercise an effective and continuous control.

It may not be feasible in practice to require subsequent notification of surveillance measures in all cases. However, as soon as notification can be carried out without jeopardising the purpose of the restriction after the termination of the surveillance measure, information should be provided to the persons concerned. The question of subsequent notification is linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers. There is in principle little scope for recourse to the courts by the individual concerned unless he is advised of the measures taken and thus able to challenge their legality retrospectively or, in the alternative, unless any person who suspects that his communications have been intercepted can apply to courts (ECtHR, 4 December 2015, *Roman Zakharov v. Russia*).

From another point of view, in some judgments (ECtHR, 17 July 2003, *Craxi v. Italy*) based on the idea that Art. 8—as mentioned in general—imposes on the

States a positive obligation to ensure actual compliance with the privacy rules, the Strasbourg Court has held that national authorities must prevent the publication on the press of intercepted telephone conversations of a strictly private nature that are irrelevant in the criminal proceedings. If the measures aimed at preventing the dissemination prove to be insufficient, national authorities must commence an investigation to clarify how the press has had access to these documents and to punish, where necessary, those responsible for the violations of the law. The Court has held that the State that has not complied with the obligation to organise its services and to train its personnel so as to ensure a safe keeping of telephone interceptions and to prevent secret information from being disclosed shall be held responsible (ECtHR, 3 February 2015, *Apostu v. Romania*).

There is a compatibility problem with Art. 8 ECHR also with reference to the acquisition of 'external data' of telephone communications (the 'call records'). The Strasbourg Court has held that the use of information regarding the dates, the telephone called and the duration of communications as evidence infringes the right to respect for private life exactly as telephone interceptions do, and, therefore, may only be made in the presence of analogous conditions (ECtHR, 1 March 2007, *Heglas v. Czech Republic*; ECtHR, 2 August 1984, *Malone v. United Kingdom*).

The same applies to strategic monitoring, i.e. systems for the control of communication flows of users of IT services residing in a State (for example, by filtering communications through search engines for terrorism prevention purposes). Therefore, there is violation of Art. 8 whenever the domestic legislation does not specify, in a form accessible to the public, the procedures followed to select, examine, share, keep and destroy the intercepted material (ECtHR, 1 July 2008, *Liberty and Others v. United Kingdom*; ECtHR, 29 June 2006, *Weber and Saravia v. Germany*).

A lesser interference with private life has been found with regard to surveillance of movements in public places via GPS. It has been held that only the most general principles of protection against arbitrary interference with the rights granted by Art. 8 ECHR apply to this case, instead of the more stringent principles concerning the control of telecommunications (ECtHR, 2 September 2010, *Uzun v. Germany*).

The European Union legal system lacks an exhaustive regulation of interceptions of communications. Although Directive 2014/41/EU, regarding the European Investigation Order in criminal matters (EIO), permits resorting to this instrument also to intercept telecommunications, Arts. 30 and 31, which regulate 'interception of telecommunications with technical assistance of another Member State' and 'notification of the Member State where the subject of the interception is located from which no technical assistance is needed', respectively, do not depict a complete framework of minimum standards to observe in conducting these investigation activities. More specifically, Art. 30 only provides that the EIO issued for the interception of telecommunications in another Member State whose technical assistance is necessary must contain the information needed to identify the subject of the interception; the desired duration of the interception; sufficient technical data, in particular the target identifier, to ensure that the EIO can be executed. Furthermore, it establishes that the executing State may make its consent subject to any conditions

that would be observed in a 'similar domestic case'. Thus, harmonisation in this important sector appears to be completely insufficient.

3.3.3 The Protection of Victims

3.3.3.1 The Victim's Disadvantaged Place in the Council of Europe Conventions

In this presentation of the content of the fundamental European rights guaranteed in criminal proceedings, the special attention to the victim's rights cannot be overlooked.

Within the Council of Europe, this area has not really seen much development. Suffice it to say that the person affected by the offence is not taken into consideration as such by the ECHR, which, when talking about 'victims', refers generally to anyone who has suffered a violation of his rights guaranteed under the Convention. And this underestimation of the victim has only been partially addressed by some judicial decisions and Convention provisions.

With regard to case law, within the ECHR system, besides recognising the victim's ability to enforce his civil claims in the criminal proceedings, some indirect forms of victim protection were developed by the Strasbourg Court, where it held, for example, that investigations into alleged unlawful killing (including manslaughter) committed by State agents must be effectively carried out, not secretly, by an authority independent from the one to which the agents involved belong and must ensure the participation of the victim's family members (ECtHR, 4 May 2001, *Jordan v. United Kingdom*) or when it ruled out that the statute of limitations may make void the proceedings or the sentences for crimes committed in breach of Arts. 2 and 3 ECHR (ECtHR, 29 March 2011, *Alikaj v. Italy*; ECtHR, 1 July 2014, *Saba v. Italy*).

As for other international law sources, of note is the European Convention on the Compensation of Victims of Violent Crime, signed in Strasbourg on 24 November 1983, which, for reasons of social solidarity and equity, imposes on the State the obligation to contribute to compensation of damages in favour of individuals who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence and of the dependants of persons who have died as a result of such crime in cases where they may not be fully compensated otherwise and even though the offender cannot be prosecuted or punished.

This Convention has been a model for the following EU initiatives, in particular Directive 2004/80/EC.

3.3.3.2 The Protection of Victims Under the European Union Law Before the Treaty of Lisbon

Under European Union law, higher regard is given to the victim of crime. In fact, by means of the guarantees ensured to the victim, the European legislation has made its

largest contribution to setting higher standards for the protection of fundamental rights in criminal proceedings. This largely depends on the fact that giving due consideration to the victims was consistent with the repressive approach followed in the field of judicial cooperation in criminal matters.

From this latter viewpoint, the need to look at the procedural system also 'from the victim's perspective' was brought up with particular intensity already before Treaty of Lisbon's entry into force.

In this regard, the Framework Decision on the standing of victims in criminal proceedings (2001/220/JHI) established a 'charter of victims' rights', requiring Member States to implement a series of updates to their internal legal systems.

This Framework Decision was replaced by Directive 2012/29/EU, which we will take up a little later.

Another significant document issued before the Treaty of Lisbon was Directive 2004/80/EC, relating to compensation to crime victims (concerning cross-border situations, in which a violent intentional crime was committed in a State other than the one where the applicant for compensation is habitually a resident).

The Directive deals with judicial cooperation, as well as legislative harmonisation.

In fact, it introduces a system of cooperation aimed at facilitating access to compensation by victims of violent crimes in cross-border situations and at the same time enhances the State's solidarity requiring it to compensate the damages caused by the criminal offences committed within its borders to victims residing abroad, where other ways to obtaining compensation are foreclosed.

3.3.3.3 The Treaty of Lisbon and the Roadmap for Strengthening the Rights and the Protection of Victims

With the Treaty of Lisbon, the effort of European institutions aimed at raising the standards of protections of victims now has a 'legal basis' under Art. 82.2 TFEU, which allows for the adoption, through ordinary legislative procedure, of directives aimed at establishing 'minimum rules' on the rights of victims of crimes.

The programmed harmonisation of the national legislation of Member States is aimed to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters having a cross-border dimension.

The directives implementing this European legal framework are based on the resolution approved on 10 June 2011 by the EU Council, for the 'roadmap' for strengthening the rights and protection of victims, in particular in criminal proceedings.

This guiding document identifies a set of priority measures to be taken to guarantee a minimum level of victims' rights, support and protection throughout the European Union, regardless of their place of origin or residence.

Some scheduled measures under the 'roadmap' have already been implemented: in particular, Directive 2012/29/EU, which replaced Framework Decision 2001/220/JHA, on the standing of victims in criminal proceedings, and Regulation 606/2013/

EU regarding mutual recognition of protection measures in civil matters. The other measures are (a) one or more recommendations aimed at identifying the best practices in Member States and in non-governmental organisations related to victim assistance and protection, to facilitate the internal implementation of Directive 2012/29; (b) the revision of Directive 2004/80/EC on the compensation of victims of crime mentioned above; and, finally, (c) the introduction of a specific legislation related to the fight against certain types of crimes involving particular victim needs, such as trafficking in human beings, sexual exploitation of children (which are the subject of Directives 2011/36/EU and 2011/92/EU), terrorism (about which Directive 2017/541/EU was adopted) and organised crime.

3.3.3.4 Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime

Currently, the European Union's basic rules regarding victims are established in Directive 2012/29/EU, which provides 'minimum standards' on the rights, support and protection of victims. It replaces the earlier Framework Decision 2001/220/JHA, keeping some provisions but also introducing some important new rules.

With regard to the first aspect, the wide scope that it provides for the definition of 'victim' is noteworthy, covering not only the person who has suffered harm directly caused by a criminal offence but also the family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of the death (the definition is still limited to natural persons and excludes legal entities).

The Directive refers to three categories of measures: those related to information and support for victims, those related to their participation in the proceedings and those aimed at their protection.

The main measures concerning information and support to be taken into account are the victim's right to obtain information, in an understandable form that is relevant to the protection of his or her interests, from the time of first contact with the competent authorities and during the course of the proceedings (with contents such as the right to be informed of the suspect's release or escape); the right to interpretation and translation; the right of access to specific confidential support services offered free of charge, which can weigh heavily on the decision to report the crime.

Of particular significance are the provisions concerning participation in the criminal proceedings, which first include specific evidentiary safeguards, requiring the State to grant the victim the opportunity to be heard during the proceedings and to submit evidence.

A set of rights is also attributed to the victims and involves several aspects of criminal proceedings, such as the following:

- the right to a review of a decision to not prosecute;
- the right to legal aid and to reimbursement of expenses incurred as a result of their active participation in criminal proceedings (though subject to conditions established by national law);

– the right to return without delay of seized property belonging to the victim, unless required for the purposes of criminal proceedings;
– the right to obtain a decision on compensation by the offender, within a reasonable time in the course of criminal proceedings, except where national law provides for such a decision to be made in other legal proceedings (accordingly, not simply the right to exercise the related right in criminal proceedings).

In addition, States are required to facilitate the referral of cases to mediation and other restorative justice services, even though the recourse to such service be subject to several conditions, to prevent repeated victimisation, including the service functionality and the interests of the victim.

Particular attention is given to the rights of the victims resident in another Member State as regards the manner of taking their statements (which can be done immediately after the complaint relating to the criminal offence is made), the recourse to international video conferencing and the possibility to make a complaint to the competent authorities of the Member State of residence.

One of the areas substantially upgraded by the Directive consists of the provisions governing protection of victims and their vulnerability.

A general recognition of this right is provided in Art. 18, which requires States to ensure that measures are available to protect victims and their family members from secondary victimisation, intimidation and retaliation, as well as protecting the victims' dignity during questioning or when testifying.

The protection of the victim is then divided out into a number of specific guarantees such as the right to avoid contact with the offender within premises where criminal proceedings are conducted; the right to protection during the criminal investigation, inter alia by limiting interviews and medical examinations to a minimum; the right to protection of the privacy of the victims and their family members.

The specific protection needs of each victim and the special measures that are to be applied (such as interviews carried out in premises designed for that purpose, through professionals specifically trained, or appropriate means, including the use of communication technology, to avoid visual contact between victims and offenders and to ensure that the victim may be heard in the courtroom without being present) must be identified by means of an individual assessment, in which the personal characteristics of the individual and the type, nature and circumstances of the crime come into play. Still, it is expected that the vulnerability of child victims will require further specific measures of protection. In this context, particularly important is the dual obligation of enhanced documentation through audiovisual recording of all interviews with the child victim conducted during investigation and of possible evidentiary use of such recorded interviews in the criminal proceedings.

This dual obligation raises serious questions as to the consistency with EU law of those national legislation that, on the one hand, permit other forms of documentation of interviews with the child victim during the course of an investigation and, on the other hand, preclude their evidentiary use at trial.

Again, in terms of vulnerability, the directive addresses the requirement to take into due consideration victims of terrorism, organised crime, human trafficking,

gender-based violence, violence in close relationships, sexual violence, exploitation or hate crime and victims with disabilities.

3.3.3.5 The Protection of Victims of Human Trafficking and Sexual Exploitation of Children: Directives 2011/36/EU and 2011/93/EU

The above-said general legislative instruments are accompanied by others aimed at protecting victims of specific crimes, such as trafficking of human beings and sexual exploitation of minors.

In these two important areas of criminal law, on the basis of provisions introduced by Arts. 82 and 83 TFEU, two legislative instruments were adopted: namely, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, which, adopting the perspective of a global approach against these criminal conducts, introduced several uniform and highly innovative principles. As to the substantive law, they laid down a set of obligation to criminalise certain facts, as well as introducing several types of liability (including of legal entities) and multiple punishment options (including confiscation of property and assets).

As to the criminal procedure, the States are required to take measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on the victims involved in criminal activities that they were compelled to commit as a direct consequence of being subjected to crimes related to the trafficking of human beings or the abuse of exploitation of minors and child pornography (Art. 8 Directive 2011/36/EU and Art. 14 Directive 2011/93/EU).

To ensure victim immunity from prosecution, national legal systems will therefore be called upon to establish, depending on the respective basic principles, guidelines for commencing criminal proceedings, grounds for dismissal or appropriate substantive provisions of criminal law.

The provision of victim immunity from prosecution is particularly important, especially taking into account the wide scope of the notion of 'trafficking of human beings' within Directive 2011/36/EU, which encompasses any form of exploitation of illegal activities, thus a rather broad formulation that includes exploitation of an individual to make him commit pickpocketing, shoplifting, drug trafficking, as well as any other significant criminal activity producing financial gain.

Additionally, in order to relieve victims from the pressure of criminal environments, both directives establish the principle of official prosecution of crimes covered in them. In this way, not only the prosecution is independent from the filing of a complaint or the making of a report by the victim, but the criminal proceedings may also continue if the victim (as often happens) withdrawn his or her statements.

Similarly to Directive 2012/29/EU, these two directives also provide for enhanced documentation and evidentiary use (according to internal rules) for all interviews (including those conducted by the public prosecutor and the law enforcement authorities during investigations) involving child victims or witnesses to the

crimes in question. Moreover, they impose a general obligation to assist and support victims, aimed at the exercise of all rights granted to them, regardless of their willingness to cooperate with the judicial authorities.

3.3.3.6 The Protection of Victims of Terrorism: Directive 2017/541/EU

Another legislative instrument aimed at protecting victims of specific crimes is the recent Directive 2017/541/EU on combating terrorism. According to this Directive, Member States are obliged to adopt measures of protection, support and assistance responding to the specific needs of victims of terrorism.

In particular, under Art. 24, it is necessary to put in place support services addressing the specific needs of victims of terrorism; such services must be available immediately after a terrorist attack and include emotional and psychological support; provision of advice and information on any relevant legal, practical or financial matter; assistance with claims regarding compensation under national law.

Under Art. 25, when determining whether victims of terrorism should benefit from protection measures in the course of criminal proceedings, particular attention shall be paid to the risk of intimidation and retaliation and to the need to protect their dignity and physical integrity, including during questioning and when testifying.

Article 26 regulates the rights of victims of terrorism resident in a Member State other than that where the terrorist offence was committed. Firstly, it is necessary to grant them the effective access to information regarding their rights, as well as the available support services and compensation schemes in the Member State where the terrorist offence was committed. Moreover, the Member States are obliged to ensure that all victims of terrorism have access to long-term support services in the Member State of their residence.

3.3.3.7 Directive 2011/99/EU on the European Protection Order

The need to introduce a consistent and comprehensive set of measures regarding the rights of victims is the basis of another legislative instrument applying the principle of mutual recognition of judicial decisions: namely, Directive 2011/99/EU on the European Protection Order (EPO).

The purpose of this Directive is to ensure that the protection provided to an individual in a Member State is maintained when the individual relocates (temporarily or permanently) to another Member State. It aims to prevent a 'loss of security' arising from the exercise by European citizens of their right to move freely within the European Union. More specifically, an EPO may be issued in the presence of previous measures aimed at protecting life, physical or psychological integrity, dignity, personal liberty or sexual integrity, which involve the imposition of prohibitions or restrictions, such as prohibition from entering certain places where the protected person resides and prohibition or a regulation on approaching the protected person closer than a prescribed distance.

So as to ensure that protection of a victim is effective and continues in the foreign country where the individual resides or decides to relocate, the judicial authority of the issuing State is granted the power to issue an EPO upon the request of the victim. On the basis of the EPO, the judicial authority of the executing State shall order measures—of a criminal, administrative or civil nature—that would be issued under national laws in a similar case.

3.3.4 Guarantees in Seizure and Confiscation of Property Proceedings

3.3.4.1 Guarantees Under the ECHR Framework

This study on the contents of fundamental rights cannot be concluded without mentioning a matter that is destined to have greater importance at the European level: this refers to the protection that may be afforded individuals possessing property subject to seizure or confiscation, measures that in the recent years have gone through a phase of intense and dynamic development, leading to their growing use in strategies to combat economic and organised crime.

In this regard, noteworthy are—in addition to principles of fair trial—the provisions contained in the only conventional instrument concerning the protection of an economic right: Art. 1 Protocol 1 to the ECHR, which lays down the principle under which 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'; makes the deprivation of possessions subject to conditions provided for by law, as well as limits of public interest; and recognises the right of a State to enforce laws necessary to control the use of property in accordance with the general interest.

Like those set out in other ECHR provisions, the concepts included in Art. 1 Protocol 1 have an autonomous meaning. More specifically, the notion of 'possession' includes not only movable or immovable property but also other established economic interests, such as intellectual property, company shares, contractual rights, judgment debts, rights *in personam* deriving from public law relationships and assets, including claims, in respect of which a person has a 'legitimate expectation' of obtaining effective enjoyment of a property right, where there is a settled case law of the domestic courts confirming it (ECtHR, 12 October 2010, *Maria Atanasiu and Others v. Romania*). The notion of 'deprivation of possessions' includes expropriation, as well as nationalisation.

The case law of the Court of Strasbourg has considered as types of control of the use of property, covered by the provisions of Art. 1.2 Protocol 1, not only interferences short of deprivations and restrictions imposed on activities of individual and legal persons but also forfeiture and confiscation orders, within the scope of criminal law or for preventive purposes, even though such orders lead to a deprivation of property, and also when the confiscated assets belong to a third party, who has

remained outside of the proceedings (ECtHR, 5 May 1995, *Air Canada v. United Kingdom*; ECtHR, 5 July 2001, *Arcuri and Three Others v. Italy*).

Starting with the premise that interference by the public authority with property rights must be provided by law, pursue purpose in the public interest and be necessary in a democratic society, the European Court confirmed the need to respect the principle of legality and the principle of proportionality (which requires that a fair balance be struck between the general interest of the community and the protection of the individual's fundamental rights) in relation to all types of forfeiture and confiscation.

The principle of legality has not been given a formal meaning because the autonomous meaning of the term 'law' includes judge-made law as well as legislation. However, this principle is particularly important with regard to the 'Convention control' because it implies qualitative requirements, notably those of accessibility, precision and foreseeability of the provisions of domestic law; furthermore, the principle requires the establishment of procedural safeguards, designed to ensure adequate protection of property rights against arbitrary use of public power.

In addition to substantive protection of property rights, ensured by Art. 1 Protocol 1, there are the principles of 'fair trial' contained in Art. 6 ECHR, which are applied to measures affecting property differently depending on the criminal or non-criminal nature of the forfeiture and confiscation order.

In the former case, when the confiscation is interpreted as a criminal penalty—even though national laws classify it as an administrative measure—the presumption of innocence and the rights of the accused provided for by Art. 6.2–3 ECHR also apply (ECtHR, 1 June 2007, *Geerings v. The Netherlands*; ECtHR, 20 January 2009, *Sud Fondi and Others v. Italy*). Furthermore, a following judgment of the Court of Strasbourg has ruled out the use of confiscation as a criminal penalty without a conviction (ECtHR, 29 October 2013, *Varvara v. Italy*, regarding a case in which the criminal offence had been time-barred). Similar cases have been referred to the Grand Chamber on 25 March 2015 (*G.I.E.M. s.r.l. and Others v. Italy*).

On the contrary, when a confiscation or forfeiture order is issued in *in rem* proceedings, which are regarded as non-criminal and are not based on a conviction, only the general rights contained in Art. 6.1 apply. The prototype of this model is represented by civil forfeiture increasingly widespread in *common law* countries; also the Italian system of patrimonial prevention measures has been included in this category. Such measures are considered as forms of control of the use of property in accordance with the general interest, allowed by Art. 1.2 Protocol 1. They are designed to prevent the commission of offences and do not involve the determination of a criminal charge; consequently, they may be used also against persons who have been acquitted in separate criminal proceedings (ECtHR, 28 October 2004 and 16 March 2006, *Bocellari and Rizza v. Italy*).

However, the European Court has held that in all types of confiscation proceedings an opportunity for effective judicial review must be provided, which allows any interested party to submit his arguments, including those based on good faith, in opposition to the seizure and confiscation (ECtHR, 20 January 2009, *Sud Fondi and Others v. Italy*).

3.3.4.2 Guarantees Under European Union Law

Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (see Sect. 12.2.1) provides guarantees and remedies aimed at protecting the rights of suspects and accused persons, as well as the rights of third parties.

To this end, Art. 8 of the Directive imposes on Member States the obligation to take the necessary measures to ensure that the persons affected by such orders have the right to an effective remedy and a fair trial.

In addition, the Directive requires Member States to provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court and for the person in respect of whom confiscation is ordered to challenge this order before a court.

Lastly, the protection of the rights of third parties, who have other property rights, is also granted, in particular through the 'right to be heard', as indicated in recital 33.

Finally, of particular significance are the provisions contained in Art. 10 of the Directive, which make express reference to the establishment of 'centralised offices, a set of specialised offices or equivalent mechanisms', in order to ensure the adequate management of property frozen with a view to a possible subsequent confiscation, and require Member States to consider taking measures allowing confiscated property to be used for public interest or social purposes.

Such measures could include, *inter alia*, earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures.

Further Reading

Addo MK, Grief N (1998) Does Article 3 of the European Convention on Human Rights enshrine absolute rights? Eur J Int Law, pp 510 ff

Aguado Correa T (2015) La Directiva 2014/42/UE sobre embargo y decomiso en la Unión Europea: una solución de compromiso a medio camino. Revista General de Derecho Europeo, no. 35

Allegrezza S, Covolo V (2016) The Directive 2012/13/Eu on the right to information in criminal proceedings: status quo or step forward? In: Durdevic Z, Ivicevic Karas E (eds) European criminal procedure law in service of protection if the Union financial interests: state of play and challenges. Croatian Association of European Criminal Law, Zagreb, pp 41 ff

Androulakis IN (2014) European perspectives on rights for victims of crime. Eucrim, pp 111 ff

Arangüena Fanego C (2014) El derecho a la asistencia letrada en la directiva 2013/48/UE. Revista General de Derecho Europeo, pp 1 ff

Ashworth A (2008) Self-Incrimination in European Human Rights Law. A pregnant pragmatism. Cardozo Law Rev, pp 751 ff

Bachmaier Winter L (2015) The EU Directive on the right to access to a lawyer: a critical assessment. In: Ruggeri S (ed) Human Rights in European Criminal Law. New developments in European legislation and case law after the lisbon Treaty. Springer, Heidelberg, pp 111 ff

Balsamo A, Kostoris RE (eds) (2008) Giurisprudenza europea e processo penale italiano. Giappichelli, Torino
Becerril J, Lopez R (2011) The European Protection Order. Eucrim, pp 76 ff
Berger M (2007) Self-Incrimination and the European Court of Human Rights: procedural issues in the enforcement of the right to silence. Eur Human Rights Law Rev, pp 514 ff
Biral M (2014) The right to examine or have examined witnesses as a minimum right for a fair trial: pitfalls and trends. Eur J Crime Crim Law Crim Justice, pp 331 ff
Cape E, Hodgson J (2014) The right to access to a lawyer at police station: making the European Union Directive work in practice. New J Eur Crim Law, pp 450 ff
Chenal R, Gambini F, Tamietti A (2012) Commento all'art. 6. In: Bartole S, De Sena P, Zagrebelsky V (eds) Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. Cedam, Padova, pp 172 ff
Chiavario M (2001) Commento all'art. 6. In: Bartole S, Conforti B, Raimondi G (eds) Commentario alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. Cedam, Padova, pp 153 ff
Cocq CC (2016) EU data protection rules applying to law enforcement activities: towards an harmonised legal framework? New J Eur Crim Law, pp 263 ff
Costa Ramos V (2016) The rights of the defence according to the ECtHR: an illustration in the light of A.T. v. Luxembourg and the right to legal assistance. New J Eur Crim Law, pp 397 ff
Coventry T (2017) Pretrial detention. Assessing European Union competence under Article 82 (2) TFEU. New J Eur Crim Law, pp 43 ff
Cras S, De Matteis L (2010) The Directive on the right to interpretation and translation in criminal proceedings. Eucrim, pp 153 ff
Cras S (2014) The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings. Eucrim, pp 32 ff
Cras S (2016) The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings genesis and descriptive comments relating to selected articles. Eucrim, pp 109 ff
Cras S, Erbežnik A (2016) The Directive on the presumption of innocence and the right to be present at trial. Eucrim, pp 25 ff
Cras S (2017) The Directive on the right to legal aid in criminal and EAW proceedings. Genesis and description of the sixth instrument of the 2009 Roadmap. Eucrim, pp 34 ff
Daniele M (2014) Testimony through a live link in the perspective of the right to confront witnesses. Crim Law Rev, pp 189 ff
de Hert P, Papakonstantinou V (2016) The new police and criminal justice data protection Directive: a first analysis. New J Eur Crim Law, pp 7 ff
de Jong F, van Lent L (2016) The presumption of innocence as a counterfactual principle. Utrecht Law Rev, pp 32 ff
Dennis I (2011) The human rights act and the law of criminal evidence: ten years on. Sydney Law Rev, pp 333 ff
De Valkeneer C (2009) La provocation policière à la lumière de la jurisprudence de la Cour européenne des droits de l'homme. Revue trimestrielle des droits de l'homme, pp 211 ff
De Wet E (2004) The prohibition of torture as an international norm of jus cogens and its implications for national and customary law. Eur J Int Law, pp 97 ff
Di Chiara G (2013) The protection of the right of freedom on the European Union Level: the European arrest warrant and non-custodial pre trial measures. The guideline of the principle of proportionality: an interpretive perspective. In: Ruggeri S (ed) Transnational inquiries and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg, pp 241 ff
Esen R (2012) Intercepting communications 'In Accordance with the Law'. J Crim Law, pp 164 ff
François L (2007) La procédure italienne par contumace confrontée aux exigences européennes du procès équitable. Revue trimestrielle des droits de l'homme, pp 521 ff
Gambini R, Salvadori M (eds) (2009) Convenzione europea sui diritti dell'uomo: processo penale e garanzie. ESI, Napoli

Gialuz M, Spagnolo P (2012) Commento all'art. 5. In: Bartole S, De Sena P, Zagrebelsky V (eds) Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali. Cedam, Padova, pp 107 ff
Gillespie A, Bettinson V (2007) Preventing secondary victimisation through anonymity. Mod Law Rev, pp 114 ff
González Monje A (2016) La presunción de inocencia en la Unión Europea: Directiva 2016/343 del Parlamento Europeo y del Consejo de 9 de marzo de 2016 por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y el derecho a estar presente en el juicio. Revista General de Derecho Europeo, no. 39
Grasso G, Sicurella R (eds) (2007) Lezioni di diritto penale europeo. Giuffrè, Milano
Groenhuijsen MS, Pemberton A (2009) The EU framework decision for victims of crime: does hard law make a difference? Eur J Crime Crim Law Crim Justice, pp 43 ff
Harris D, O'Boyle M, Warbrick C (2014) Law of the European Convention on Human Rights. Oxford University Press, Oxford
Henzelin M, Rordorf H (2014) When does the length of criminal proceedings become unreasonable according to the European Court of Human Rights? New J Eur Crim Law, pp 78 ff
Hoyano LCH (2001) Striking a balance between the rights of defendants and vulnerable witnesses: will special measures directions contravene guarantees of a fair trial? Crim Law Rev, pp 968 ff
Jacobs FG, White RCA, Ovey C (2010) The European Convention on Human Rights. Oxford University Press, Oxford
Jackson JD (2005) The effect of Human Rights on criminal evidentiary processes: towards convergence, divergence or realignment? Mod Law Rev, pp 737 ff
Jackson JD, Summers SJ (2012) The internationalisation of criminal evidence. Cambridge University Press, Cambridge
Jebens SE (2007) The scope of the presumption of innocence in article 6 paragraph 2 of the Convention: especially on its reputation-related aspect. Liber amicorum Luzius Wildhaber – Human Rights – Strasbourg Views/Droits de l'homme – Regards de Strasbourg. Engel Verlag, Kehl, pp 207 ff
Jimeno-Bulnes M (2017) The use of intelligence information in criminal procedure. A challenge to defence rights in the European and the Spanish panorama. New J Eur Crim Law, pp 171 ff
Klip A (2015) On victim's rights and its impact on the rights of the accused. Eur J Crime Crim Law Crim Justice 23(3):177 ff
Kloth M (2010) Immunities and the right of access to court under Article 6 of the European Convention on Human Rights. Martinus Nijhoff, Leiden
Kostoris RE (ed) (2005) La ragionevole durata del processo. Garanzie ed efficienza della giustizia penale. Giappichelli, Torino
Kostoris RE (2016) Equità, processo penale, diritto europeo. Riflessioni di un giurista di civil law. Rivista italiana di diritto e procedura penale, pp 1653 ff
Kuty F (2006) Justice pénale et procès équitable. Larcier, Bruxelles
Lamberigts S (2016) The Directive on the presumption of innocence. A missed opportunit for legal person? Eucrim, pp 36 ff
Lamberigts S (2016) The privilege against self-incrimination: A chameleon of criminal procedure. New J Eur Crim Law, pp 418 ff
Lonati S (2017) Fair trial and the interpretation approach adopted by the Strasbourg Court. Eur J Crime Crim Law Crim Justice, pp 52 ff
Lupària L (ed) (2015) Victim: and criminal Justice. European standards and national good practices. Wolters Kluver, Assago
Manes V, Zagrebelky V (eds) (2011) La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano. Giuffrè, Milano
Mcbride J (2009) Human rights and criminal procedure. The case law of the European Court of Human Rights. Council of Europe, Strasbourg
Mcdonagh M (2013) The right to information in international human rights law. Human Rights Law Rev, pp 25 ff

Muraszkiewicz J (2016) Article 12 of the EU human trafficking directive: fulfilling aspirations for victim participation in criminal trials? New J Eur Crim Law 7:331 ff
Murdoch JL (2002) Article 5 of the European Convention on Human Rights. The protection of liberty and security of person. Council of Europe, Strasbourg
Novokmet A (2016) The right of a victim to a review of a decision not to prosecute as set out in Article 11 of Directive 2012/29/EU and an assessment of its pransposition in Germany, Italy, France and Croatia. Utrecht Law Rev, pp 86 ff
O'Keefe R (2011) State immunity and human rights: heads and walls, hearts and minds. Vanderbilt J Transnl Law, pp 999 ff
Pettigrew M (2017) Retreating from vinter in Europe: sacrificing whole life prisoners to save the Strasbourg Court?. Eur J Crime Crim Law Crim Justice, pp 260 ff
Pettigrew M, Vinter A (2017) Retreat in Europe. returning to the issue of whole life sentences in Strasbourg. New J Eur Crim Law, pp 128 ff
Pinto de Albuquerque P (2015) Life Imprisonment and the European Right to Hope. AIC, no. 2
Pradel J (1996) La notion de procès equitable en droit pénal européen. Revue général de droit, pp 514 ff
Quattrocolo S (2015) The right to information in EU legislation. In: Ruggeri S (ed) Human Rights in European criminal law. New developments in European legislation and case law after the lisbon treaty. Springer, Heidelberg, pp 81 ff
Rafaraci T (ed) (2011) La cooperazione di polizia e giudiziaria in materia penale nell'Unione europea dopo il Trattato di Lisbona. Giuffrè, Milano
Renucci JF (2017) Droit européen des droits de l'homme. L.G.D.J, Paris
Repik B (1995) Réflexions sur la jurisprudence de la Cour européenne des droits de la personne concernant la présomption d'innocence. In: Liber Amicorum Marc-André Eisen. L.G.D.J., pp 331 ff
Requa M (2010) Absent witnesses and the UK Supreme Court: judicial deference as judicial dialogue? Int J Evid Proof, pp 208 ff
Roberts P (2011) Does Article 6 of the European Convention on Human Rights require reasoned verdicts in criminal trials? Human Rights Law Rev, pp 213 ff
Roberts P, Zuckerman A (2010) Criminal evidence. Oxford University Press, Oxford
Ruggeri S (2016) Inaudito reo proceedings, defence rights, and harmonisation goals in the EU responses of the European Courts and new perspectives of EU law. Eucrim, pp 42 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Soo A (2016) Potential remedies for violation of the right to counsel in criminal proceedings: Article 12 of the Directive 2013/48/EU (22 October2013) and its output in national legislation. Eur Crim Law Rev, pp 284 ff
Soo A (2017) Article 12 of the Directive 2013/48/EU: A starting point for discussion on a common understanding of the criteria for effective remedies of violation of the right to counsel. Eur J Crime Crim Law Crim Justice, pp 31 ff
Soo A (2017) How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed. New J Eur Crim Law, pp 64 ff
Spencer JR (2014) Hearsay evidence in criminal proceedings. Hart, Oxford
Stavros S (1993) The guarantees for accused persons under article 6 of the European Convention on Human Rights. Martinus Nijhoff, Leiden
Sudre F (2015) Droit européen et international des droits de l'homme. Presses Universitaires de France, Paris
Summers SJ (2007) Fair Trials. The European criminal procedural tradition and the European Court of Human Rights. Hart, Oxford
Symeonidou-Kastanidou E (2013) The right of access to a lawyer in criminal proceedings: the transposition of Directive 2013/48/EU of 22 October 2013 on national legislation. Eur Crim Law Rev, pp 68 ff

Symeonidou-Kastanidou E (2016) Directive 2011/36/EU on combating trafficking in human beings. Fundamental choices and problems of implementation. New J Eur Crim Law, pp 465 ff
Thörnich D (2017) Art. 6 Abs. 3 lit. d EMRK und der unerreichbare (Auslands-)Zeuge: Appell zur Stärkung des Konfrontationsrechts bei präjudizierender Zeugenvernehmung im Ermittlungsverfahren. Zugleich Besprechung von EGMR, Urt. v. 15.12.2015 – 9154/10 (Schatschaschwili v. Deutschland. Zeitschrift für Internationale Strafrechtsdogmatik, pp 39 ff
Trechsel S (2006) Human rights in criminal proceedings. Oxford University Press, Oxford
Tulkens F, Lotarski J (2004) Le tribunal indépendant et impartial à la lumière de la jurisprudence de la Cour européenne des droits de l'homme. In: Mélanges Jacques van Compernolle. Bruylant, Bruxelles, pp 741 ff
Ubertis G, Viganò F (eds) (2016) Corte di Strasburgo e giustizia penale. Giappichelli, Torino
Van Bockel B (2010) The Ne Bis in Idem Principle in EU law. Kluwer Law International, Alphen aan den Rijn
van der Aa S (2014) Post-trial victims' rights in the EU: do law enforcement motives still reign supreme? Eur Law J, pp 239 ff
van der Aa S (2016) Variable vulnerabilities? Comparing the rights of adult vulnerable suspects and vulnerable victims under EU law. New J Eur Crim Law, pp 39 ff
Vanderpuye K (2010) Traditions in conflict: the internationalization of confrontation. Cornell Int Law J, pp 513 ff
Vervaele JAE (2014) Extraordinary rendition and the security paradigm. In: Haeck Y, McGonigle Leyh B, Burbano-Herrera C, Contreras-Garduño D (eds) The realisation of Human Rights: when theory meets practice. Intersentia, Cambridge, pp 371 ff
Vogel B (2017) "In camera"- Verfahren als Gewährung effektiven Rechtsschutzes? Neue Entwicklungen im europäischen Sicherheitsrecht. Zeitschrift für Internationale Strafrechtsdogmatik, pp 28 ff
VV AA (2009) The right to trial within a reasonable time and short-term reform of the European Court of Human Rights. Council of Europe, Strasbourg
Wieczorek I (2012) A needed balance between security, liberty and justice. Positive signals arrive from the field of victims' rights. Eur Crim Law Rev, pp 141 ff.

Part III
Police Cooperation and Judicial Cooperation

Chapter 4
History of the Cooperation

Anne Weyembergh

Contents

A. Weyembergh (✉)
Université Libre de Bruxelles – Institut d'Etudes européennes, Brussels, Belgium
e-mail: aweyembe@ulb.ac.be

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_4

4.1 From the Origins to the Schengen Agreement

4.1.1 Foreword

The EU area of criminal justice, namely police cooperation and judicial cooperation in criminal matters among the Member States of the EU, has experienced a significant evolution over time, under multiple profiles, including those concerning the institutions, the decision-making procedures and its substance; it is therefore appropriate to provide a short account of this evolution. This path may be divided into five important steps, represented by the following:

(a) the origin of the cooperation in the areas of criminal law and police, since the 1970s;
(b) the 1985 Schengen Agreement (which came into effect in 1986) and the Convention implementing the Schengen Agreement (which came into effect in 1995);
(c) the 1992 Maastricht Treaty (came into effect in 1993);
(d) the 1997 Treaty of Amsterdam (in effect in 1999) and the 2001 Treaty of Nice (in effect in 2003), the Tampere Conclusions and the Hague Programme;
(e) the 2007 Treaty of Lisbon (in effect in 2009), the Stockholm Programme and the strategic guidelines of the European Council for the 5-year period 2015–2020.

4.1.2 The Origins of Cooperation

4.1.2.1 A Late Start and the Establishment of the 'Trevi Group'

While some European organizations, represented mainly by the Council of Europe, or sub-European organizations such as the Benelux, activated forms of cooperation in criminal matters in the 1950s (note, for example, the 1957 European Convention on Extradition, the 1959 European Convention on Mutual Assistance in Criminal Matters or the 1962 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters), the European Economic Community at the beginning had not taken a direct interest in this field. It is only from the 1970s that the Member States of the European Economic Community started some initiatives relating to cooperation in criminal matters.

Indeed, at that time, concerns regarding the development of forms of 'Euro-terrorism', targeting western European countries and originating from extremist left-wing and right-wing movements and movements coming from the Middle East, started to grow. To join forces against these new threats, the Member States of the European Economic Community established some bodies to cooperate in a purely intergovernmental way, developing cooperation outside of the Community's institutional framework.

As a result, the 'Trevi Group' was established in Rome in 1975 by the Ministers of Interior. Initially, its main purpose was to develop police cooperation to fight terrorism; later, it extended its competences to other forms of crime, such as hooliganism, drug trafficking, illegal immigration or international crime, and to the general maintenance of public order. The 'Trevi Group' represents thus the initial structure from which police cooperation within the European Union originated. It is within this very context that the idea of establishing a European Police Office—later accomplished through Europol—was developed for the first time.

4.1.2.2 The French Project of Creating a 'Espace Judiciaire Pénal Européen'

At the time when the 'Trevi Group' was established and within that same context, a French project aimed at establishing a 'Espace judiciaire pénal européen' saw the light. The project was presented by President Giscard d'Estaing at the 1976, 1977 and 1978 European Councils. As indicated in one of his statements at the European Council held in Brussels on 5 and 6 December of 1977, 'The Treaties of Paris and Rome laid the bases of an Economic Area, of the Common market and of a Commercial Area. The European structure should be enriched with a new concept, that of a Judicial Area'.

This project envisioned *five steps*: the drafting of a simplified extradition convention, the improvement and simplification of the procedure for criminal judicial assistance between States, the implementation of a procedure for the transfer of criminal proceedings, the mutual recognition of criminal judgments and the standardisation of the procedure for the transfer of sentenced persons between Member States. Some of these steps concerned already established conventions (for example, the 1957 European Convention on Extradition and its two additional Protocols of 1975 and 1978; the 1978 European Convention on Mutual Assistance in Criminal Matters; the 1970 European Convention on the International Validity of Criminal Judgments and the 1972 European Convention on the Transfer of Proceedings in Criminal Matters) and other conventions still under development within the Council of Europe (such as the Convention on the Transfer of Sentenced Persons). The purpose was to strengthen the links in the area of criminal matters between the Member States of the European Communities—States that were deemed closer to each other than the Member States of the Council of Europe.

From this perspective, the European Council established a working group composed of senior officials of Member States and adopted two instruments. The first,

the *Dublin Agreement*, concerned the application to the Member States of the Community of the Council of Europe's Convention for the Suppression of Terrorism of 27 January 1977; the Agreement, signed by the (at the time) nine Member States of the Communities on 4 December 1979, did not become effective due to the insufficient number of ratifications and also due to the great success enjoyed by the Convention of the Council of Europe. The second instrument was dedicated to the matter that was the subject of the first step of the French project. It was an extradition convention of wide application, with very detailed provisions concerning both the requirements for extradition and the conditions upon which a State refusing to extradite was expected to prosecute the concerned person (pursuant to the rule *aut dedere aut iudicare*, that is, 'either extradite or prosecute'). However, despite a very intense diplomatic effort, the Netherlands refused to sign the convention because it perceived the context of the Council of Europe as more suitable to develop judicial cooperation in criminal matters than that of the European Communities.

After the failure of the first project, the French Government presented at the Conference of Justice Ministers held on 25 October 1982 two proposals for the revitalisation of judicial cooperation in criminal matters between the Member States of the European Communities. This was a revised project on extradition and a draft project for the establishment of a future *European Criminal Court* intended to try the person whose extradition had been refused whenever the requested Member State had no competence to proceed on the basis of its domestic law. Such project preserved national sovereignty since it did not involve any change to Member States' domestic competence in criminal matters. The Court would have jurisdiction over crimes concerning 'harm to life, body integrity or freedom of persons, and punished with a period of imprisonment of more than 5 years, even in case of attempt'.

Despite the intense diplomatic effort conducted between 1982 and 1984 and due mainly to the opposition of some States (the Netherlands, Belgium and the United Kingdom), these proposals were ultimately unsuccessful. The French project of a criminal judicial area between the Member States of the European Communities was put aside.

4.1.2.3 Mere Intergovernmental Cooperation to Compensate the Abolition of Border Controls

In the second half of the 1980s, judicial and police cooperation in criminal matters between the Member States of the European Communities further developed, this time with a view to compensating the abolition of controls at internal borders, which was necessary for the establishment of the internal market.

Such an objective revitalised the pathway to European integration, as decided by the heads of state and prime ministers of the Member States of the European Communities in the meeting at Fontainebleau in June 1984, leading to the drafting of the new White Paper of the Commission in 1985 and to the enactment of the

Single Act in 1986, i.e. the first fundamental revision of the Treaty of Rome. It aimed to avoid that the abolition of border controls would favour criminal organisations and promote illegal immigration and would generate a security deficit. The need was felt, therefore, to adopt 'compensatory measures' concerning the cooperation in the area of justice and home affairs of the Member States (hereinafter JHA) with regard to varied sectors ranging from asylum to immigration, from border controls to—most relevant to our purposes—police and judicial cooperation in criminal matters.

The work carried out between the end of the 1980s and the beginning of the 1990s to design and implement such measures was, however, conducted outside the framework of the European Communities, at an intergovernmental level, mostly in the context of European political cooperation through bodies with their own special rules, which, nonetheless, showed some common features associated to their intergovernmental nature. The instruments established by such bodies were adopted unanimously and found their origin in the traditional diplomatic repertoire: indeed, these were conventions, recommendations and resolutions. The main—almost exclusive—actors were governments and administrations, while national parliaments and the European Parliament lacked any power in this regard; the Court of Justice exercised no control.

Among the achievements of these working bodies, it is worth mentioning the five conventions dealing with judicial cooperation in criminal matters, the most important of which concerned the application of the *ne bis in idem* (double jeopardy) principle (whose provisions would then be included in the Convention for the implementation of the Schengen Agreement of 19 June 1990). These were conventions that aimed at implementing, within the narrower framework of the then 12 Member States of the Communities, more simple and operational agreements than those developed by the Council of Europe. The conventions were in any case based on very traditional cooperative mechanisms, with regard to which national sovereignty and the principle of territoriality still played a prominent role. None of these instruments managed, however, to earn the ratification of all the Member States of the Union and, therefore, failed to find application in all Member States. This contributed to the qualification of that cooperation as merely 'virtual'.

4.1.3 The 1985 Schengen Agreement and the 1990 CISA

4.1.3.1 An Intergovernmental Cooperation Outside the Framework of the European Communities

At a time when judicial and police cooperation in criminal matters within the European Communities was suffering a setback, five Member States interested in closer cooperation (France, Belgium, Luxembourg, Germany and the Netherlands)

signed the *Schengen Agreements*. These include the Schengen Agreement of 14 June 1985 (came into effect on 2 March 1986) concerning the gradual removal of border controls and the Convention on the Implementation of the Schengen Agreement of 19 June 1990, which came into effect on 26 March 1995 (hereinafter CISA).

These agreements were also concluded outside the institutional framework of the European Communities and were implemented in a strictly intergovernmental framework.

In order to avoid that the removal of internal controls gave rise to a security deficit, the CISA established a series of compensatory measures in the framework of JHA cooperation, including some provisions specifically dedicated to police cooperation and judicial cooperation in criminal matters.

4.1.3.2 Important Achievements Representative of an EU Area of Criminal Justice

It is within this very context that the most ambitious achievements took place. Indeed, some of the provisions of the Schengen Agreements proved to be particularly innovative and indicative of the intention to establish an EU area of criminal justice. Examples include, specifically, Art. 54 CISA on the principle of *ne bis in idem* (double jeopardy) and Arts. 40 and 42 CISA concerning cross-border observation and pursuit. Furthermore, the Schengen Agreements had an extraordinary multiplier/spillover effect, which will be addressed in more detail below.

4.2 From the Treaty of Maastricht to the Treaty of Amsterdam

4.2.1 The Treaty of Maastricht

4.2.1.1 The Integration of Cooperation in Criminal Matters in the Framework of the Third Pillar

The Treaty on the European Union was adopted in Maastricht on 7 February 1992 and entered into force on 1 November 1993 (TEU). It established a Pillar structure, placing side by side to the Treaties on the European Communities integrating the 'First Pillar'—that is, the Community pillar—two new 'Pillars' connected to the newly established institutional framework, namely the European Union. Of these new Pillars, the 'Second Pillar' was dedicated to the Common Foreign and Security Policy (CFSP), while the 'Third Pillar', more directly related to our subject, comprised the various activities connected to JHA cooperation among Member States of the European Communities, including judicial and police cooperation in criminal matters.

These sectors were expressly included among the matters defined as of 'common interest' in Art. K1 TEU, from which it is possible to infer that at that time the main goal was—as had been in the 1980s—that of guaranteeing the free movement of persons and of finding ways to avoid a potential spread of transnational crime resulting from the abolition of internal border controls.

Essentially, while before Maastricht the competence to develop JHA cooperation activities lied in a series of different bodies or groups lacking any coordination, with the Treaty of Maastricht the activities relating to justice and police cooperation in criminal matters were specifically channelled into the 'Third Pillar'. This marked the end of the majority of pre-existing groups, such as the Trevi group, whose competences were since assigned to the European Union. The Treaty of Maastricht therefore brought about a centralisation and rationalisation of the activities in the area; at the same time, it also allowed the parallel development, among a smaller number of States, of the Schengen cooperation. Article K7 TEU clarified that a closer cooperation among the States bound by the Schengen Agreements did not violate the Treaty on the European Union.

4.2.1.2 A Third Pillar with Clear Intergovernmental Predominance

However, the Third Pillar continued to operate in an intergovernmental fashion.

Various elements were symptomatic of such intergovernmentalism. First of all, the rule concerning the unanimity vote effectively guaranteed a veto power to Member States. This rule was the expression of their cautious approach towards taking on any commitment in this area of cooperation. Consensus was therefore sought at the cost of not only draining diplomatic exchanges but also reducing the level of ambitions and achieving agreements only on minimum targets.

The fact that JHA activities had been included within the competences of the European Union provided EU institutions the competence to take action also in those matters since the division in Pillars was not to undermine the unity of the institutional framework. That said, the role the institutions could play in the context of the Third Pillar was significantly different to the one they could play within the First Pillar.

In this regard, the relevant role played by the Council of the European Union, combined with the weakness of the powers assigned to the other three institutions of the Communities—the Commission, the Parliament and the Court of Justice—represented a characteristic feature of the intergovernmental dynamics characterising the Third Pillar.

Decisions were taken by the EU Council, composed of the ministries of justice and home affairs of the Member States. The Commission enjoyed the power to initiate legislation in various JHA areas—a power shared with the Member States; however, it lacked such power in respect of custom matters, police cooperation and judicial cooperation in criminal matters (Art. K 4. 2) with regard to which the Member States held an absolute monopoly. The level of involvement of the European Parliament was also limited: the Parliament was informed of the activities by the Commission and

could be consulted on the main aspects of the activities in that sector (Art. K 6). The democratic deficit resulting from this limited involvement of the Parliament was heavily criticised, also because concretely the relationships of the Council with the Parliament were not characterised by openness or mutual trust. Finally, normally the Court of Justice did not have jurisdiction to review matters concerning the Third Pillar (Art. L), a jurisdictional deficit that was criticised by many.

An additional element representative of the intergovernmental character of the Third Pillar was the limited effectiveness of the legal tools available. Regulations and directives could not be used in this area. Classic tools of multilateral cooperation such as resolutions and recommendations—which were not binding—or conventions—binding but implying a long procedure before entering into force—could be used, so as common positions and joint actions, whose legal effects were controversial and limited.

The financial rules relating to the Third Pillar also operated according to an intergovernmental model. While the budget of the European Communities covered the administrative expenditure incurred in the area, the Council could decide that operational expenditure linked to the implementation of this policy field was either charged to the MSs' or to the European Communities' budget (Art. K 8.2).

Moreover, the Third Pillar's 'intergovernmental' character was further reinforced in relation to the areas of police and judicial cooperation in criminal matters and to customs cooperation—all of which are 'core' areas of State sovereignty—by excluding (Art. K 1) the possibility of resorting to the so-called bridging clause (in French, *passerelle*) provided for in Art. K 9 with regard to those fields of cooperation. The excluded provision allowed to 'communitarise' matters covered by Art. K1—by transferring them to the First Pillar—without modifying the Treaty, albeit through a cumbersome procedure that, in the end, was never used.

4.2.1.3 A Disappointing Progress Report but Some Instruments Announcing a Change

On the eve of the intergovernmental Conference that would lead to the Treaty of Amsterdam, the results produced in the context of the Third Pillar of the Treaty of Maastricht were deemed disappointing by the institutions of the Communities, Member States and scholars. Many legislative measures had been adopted, but their significance often turned out to be limited. In addition to non-binding documents, some conventions had been adopted; however, these conventions—despite some notable exceptions, like the Convention establishing Europol of 26 July 1995—had not come into effect in all the Member States of the Union. The cooperation developed at the time therefore remained, at least in part, virtual. In turn, the legislative measures aiming at the approximation of legislation were rather ineffective since Member States enjoyed wide margins of discretion to avoid implementation. The States aiming to simplify cooperation in criminal matters remained anchored to traditional models, without adopting a truly innovative position. Nonetheless, some measures witnessed a change. This is especially testified by the

Convention of 10 March 1995 relating to the simplified extradition procedure between Member States and the Convention of 27 September 1996 relating to extradition between the Member States of the EU. New forms of cooperation were also created in order to improve operational work, including the European judicial network and the liaison magistrates (see, respectively, Joint Action 98/420/JHA of 29 June 1998 and Joint Action 96/277/JHA of 22 April 1996).

4.2.2 The Treaty of Amsterdam and the Treaty of Nice, the Tampere Conclusions, and the Hague Programme

With regard to the fourth step in the evolution concerning judicial and police cooperation in criminal matters, it is appropriate to consider the most significant changes introduced by the Treaty of Amsterdam, the few reforms introduced by the Treaty of Nice and the conclusions of two important European Councils that led to the adoption of the two first five-year working programmes in the field: the Conclusions of the Tampere European Council and the Hague Programme.

4.2.2.1 The Four Fundamental Innovations Introduced by the Treaty of Amsterdam

The Treaty of Amsterdam, signed on 2 October 1997 and entered into force the 1st of May 1999, introduced four fundamental innovations in the field of cooperation in criminal matters. It assigned a new objective to the European Union: that of maintaining and establishing an Area of Freedom, Security and Justice; it divided JHA into two distinct groups, reducing the Third Pillar (itself renewed) only to judicial and police cooperation in criminal matters; it enabled enhanced cooperation in the institutional framework of the European Union and integrated the Schengen acquis within EU law.

A new objective: the development of an Area of Freedom, Security and Justice—with the entry into force of the Treaty of Amsterdam, JHA cooperation—and especially judicial and police cooperation in criminal matters—is no longer conceived as a mere mechanism to compensate the abolition of internal border controls. From that moment on, the aim is to establish an Area of Freedom, Security and Justice (Art. 29.1 former TEU), a new objective of the European Union. This is indeed a strategic goal that foreshadows fundamental changes in the field of criminal justice, changes that are linked on the one hand to the notion of 'Area' and, on the other, to the notions of 'freedom, security and justice'.

The notion of 'Area' is of fundamental importance. To an extent, it represents—with regard to national territories—what the notion of citizenship of the European Union, as introduced by the Treaty of Maastricht, represents for domestic nationality. Just like the concept of citizenship of the European Union did not eliminate the

concept of nationality—and was actually added to it to emphasise the sense of belonging to a common political entity—the concept of Area does not abolish the concept of national territory but rather joins it to clarify the idea that the national territories forming the European Union represent a common geographical unit. The notion of 'Area' implies to go beyond the principle of strict State territoriality in criminal matters; it indeed lead to the extension of the principle of mutual recognition to criminal matters and to the establishment of common investigation teams.

The concepts of 'freedom, security and justice'—intimately connected—are no less important. Together, they make clear the need for the European Union to ensure the fight against crime. But they highlight also the need to develop other concerns than fight against impunity and repression, such as the development of access to justice, of victims' rights, of rights of suspects and accused persons and so on. The juxtaposition of these three concepts resulted in a more global approach in the field.

The division of JHA in two different groups and the renewal of the Third Pillar—the Treaty of Amsterdam divided JHA cooperation, previously subject in its entirety to the Third Pillar of the Treaty of Maastricht, in two different groups.

The first group—which included asylum, controls on the external borders, immigration policy towards third country nationals and judicial cooperation in civil matters—was transferred from the Third to the First Pillar and was included in a new Title IV, dedicated to 'Visas, asylum, immigration and other policies related to the free movement of persons'. Such areas were therefore 'communitarised', although some Member States, namely Denmark, the United Kingdom and Ireland, decided to opt out. These opt-outs were justified on different grounds. In the case of Denmark, the opt-out was provided in the Edinburgh agreement, concluded when the Treaty of Maastricht was ratified and pursuant to which the Danish authorities guaranteed their citizens that JHA cooperation would not be 'communitarised'. The opt-outs of the United Kingdom and Ireland were in turn linked to the two States' refusal to eliminate internal border controls. Furthermore, the rules concerning the possibilities to opt in were also different for Denmark on the one hand, and the United Kingdom and Ireland on the other.

The second group into which the former Third Pillar was divided concerned police cooperation and judicial cooperation in criminal matters, and was kept under the Third Pillar, still regulated by Title VI of the former TEU renamed 'Provisions on police and judicial cooperation in criminal matters'. This was a predictable choice since these were matters that Member States deemed associated with the core elements of national sovereignty, a choice that was also consistent with previous choices. Indeed, as we have seen, such matters were—under the Treaty of Maastricht—already subject to more intergovernmental features than other sectors regulated under the Third Pillar.

The intergovernmental logic continued to characterise the operation of the Third Pillar under the Treaty of Amsterdam, this Pillar being since limited to judicial and police cooperation in criminal matters. Except the measures necessary to implement decisions and conventions (Art. 34.2 of the former TEU), the unanimity rule was maintained and represented a significant obstacle to the development of the field,

especially following the European Union's subsequent enlargements of 2005 and 2007.

While negotiations were seldom abandoned on the mere basis of the opposition of one Member State, the inclusion in the agreements of derogations requested by a single State was, conversely, rather frequent, a circumstance that had the effect of diminishing the original objectives and of muddling the project, thereby limiting the effectiveness of the instruments of the Third Pillar and making extremely complex and difficult the work of practitioners.

Also following an intergovernmental logic, the primary role of the Council of the European Union and the weak position of the European Parliament were maintained. The Parliament was simply consulted by the Council with regard to legislative proposals and was not even consulted on the initiatives aimed at developing the external dimension of the European area of criminal justice, such as common positions or external agreements (Art. 39.1 former TEU). The ancillary position assigned to the European Parliament and the resulting democratic deficit were naturally heavily criticised.

However, despite this intergovernmental predominance, the Treaty of Amsterdam introduced in the Third Pillar several elements inspired by the regime of the 'Communities'. Here we will address five of these elements:

- The European Commission was vested with a power of initiative in matters relating to police cooperation and judicial cooperation in criminal matters (Art. 34.2 former TEU), a power that the Commission did not enjoy before and that became shared with the Member States.
- The competence of the Court of Justice with regard to matters falling under the Third Pillar was expanded compared to the competence assigned to the Court under the Treaty of Maastricht (Art. 35 former TEU). While its powers in this area remained more limited than those exercised in the area of Community law, the Court had the opportunity to exercise its competence in several occasions and to issue some fundamental judgments related to the EU area of criminal justice. Specifically, the competence of the Court to interpret European law or to adjudicate on its validity in the context of preliminary reference procedures activated by national judges was subject, in the area of cooperation in criminal matters, to the acceptance of this competence by the Member State concerned. The Commission, for its part, was prevented from taking action against a Member State before the Court for lack of implementation of a legislative measure. No measure equivalent to the infringement procedure under Community law was therefore available.
- Unlike what happened under the Maastricht Treaty, it became possible to resort to the 'bridging clause' also in the area of police cooperation and judicial cooperation in criminal matters. Pursuant to the 'bridging clause' and upon an initiative of the Commission or a Member State, the Council could unanimously decide to 'communitarise' some of these subjects by transferring them to the First Pillar (Art. 42 former TEU).

– It became possible to resort to more effective instruments to develop police cooperation and judicial cooperation in criminal matters. Indeed, join actions were abandoned to embrace decisions and framework decisions (Art. 34.2 *b* former TEU). The latter were legally binding for the Member States, like directives. In a famous judgment (CJEU, 16 June 2005, C-105/03, *Pupino*), the Court of Justice strengthened the effectiveness of the new instruments by recognising the framework decisions an 'indirect effect', namely by submitting them to the duty of conforming interpretation. It was possible to adopt common positions, and the Treaty of Amsterdam specified their scope and binding effect (Art. 34.2 *a* former TEU). The possibility to adopt conventions was maintained, but the recourse to such instrument became quite exceptional in the field of police cooperation and judicial cooperation in criminal matters. The Convention of 29 May 2000 on judicial assistance in criminal matters and its Protocol of 16 October 2001 were nevertheless adopted.
– Finally, the financial provisions were also amended to ensure that the operational expenses relating to the Third Pillar were covered by the budget of the European Communities, as was already the case for the administrative expenses, unless the Council, by unanimous vote, decided otherwise.

The use of enhanced cooperation within the institutional framework of the European Union—by means of the 'enhanced cooperation' mechanism, some Member States of the European Union could autonomously pursue cooperation without being blocked by the opposition of Member States exercising their veto. A similar mechanism pre-existed under the Treaty of Maastricht but only *outside* the institutional framework of the Union. The Treaty of Amsterdam added the possibility of resorting to this mechanism within the institutional framework of the European Union, pursuant to the common rules on enhanced cooperation provided for in Title VII (Arts. 43–47 former TEU) and, under certain conditions, specifically provided in Title VI (Art. 40 former TEU). The choice was inherently political in that it aimed to promote the achievement of the European Union's objectives and, especially, that of accelerating the establishment of an Area of Freedom, Security and Justice. Indeed, enhanced cooperation created the risk of an *à la carte* approach to integration, leaving every State free to choose the preferred areas and modes of cooperation and therefore risking the development of a multi-speed Europe. However, enhanced cooperation had the advantage of circumventing the unanimity rule and of creating a spillover effect on non-adhering States, an effect that had occurred with regard to the Schengen cooperation, initially started by five Member States, and also with regard to the Treaty of Prüm, signed on 27 May 2005 by seven Member States: both agreements had then been ratified by all or almost all of the European Union's Member States. In both cases, cooperation had been established outside the framework of the European Union. This is remarkable particularly with regard to the Treaty of Prüm since this enhanced cooperation instrument was established after the entry into force of the Treaty of Amsterdam. This provides evidence that, albeit potentially important, the possibility of using enhanced cooperation within the framework of the European Union remained—at the time—theoretical.

Integrating the Schengen's acquis into the law of the European Union—the Treaty of Amsterdam continued the centralisation efforts started with the Treaty of Maastricht by integrating the Schengen's *acquis* within the framework of the European Union through a protocol attached to the Treaty (Protocol integrating the Schengen *acquis* into the framework of the European Union).

The main reasons for this integration were essentially three.

First of all, the Schengen cooperation and the European Union pursued common objectives. There was therefore a need to eliminate the presence of two parallel institutional and procedural circuits applicable to the same subjects. Second, this rationalisation became necessary due to the aforementioned spillover effect produced by the Schengen Agreements. Over the years, several other States had joined the original five partners: at the opening of the intergovernmental conference that led to the Treaty of Amsterdam, 13 of the then 15 Member States of the European Union (with the exception of Ireland and the United Kingdom) had already joined the agreement. Finally, the integration was also functional from the perspective of the EU enlargement. By transforming the provisions of the Schengen Agreements into Union *acquis*, the candidates to join the EU necessarily had to accept these conditions (Art. 8 of the Additional Protocol).

To reach integration, and to fit the opposition of the United Kingdom and Ireland, a specific enhanced cooperation mechanism became necessary (Art. 1 of the Protocol envisioned the participation of only the 13 participating States). Opt-in possibilities were, however, provided for the two non-participating Member States, subject to unanimity in the Council among the signatory States. Wishing to safeguard their insularity, the United Kingdom and Ireland have always refused to participate in the abolition of internal border controls. However, over time, partial opt-ins in the Schengen *acquis* relating to cooperation in criminal matters have been requested and granted to both States.

The integration of the 'Schengen *acquis*' required specifying the EU legal basis for each of the provisions and decisions included in the *acquis*. The corresponding provisions were incorporated into the First EC Pillar, enriched with its new Title IV, or into the Third Pillar, now limited to police cooperation and judicial cooperation in criminal matters (Decision of the Council of 20 May 1999). This integration in one or the other Pillar of the Treaty turned out to be of fundamental importance in the implementation and development of the *acquis*, with regard to judicial and police cooperation. It especially allowed to minimise some of the drawbacks linked to the pure 'intergovernmental' nature that characterised the previous Schengen framework.

Finally, the Protocol integrating the Schengen *acquis* regulated the position of Norway and Iceland, the two non-EU Member States that, on the eve of the intergovernmental conference, had been granted the status of associated States to the Schengen Agreements pursuant to the Luxembourg agreement of 19 December 1996 signed with the 13 Schengen-participating States when Denmark, Sweden and Finland joined the Schengen Agreements. This made possible to maintain the existing regime between the five Nordic States in light of the agreement concerning the abolition of passport controls over 'intranordic' borders signed in Copenhagen on 12 July 1957. The number of associated States—with regard to Schengen—later

rose to four, when Switzerland and Liechtenstein joined the Republic of Iceland and the Kingdom of Norway.

4.2.2.2 The Treaty of Nice

The Treaty of Nice, signed on 26 February 2001 and came into effect on 1 February 2003, did not bring about significant changes to Title VI TEU, that is to the Third Pillar, with the exception of a provision concerning the establishment of Eurojust (Art. 31 former TEU) and the simplification of the procedure to resort to enhanced cooperation in an enlarged Union (Arts. 40, 40 *a* and 40 *b*, as amended/added by the Treaty of Nice). This was accomplished by providing that the initiative to establish enhanced cooperation was to be taken by the Commission or by at least eight Member States, no longer, therefore, by the majority of the Member States, as was required by the Treaty of Amsterdam.

4.2.2.3 The Tampere Programme and the Hague Programme

The Tampere Programme and the Hague Programme represented the first two five-year working Programmes adopted by the heads of state and prime ministers of the Member States to establish an Area of Freedom, Security and Justice. These proved to be very important in terms of political orientation.

The European Council of Tampere (15 and 16 October 1999) represented the first meeting of heads of state and government focused on justice and home affairs. It confirmed that, in assigning the European Union the general goal of developing an Area of Freedom, Security and Justice, the Treaty of Amsterdam had involved the Union in a hardly reversible process. Besides implementing or specifying the content of some of the provisions included in the Treaty of Amsterdam, the Tampere Conclusions (Conclusions of the Presidency, SN 200/99) first and foremost provided new perspectives for the development of a European area of criminal justice. The Conclusions inaugurated a new approach to the management of judicial cooperation in criminal matters within the Union based on mutual trust and resting upon the principle of mutual recognition of judicial decisions as cornerstone (para. 33 of the Conclusions) (see Chap. 7). Furthermore, in order to fight more effectively the most serious forms of transnational crime, the Conclusions created the basis for the establishment of a unit called 'Eurojust', composed of prosecutors, magistrates or police officers with equivalent competences, seconded by each Member State in accordance with its own legal system (para. 46 of the Conclusions), a body that, as we highlighted, was then formally mentioned in the 2001 Treaty of Nice.

For its part, the Hague Programme was adopted by the European Council of Brussels of 4 and 5 November 2004, thereby 'succeeding' the Tampere Conclusions as the new 5-year plan concerning the Area of Freedom, Security and Justice. The Hague Programme was then specified in a roadmap adopted in June 2005 (Doc. 9778/2/05 Rev. 2, 10 June 2005). The purpose of the Programme and its plan was to

further develop the notion of European area of criminal justice by confirming, among other things, the importance of mutual recognition and mutual trust. The Hague Programme moreover consecrated the principle of availability in the area of police cooperation pursuant to which, within the Union, a law enforcement officer of one Member State who needs information in order to perform his duties can obtain the information from the corresponding authorities of the Member State holding the information, taking into account the requirements of ongoing investigations in the requested State (para. 2.1 of the Hague Programme). A principle that is linked to police cooperation just like the principle of mutual recognition is linked to judicial cooperation in criminal matters: while mutual recognition aims to guarantee the free movement of criminal decisions, the principle of availability aims to guarantee the free movement of information.

4.2.2.4 A Short Review of This Fourth Stage

The entry into force of the Treaty of Amsterdam marked the beginning of an enormous proliferation of initiatives in the area of police cooperation and judicial cooperation in criminal matters. With regard to legislative action, the EU area for criminal justice has become one of the largest legislative laboratories of the European Union. This is evidenced by the high number of framework decisions adopted in order to simplify and make more flexible judicial cooperation by implementing the principle of mutual recognition in criminal matters, or with the aim of approximating the criminal laws of the Member States.

These new developments are remarkable not only for their quantity but also for their content. If we compare them to the instruments of cooperation adopted under the Treaty of Maastricht—still very much linked to the traditional concepts of national sovereignty and territoriality—the instruments adopted after the entry into force of the Treaty of Amsterdam appear, in general, more representative of the notion of Area. Think, for example, of the development experienced by the mechanisms of judicial cooperation, which have moved from a simplified form of intergovernmental cooperation to a cooperation based on the principle of mutual recognition of judicial decisions, a change that is clearly noticeable in the replacement of the old extradition procedures by the European Arrest Warrant and the surrender procedures (Framework Decision of Council 2002/584/JHA of 13 June 2002) (see Sect. 8.1.3). Furthermore, following the Treaty of Amsterdam, a trend towards a diversification of objectives in the actions relating to the criminal justice area developed: think, for example, of Council Decision 2001/427/JHA of 28 May 2001, which established a European network for the prevention of crime, or of Council Framework Decision 2001/220/JHA concerning the position of the victim in criminal proceedings.

Despite these significant innovations, the EU area of criminal justice continued to find resistance, evidenced by two strands.

On the one hand, the establishment of a real EU area implying going beyond national territoriality faced serious difficulties. This emerged clearly from the limited

powers assigned to the European actors of judicial and police cooperation: despite some actions aimed at updating their structure (think, for example, of Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime or of Council Decision 2009/371/JHA of 6 April 2009 concerning Europol), none of these bodies were vested with binding powers vis-à-vis national authorities. The difficulties encountered during the negotiations of the mutual recognition instruments after the adoption of the Framework Decision on the European Arrest Warrant and the delay and non-compliance that characterised their implementation at national level were also symptomatic of this resistance. Finally, also symptomatic were the limits to the approximation of national criminal laws; indeed, the approximation of such laws appeared somehow superficial due to the wide margin of discretion granted to the Member States.

On the other hand, resistance also mounted against embracing objectives other than the merely repressive ones, as was shown by the frosty treatment reserved by several Member States to the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, presented by the European Commission in 2004 (Doc. COM(2004) 328 final, 28 April 2004) and the subsequent failure of the negotiations.

4.3 The Treaty of Lisbon and Following Developments

4.3.1 The Treaty of Lisbon, the Stockholm Programme, and the Strategic Guidelines for the 5-Year Period 2015–2020

With regard to this fifth step, we will address (a) the fundamental changes introduced by the Treaty of Lisbon in the field of police cooperation and judicial cooperation in criminal matters, (b) the important 5-year working programme adopted by the European Council in December 2009 known as the 'Stockholm Programme' and (c) finally, the strategic guidelines developed by the European Council in June 2014 for the subsequent 5-year period.

4.3.1.1 From the 'Convention on the Future of the Union' to the Treaty of Lisbon, via the 'Constitutional Treaty'

The concrete application of the Third Pillar of the Treaty on the European Union had encountered some problems, especially from an institutional standpoint. These issues had been addressed during the preparatory work for the 'Convention on the Future of Europe'; on that basis, Working Group X, tasked with justice and home affairs issues, proposed in its final report many significant reforms (CONV 426/02, 2 December 2002). These reforms were then debated and included, in their

fundamental aspects, in the draft Treaty establishing a Constitution for Europe presented by the Members of the Convention to the European Council on 18 July 2003 (CONV 850/03, 18 July 2003). The draft was then discussed and amended by the Intergovernmental Conference, which would ultimately lead to the text of the Constitutional Treaty, adopted by the European Council in June 2004 and solemnly signed in Rome on 29 October 2004. With regard to JHA in general, and in particular in the field of cooperation in criminal matters, the Treaty establishing a Constitution for Europe brought about very significant changes. These, however, never entered into force since the referendums in France and the Netherlands in the spring of 2005 rejected ratifying the Constitutional Treaty. After several months of stalemate, and under the German presidency, a new Intergovernmental Conference was summoned and lead to the adoption and subsequent signature of the Treaty of Lisbon on 13 December 2007. A first negative referendum, held in Ireland in June 2008, seemed to open a new period of crisis, but this moment was overcome by a second, positive referendum in October 2009, which enabled the entry into force of the Treaty of Lisbon on 1 December 2009.

In the area of police and judicial cooperation in criminal matters, the Treaty of Lisbon brought back the reforms introduced by the Treaty establishing a Constitution for Europe. The most radical changes concern the institutional framework and the decision-making procedure. Of lesser importance—even if still relevant—are some 'substantive' changes, i.e. concerning the content of judicial and police cooperation. It should be noted, however, that compared to the 'Constitutional Treaty', the Treaty of Lisbon increases variable geometry: this was probably the price to pay to incorporate the 'constitutional *acquis*' in this area.

The Treaty of Lisbon and its fundamental institutional changes—the Treaty of Lisbon introduced two fundamental reforms: it eliminated the Third Pillar and its 'intergovernmental' method in police and judicial cooperation in criminal matters, which since then became subject to the 'Community' method.

With regard to abolition of the Third Pillar, the Treaty of Lisbon incorporates the approach that had already been adopted by the Constitutional Treaty. The provisions concerning the Area of Freedom, Security and Justice are grouped in Title V of Part III of the Treaty on the Functioning of the European Union (TFEU) (the new name of the former Treaty establishing the European Community or First Pillar). This Title V is divided into five chapters. Specifically, three are concerned with the EU area of criminal justice: the first includes common rules to the Area of Freedom, Security and Justice; the fourth is dedicated to 'judicial cooperation in criminal matters'; and the fifth pertains to 'police cooperation'.

The abolition of the Third Pillar represented, in many respects, an essential reform. The previous system had fuelled numerous interinstitutional controversies with regard to the legal basis applicable to the many sectors falling 'in between' Pillars (think, for example, of drugs), which had made negotiations more difficult and had resulted in several annulment decisions of the Court of Justice (see, for instance, CJEU, 13 September 2005, C-176/03, *Commission v. Council*, and CJEU, 23 October 2007, C-440/05, *Commission v. Council*). The elimination of the Third

Pillar therefore facilitated and strengthened EU action in this field, making it more coherent and readable. Some choices, however—such as that of clearly separating police and judicial cooperation in criminal matters or that of strengthening variable geometry—diminished those advantages, especially with regard to the coherence of legislative initiatives and the clarity of EU action.

The abolition of the Third Pillar and the integration of police and judicial cooperation in criminal matters in Title V TFEU also brought about the end of the 'intergovernmental' method and the application of the 'Community' method. The consequences are extremely important and can be summarised in the following: (a) in principle, the application of the co-decision regime implying that decisions are taken by qualified majority in the Council and by the European Parliament as a co-legislator, (b) the use of Community instruments, (c) the broadening of the Court of Justice's jurisdiction and (d) the application of Community principles to this field of law.

With regard to the first consequence, judicial and police cooperation are, indeed, now almost entirely subject to the ordinary legislative procedure. This change had a remarkable impact on the activities of the Council and on the negotiations. One single State or a limited number of States no longer hold the power to block negotiations through their veto power: if they want to avoid being isolated and succumbing, they will have to actively participate in the search of satisfactory compromises. Furthermore, the co-decision regime implies that the adoption of an instrument is subject to the positive vote of both the Council and the European Parliament. The democratic deficit that previously affected police cooperation and judicial cooperation in criminal matters is now for the major part overcome.

After the entry into force of the Lisbon Treaty, the EC legislative instruments find application also in the areas of criminal law and procedure: among these, regulations and directives become relevant. This is an important change because regulations are directly applicable in the domestic legal system of the Member States, and directives may—under certain conditions defined by the Court of Justice of the EU—enjoy an ascending vertical direct effect, meaning that private individuals can directly rely on a directive's provisions against a Member State that failed to implement it or incorrectly implemented it (see Sect. 1.2.4.2). These instruments, therefore, are significantly more effective than the decisions and framework decisions of the Third Pillar, which, nonetheless, had enjoyed 'indirect effect' since the famous *Pupino* decision (see Sect. 1.2.4.3). Their effectiveness is all the more improved as defaulting States may, since the entry into force of the Treaty of Lisbon, be subject to the infringement procedure, with the risk of being sentenced to pay a rather substantial fine.

The Treaty of Lisbon significantly broadens the possibilities for judicial control over the EU area of criminal justice. In addition to the external control carried out by the European Court of Human Rights—a control that should be strengthened with the accession of the European Union to the ECHR (Art. 6 TEU)—the Court of Justice is now vested in this area with the power to perform a control that is analogous to that routinely exercised by it on EC law. Therefore, the Court is able to issue a preliminary ruling, in addition to being able to rule on infringement,

annulment, failure to act and damage proceedings. This ordinary competence of the Court applies not only to the legislation adopted after the entry into force of the Treaty of Lisbon but also, as provided by Protocol no. 36 on transitional provisions, after the expiration of the 5-year transitional period on 1 December 2014, to the old legislative instruments. These include, for example, the Framework Decision on the European Arrest Warrant. Therefore, the Treaty of Lisbon not only opened new perspectives for EU law 'after Lisbon', but also brought a 'second life' to numerous decisions and framework decisions adopted between 1999 and 2009.

Finally, the general principles of EU law find now application to police and judicial cooperation in criminal matters, including the primacy of EU law and the exclusion of reciprocity.

However, the 'communitarisation' of these fields of EU law has been submitted to or still coexist with some derogations.

First of all, the legislative initiative in this area is not assigned exclusively to the Commission but is shared with the Member States. Article 76 TFEU submits the Member States' power of initiative to a threshold: at least one-quarter of the Member States must agree to present a legislative proposal.

Furthermore, the co-decision and the qualified majority regimes are still subject to exceptions in some areas.

Specifically, these areas include the approximation of national laws with regard to elements of criminal procedure other than those expressly indicated in letters a to c (Art. 82.2.d TFEU), the extension of the approximation of national criminal laws to areas of crime other than those specifically indicated (Art. 83.1 TFEU), the establishment of a European Public Prosecutor's Office from Eurojust (Art. 86.1 TFEU), the establishment of rules concerning police operational cooperation (Art. 87.3 TFEU) and the establishment of conditions and limitations allowing the competent authorities of the Member States to operate in the territory of another Member State in liaison and in agreement with the authorities of that State (Art. 89 TFEU).

Finally, an exception to the functions ordinarily assigned to the Court of Justice is provided for in Art. 276 TFEU. By maintaining the formula originally included in Art. 35.3 former TEU, this provision provides that the ECJ has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or to issue a ruling on the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of public order and the safeguarding of internal security.

Substantial changes as to the contents of cooperation in criminal matters—the Treaty of Lisbon introduced innovations not only with regard to the decision-making procedures and the role of the EU institutions; it also affected the content of the cooperation itself. Think, for example, of the consecration in EU primary law of the principle of mutual recognition of judgments and judicial decisions in the penal field, of the insertion of clearer legal bases for the approximation of laws, of the strengthening of the powers of Eurojust and Europol and of the perspective of establishing a European Public Prosecutor's Office.

A confirmation of the importance attached to the principle of mutual recognition can be found in the consideration of this principle as a foundational element of judicial cooperation in criminal matters (Arts. 67.3 and 82.1 TFEU). Conversely, no

reference is made to the principle of availability, which, as we said, represents to some extent the counterpart of the principle of mutual recognition in the field of police cooperation. This lack of reference is probably due to the fact that such principle was only mentioned in the 2004 Hague Programme, which was adopted after the Constitutional Treaty from which the Treaty of Lisbon drew inspiration.

With some limits, the new Treaty provides clearer legal bases for the approximation of national laws both with regard to criminal law and criminal procedure.

With regard to *criminal law*, the Treaty simply confirms—along the lines of what was provided for under the Third Pillar—that the European Union can approximate national laws in a group of ten areas of crime specifically indicated (Art. 83.1 TFEU). In order to intervene in other crime areas—areas of crime that must in any case be particularly serious and have a 'cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis—a unanimous decision by the Council is necessary, subject to the consent of the European Parliament. On the other hand, the European Union is competent to establish minimum rules for the approximation of substantive criminal law whenever such rules prove essential to ensure the effective implementation of a Union policy in an area that has already been subject to harmonisation measures (Art. 83.2 TFEU), and so by means of the same legislative procedure followed for the adoption of the harmonisation measures in question.

Even more important is the express reference included in Art. 82.2 TFEU to the approximation of procedural laws. The inclusion of an express legal basis in this area is undoubtedly a significant development. The limit, however, lies in the fact that such approximation is conceived and allowed only in an ancillary function, in order to facilitate mutual recognition and police and judicial cooperation in criminal matters.

Furthermore, the approximation of both substantive and procedural laws is subject to the so-called emergency brake, which allows a Member State that deems that a draft directive would affect fundamental aspects of its criminal justice system to obtain the suspension of the legislative procedure (Arts. 82.3 and 83.3 TFEU). The same provisions also make it easier to resort to enhanced cooperation in relation to the draft directive concerned, allowing at least nine Member States to carry on with the project under such regime even without the authorisation of the Council (an authorisation that is otherwise necessary for this type of initiatives).

The most significant potential for evolution with regard to the substance of cooperation/integration introduced by the Treaty of Lisbon, however, concerns the judicial actors.

First of all, the Treaty establishes the basis for a deepening of the functions assigned to Eurojust. Article 85 TFEU allows the EU legislator to significantly strengthen the role of this agency by adopting regulations determining Eurojust's structure, operation, field of action and tasks, tasks that may include the exercise of binding powers in relation to the initiation of criminal investigations, the coordination of investigations and prosecutions, and the settlement of conflicts of jurisdiction. This provision lays the ground for a possible transformation of Eurojust from a body merely performing 'mediating' functions in the area of judicial cooperation to a body

vested with binding powers, a perspective that, if implemented, would see Eurojust acting no longer merely horizontally, but also vertically, to promote integration and a European perspective. For its part, Art. 86 TFEU takes an additional step by providing for the establishment of a European Public Prosecutor's Office from Eurojust. Clearly, this is a possibility subject to restrictions since the founding regulation must be approved unanimously in the Council, although, in case of stalemate, recourse to enhanced cooperation is facilitated. The inclusion in the Treaty of a legal basis allowing the possibility to establish a European Public Prosecutor's Office is of fundamental importance. In its face, this provision paves the way for the establishment of a truly integrated EU body. At least theoretically, this perspective goes beyond the simple concept of European 'Area' of criminal justice, to reach the more concrete and important concept of European 'Territory'.

The Treaty also provides the strengthening of Europol's tasks (Art. 87 TFEU) but in a perspective that is more limited than the one adopted for Eurojust.

The price to pay: the variable geometry of the EU area of criminal justice—the aforementioned radical changes significantly strengthen EU cooperation in criminal matters. Not all Member States, however, decided to participate in this revolutionary process. Two different types of compromise are noticeable: on the one hand, opt-out regimes were made available to some States; on the other, as we mentioned, States were given the possibility to block—under certain conditions—the adoption of a particular legislative instrument. This possibility was compensated with increased possibilities for enhanced cooperation. All these adjustments, however, add up to the already significant complexities generated by the Schengen cooperation and ultimately lead to a potentially problematic variable geometry.

The opt-out regimes concern Denmark, on the one hand, and the United Kingdom and Ireland, on the other.

The most radical regime applies to the former, Denmark having demanded that the special statute it enjoyed under the Amsterdam Treaty in the area of asylum, immigration, visas and civil justice be extended to the cooperation in criminal matters. As was latent in the Edinburgh agreement concluded when the Treaty of Maastricht was ratified, Denmark objected to the communitarisation of all sectors covered by the Area of Freedom, Security and Justice. As a consequence, all the new instruments adopted in the latter areas are not, in principle, applicable to Denmark. Denmark only enjoys very limited opt-in possibilities, only relating to the development of the Schengen acquis (Protocol on the position of Denmark and Schengen Protocol).

The situation is more complex with regard to the United Kingdom and Ireland (Protocol on the position of the United Kingdom and Ireland and Schengen Protocol). Since these two Member States did not accept the abolition of internal border controls, they did not join Title IV TEC or the integration of the Schengen *acquis* brought about by the Treaty of Amsterdam. Consistently with their special status, they, however, benefited from opt-in possibilities. The Treaty of Lisbon extended their special regime to all instruments of the Area of Freedom, Security and Justice, including cooperation in criminal matters and irrespective of their Schengen origin. Therefore, the United Kingdom and Ireland enjoy an '*à la carte*' regime, pursuant to which they can, on a case-by-case basis, choose whether to participate in the

negotiations of the proposals and initiatives concerning the 'Area' or join the measures adopted in this area at a later stage. Furthermore, pursuant to Art. 10.4 of Protocol 36, the United Kingdom benefited and made use of an additional *opt-out* with regard to measures of judicial and police cooperation adopted in the framework of the former Third Pillar. In July 2013, the UK notified the Council of its decision to opt out from all such measures. Such a broad opt-out appeared in the eyes of many as an excessive privilege and raised many questions with regard to the cooperation in criminal matters with the United Kingdom and to the coherence of the criminal justice area. Making use of its possibility to request to participate again in some of those acts, the United Kingdom then requested and obtained an *opt-in* for 35 of those instruments, including the very foundational instruments of the EU area of criminal justice (ranging from the European Arrest Warrant to the instruments regulating Eurojust, Europol or SIS II).

The variable geometry is destined to increase, considering that not only Norway and Iceland but also Switzerland and Liechtenstein have joined the Schengen *acquis* and its subsequent developments. Indeed, Switzerland and Liechtenstein have been granted the status of Associated States, but since they are not Member States of the European Union, they do not participate in the instruments of cooperation in criminal matters which are not covered by the Schengen *acquis*.

To this special status one must add the possibilities to resort to enhanced cooperation. The latter is facilitated by the Lisbon Treaty both when a Member State objects to the introduction of a measure concerning the approximation of laws—by resorting to the 'emergency brake' (Arts. 82.3 and 83.3 TFEU)—and when unanimity is not reached in all those now exceptional cases in which it is still required (for example, for the creation of a European Public Prosecutor's Office, Art. 86.1 TFEU, or for the establishment of operational police cooperation, Art. 87.3 TFEU). In such situations, the Treaty allows interested Member States to establish enhanced cooperation without the need to obtain—as is usually required—the authorisation of the Council.

The different geographical scope of application of the instruments adopted after the entry into force of the Treaty of Lisbon undoubtedly makes the understanding and operation of the EU area of criminal justice more complex and runs the risk of undermining its overall coherence.

4.3.1.2 The Stockholm Programme

Adopted by the European Council of 10 and 11 December 2009, the Stockholm Programme succeeded to the Hague Programme. This new working programme turned out to be faint-hearted in its effort to strengthen European agencies and establish a European Public Prosecutor's Office and ambitious with regard to the mechanisms for cooperation and the approximation of laws. More specifically, the Stockholm Programme generally confirmed the importance of the principle of mutual recognition in criminal matters; it foresaw an improvement of the existing instruments, especially with regard to the adoption of a general system for the

collection of evidence that would replace the scattered applicable instruments. Special attention was also devoted to the approximation of national legislation in the specific sector of criminal procedure. In this regard, the new programme focused mainly on two aspects: the rights of the victims and the rights of the suspects and accused persons. In this regard, the European Council elaborated a 'roadmap' for strengthening them.

The strategic guidelines of the European Council of June 2014—on 26 and 27 June 2014, the European Council adopted the strategic guidelines for the 5-year period 2015–2020. These guidelines depart significantly from its predecessors, by not only being extremely generic and concise but also remaining very shy in their content, as many commentators have remarked. Their name is revealing: these are simple guidelines and no longer a 'programme' (as was the case of the Hague and the Stockholm Programmes). This is not so surprising since they implement Art. 68 TFEU.

The general priority is now to consistently transpose, effectively implement and consolidate the legal instruments and policy measures in place. Nonetheless, new measures are foreseen, especially to achieve the following goals: make EU legislation more consistent and clear, continue efforts to strengthen the rights of accused and suspected persons in criminal proceedings, strengthen the protection for victims, enhance the mutual recognition of decision in criminal matters, reinforce exchanges of information between the authorities of the Member States, fight fraud and offences affecting the Union's budget. Finally, emphasis is placed on the need to progress in the negotiations on the establishment of a European Public Prosecutor's Office, facilitate cross-border activities and operational cooperation, enhance training for practitioners and mobilise the expertise of relevant EU agencies such as Eurojust and the Fundamental Rights Agency.

4.3.1.3 A Review of 8 Years of Application of the Treaty of Lisbon

Since the Treaty of Lisbon entered into force on 1 December 2009, the legislative activity of the Union in criminal matters has focused especially on the approximation of legislation.

This can be easily noted with regard to substantive criminal law, with regard to which eight directives have been adopted replacing pre-existing instruments (Directive 2011/36/EU on preventing and combating trafficking in human beings and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, Directive 2013/40/EU on attacks against information systems, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Directive 2014/57/EU on criminal sanctions for market abuse, Directive 2014/62/EU on the protection of the euro and other currencies against counterfeiting, Directive 2017/541/EU on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism, Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law). Even more important are the legislative interventions in the area of criminal procedure, in

which very little results had been achieved under the Third Pillar. More specifically, seven directives have been enacted: Directive 2012/29/EU is concerned with the protection of victims of crime and replaced the previous 2001 Framework Decision; the other six are concerned with the accused's and suspect's procedural rights and represent the first measures implementing the 'roadmap': Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings and Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

The Union has also continued to develop the principle of mutual recognition. These activities have resulted in two directives: Directive 2011/99/EU on the European Protection Order and Directive 2014/41/EU on the European Investigation Order in criminal matters. Their negotiations, however, have been particularly difficult and complex. The latter instrument is especially important, since its purpose is to answer to the call of the European Council to replace the fragmented legal framework concerning the collection of evidence.

Finally, one last area of intervention concerns European actors. Europol has received a new legal basis under the form of Regulation 2016/794/EU on the European Union Agency for Law Enforcement Cooperation (Europol), which replaces and repeals the former relevant Council decisions. After the European Parliament gave its consent, the Regulation on the establishment of the European Public Prosecutor's Office was adopted on the 12th of October 2017 by the 20 Member States that are part of the EPPO enhanced cooperation (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Spain, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia and Slovakia). The EPPO central office will be based in Luxembourg. Due to their sensitivity from the national sovereignty point of view, the negotiations of the text were particularly hard. In comparison with the initial Commission proposal (see Commission proposal COM(2013) 534 final, 17 July 2013), the text has considerably evolved and its ambitions have considerably decreased. Another draft regulation should soon be adopted, namely the draft Eurojust Regulation (COM(2013) 535 final, 17 July 2013).

4.3.2 Final Remarks

The above overview testifies to the evolving and dynamic nature of judicial and police cooperation in criminal matters. This can be noted, first and foremost, from an

institutional point of view: while no competence in criminal matters was included in the Treaty of Rome, the first cautious steps towards cooperation in this area found its way outside of the Community framework; then cooperation in criminal matters was included in the Treaty on the European Union, albeit in an intergovernmental manner; this cooperation gradually took on a more Communitarian tone, until the Treaty of Lisbon consecrated the shift towards full 'communitarisation' of this cooperation, with the disappearance of the Third Pillar and its integration in the ordinary institutional legal framework of the Union.

The evolving and dynamic character of cooperation in criminal matters emerges clearly also from the objectives pursued and the mechanisms used to implement it. The idea of a European area of criminal justice has been progressively designed and implemented. A lot has been achieved. But a lot remains to be done, and this area is still confronted with many challenges, among which, of course, the Brexit is to be mentioned.

Further Reading

Bachmaier L (2012) La cooperación judicial en asuntos penales en Europa: consideraciones prácticas, situación actual y propuestas de futuro. In: Colomer G, Vilar B, Cuadrado C (coords) El derecho procesal español del siglo XX a golpe de tango. Liber Amicorum en homenaje a Juan Montero Aroca, Tirant lo Blanch, Madrid, pp 1203 ff

Barbe E (2007) L'espace judiciaire européen. La Documentation française, Paris

Bieber R, Monar J (eds) (1995) Justice and home affairs in the E.U. The development of the third pillar. European Interuniversity Press, Bruxelles

Bigo D (1996) Polices en réseaux: l'expérience européenne. Presses de Sciences Po, Paris, pp 269 ff

Braum S, Weyembergh A (dir) (2009) Le contrôle juridictionnel dans l'espace pénal européen? Éditions de l'Université de Bruxelles, Bruxelles

Charpentier J (1978) Vers un espace judiciaire européen. A.F.D.I., pp 927 ff

Cour de Cassation (sous l'égide) (2010) Quelles perspectives pour un Ministère public européen? Protéger les intérêts financiers et fondamentaux de l'Union. Dalloz, Paris

Curti Gialdino C (1999) Schengen ed il terzo pilastro: il controllo giurisdizionale secondo il Trattato di Amsterdam. Riv. dir. eur., pp 41 ff

Curtin DM, Pouw JFM (1995) La coopération dans le domaine de la justice et des affaires intérieures au sein de l'UE: une nostalgie d'avant Maastricht? Revue du Marché Unique européen 3, pp 13 ff

De Amicis G (2001) La costruzione di Eurojust nell'ambito del "Terzo Pilastro" dell'Unione Europea. Cass. pen., pp 1964 ff

De Gouttes R (1990) Variations sur l'espace judiciaire pénal européen. D., chr. XLI, pp 245 ff

De Gouttes R (1991) Vers un espace judiciaire pénal pan européen. D., chr. XXXI (v° I), pp 154 ff

Dehousse F, Van den Hende L (1996) Plaidoyer pour la réforme du 3ème pilier. R.M.C.U.E., pp 714 ff

De Kerchove G, Weyembergh A (sous la dir. de) (2000) Vers un espace judiciaire pénal européen. Ed. de l'Université de Bruxelles, Bruxelles

De Kerchove G, Weyembergh A (sous la dir. de) (2001) La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne. Ed. de l'Université de Bruxelles, Bruxelles

De Kerchove G, Weyembergh A (sous la dir. de) (2002) L'espace pénal européen: enjeux et perspectives. Ed. de l'Université de Bruxelles, Bruxelles

De Kerchove G, Weyembergh A (sous la dir. de) (2003) Quelles réformes pour l'espace pénal européen? Ed. de l'Université de Bruxelles, Bruxelles
De Kerchove G, Weyembergh A (sous la dir. de) (2003) Sécurité et justice: enjeu de la politique extérieure de l'Union européenne. Ed. de l'Université de Bruxelles, Bruxelles
De Kerchove G, Weyembergh A (sous la dir. de) (2005) La confiance mutuelle dans l'espace pénal européen. Ed. de l'Université de Bruxelles, Bruxelles
Delmas-Marty M (sous la dir. de) (1993) Quelle politique pénale pour l'Europe? Economica, Paris
Den Boer M (ed) (1997) The implementation of Schengen: first the widening, now the deepening. European Institute of Public Administration, Maastricht
Den Boer M (ed) (1998) Schengen's final days? The incorporation of Schengen into the new TEU, external borders and information systems. European Institute of Public Administration, Maastricht
Flore D (1999) Une justice pénale européenne après Amsterdam. JTDE, pp 121 ff
Flore D (2014) Droit pénal européen. Les enjeux d'une justice pénale européenne, 2nd edn. Larcier, Bruxelles
Galli F, Weyembergh A (eds) (2013) Approximation of substantive criminal law in the EU: the way forward. Ed. de l'Université Libre de Bruxelles, Bruxelles
Herlin-Karnell E (2012) The constitutional dimension of European criminal law. Hart, Oxford
Herlin-Karnell E (2014) All roads lead to Rome: the new AFSJ package and the trajectory to Europe 2020. Eucrim, pp 27 ff
Hinajeros A, Spencer JR, Peers S (2012) Opting out of EU criminal law. What is actually involveld? CELS working paper, new series no 1, Septemebr 2012 (disponible sur le site http://www.cels.law.cam.ac.uk)
Klip A (2016) European criminal law: an integrative approach, 3rd edn. Intersentia, Cambridge
Labayle H (2013) Within you, without you: l'opt-out britannique en matière d'entraide repressive. Europe 23(2):6 ff
Lepoivre M (1995) Le domaine de la justice et des affaires intérieures dans la perspective de la Conférence intergouvernementale de 1996. Cahiers de droit européen, pp 325 ff
Miettinen S (2013) Criminal law and policy in the EU. Routledge, London
Mitsilegas V (2009) EU criminal law. Hart, Oxford
Monar J, Morgan R (eds) (1994) The Third Pillar of the E.U. Cooperation in the fields of Justice and Homes Affairs. European Interuniversity Press, Bruxelles
Moreillon L, Willi-Jayet A (2005) Coopération judiciaire pénale dans l'UE. Helbing & Lichtenhahn/Bruylant/LGDJ, Basel/Bruxelles/Paris
Pi Llorens M (2017) El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia. Revista de Derecho Comunitario Europeo, pp 77 ff
Pradel J, Corstens G, Vermeulen G (2009) Droit pénal européen, 3rd édn. Dalloz, Paris
Rolin H (sous la dir. de) (1970) Droit pénal européen. Presses universitaires de Bruxelles, Bruxelles
Sabatier M (2001) La coopération policière européenne. L'Harmattan, Paris
Salazar L (2008) Presente e futuro dello Spazio di libertà, sicurezza e giustizia: dal Piano d'azione dell'Aja alla "visione" della Commissione europea. In: Grasso G, Sicurella R (eds) Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale. Giuffrè, Milano, pp 625 ff
Satzger H (2012) International and European criminal law. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden
Scotti L (1992) La cooperazione giudiziaria dal Trattato di Roma agli accordi di Maastricht. Doc. giust., pp 1406 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden
Stile AM (2015) The instruments of the former Third Pillar in the Lisbon era: towards an integrated judicial control in the area of security, liberty and justice. New J Eur Crim Law, pp 482 ff
Van Den Wijngaert C (1981) L'espace judiciaire européen: vers une fissure au sein du Conseil de l'Europe? Revue de droit pénal et de criminologie II, pp 511 ff

Vervaele JAE (2005) L'europeizzazione del diritto penale e la dimensione penale dell'integrazione europea. Riv. trim. dir. pen. economia, pp 129 ff
Vignes D (1996) Plaidoyer pour le IIIème pilier. R.M.C.U.E., pp 273 ff
Wagner E (1998) The integration of Schengen into the framework of the European Union. Legal Issues Eur Integration, pp 17 ff
Weyembergh A (2011) The development of Eurojust: potentials and limitations of Art. 85 TFEU. New J Eur Crim Law, pp 75 ff
Weyembergh A (2017) Consequences of Brexit for European Union criminal law. New J Eur Crim Law, pp 284 ff
Weyembergh A, Armada I, Brière C (2015) Competition or cooperation? State of play and future perspectives on the relations between Europol, Eurojust and the European Judicial Network. New J Eur Crim Law, pp 258 ff

Chapter 5
Vertical Cooperation

Gaetano De Amicis and Roberto E. Kostoris

Contents

G. De Amicis (✉)
Italian Court of Cassation, Rome, Italy
e-mail: gaetano.deamicis@giustizia.it

R. E. Kostoris
School of Law, University of Padua, Padua, Italy
e-mail: roberto.kostoris@unipd.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_5

5.1 Centralised Bodies of Administrative and Police Cooperation

Gaetano De Amicis

5.1.1 Foreword

There are two kinds of key players in criminal judicial and police cooperation within the European area: the judicial and police authorities of Member States and the central bodies of the European Union, such as Eurojust, OLAF and Europol. If

cooperation were left to the sole coordination abilities of national authorities, it would hardly be able to achieve really significant goals in the fight against transnational crimes. This is even truer taking into account the far-reaching objectives set by the Lisbon Treaty. We have to consider that, on one hand, the principle of mutual recognition of judicial decisions, which greatly modified the judicial transnational cooperation mechanisms, leads to direct relationships between the judicial authorities of different States. These relationships are often in tension with one another, and therefore they must be better governed at a centralised level. On the other hand, mutual trust between different Member States' authorities cannot arise instantly. Mutual trust must be created over time by building progressively networks, structures and common supranational bodies for the transition to effective coordinated forms of fighting international crimes (both at judicial and police levels). At the same time, these structures must promote the full achievement of a common judicial area based on European territoriality principles and the free movement of judicial decisions.

From this point of view, Eurojust, OLAF and Europol are currently the most visible results of a great effort carried out by European institutions, which led to unexpected results in relatively few years. Unfortunately, such efforts are still not sufficient, considering the new challenges arising from organised crime and international terrorism.

A Europe that strives to be a driving force in the complex global community scenario must share 'common' judicial institutions and police bodies to increase its political weight.

In this perspective, it is possible to consider the different ways in which such supranational bodies can act. This feature, together with the fact that their action is carried out from top to bottom, from the European level to the national level, suggests defining this kind of cooperation as 'vertical' to distinguish it from the 'horizontal' cooperation that occurs when two or more States cooperate directly between themselves, and that will be discussed in the following chapter. It must be noted that such 'verticality' does not imply—at least so far—the use by these supranational bodies of any authoritative powers towards Member States' investigative bodies. Their goal is only to support and assist the latter when the investigation reaches a transnational level.

The climax of this evolution will be reached by the establishment of a European Public Prosecutor's Office, to be created 'starting from Eurojust', pursuant to Art. 86 TFEU.

In any case, we must not forget that, even now, OLAF, although it carries out administrative investigations, collects and processes reports of illegal acts against the financial interests of the European Union, which are transferred to the national authorities competent for investigations and decisions (which can be criminal, administrative or disciplinary). On its own, Europol assists Member States' law enforcement authorities' collecting data and promoting the exchange of information to fight serious cross-border crimes. Finally, Eurojust is called upon to strengthen judicial cooperation mechanisms and to coordinate the activities of national investigation bodies.

5.1.2 OLAF and the Protection of the Union's Financial Interests

5.1.2.1 Creation of OLAF

Speaking about the features and activities of these supranational bodies, we will start with the ones that deal with administrative and police cooperation. To this purpose, it is useful to start with the European Anti-Fraud Office (OLAF), which, even if not directly involved in criminal cooperation but in administrative activities, as further explained below, carries out an important function of cooperation and of incentive for national judicial authorities, which might have a significant role also in criminal cooperation.

OLAF was created by the European Commission with Decision 1999/352/EC of 28 April 1999, followed by Regulation 1073/1999/EC, Regulation (EURATOM) 1074/1999 and the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the European Commission.

Regulation 883/2013/EU of 11 September 2013 concerning the investigations carried out by OLAF repealed both Regulations 1073/99/EC and 1074/99/EC (EURATOM). It 'rationalized' the entire regulatory framework concerning the investigation activities of the Office and merged all precedent provisions into a single set of rules. At the same time, Decision 1999/352/EC was modified by Decision 2013/478/EU of 27 September 2013.

OLAF fully assumed the functions previously carried out by UCLAF (Unit for the Coordination of Fraud Prevention), created by the Commission in 1987 with Decision 1987/572/EEC, which was then renamed Task Force 'Coordination of the fight against fraud'. Compared to the latter, OLAF has more independence in carrying out its investigative functions.

As clearly stated in the preamble of Decision 1999/352/EC, the creation of OLAF is aimed to make the protection of the Communities' financial interests and the fight against fraud more efficient, taking into account that the financial resources of the European communities must be considered common goods and that these resources are often affected by cross-border aggressions. Therefore, this supranational investigation service has the role of supporting and strengthening the fraud prevention systems of Member States, whose task is moreover to protect, as expressed by the treaties, European financial interests.

From this point of view, Art. 325 TFEU provides that the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through deterrent measures in order to afford effective and equal protection to the Member States and to all the Union's institutions, bodies, offices and agencies. For that purpose, Member States shall coordinate themselves and cooperate directly with the Commission. In addition, Art. 325.4 TFEU provides that the European Parliament and the Council, after consulting the Court of Auditors, shall adopt any necessary measures in both the prevention of and the fight against

fraud affecting financial interests of the Union, acting in accordance with the ordinary legislative procedure.

According to this regulatory framework, OLAF's mission consists in several functions. Firstly, it carries out administrative investigations concerning fraud, corruption and any other illegal activity affecting the EU financial interests, as well as those concerning any illegal act linked to professional activities of Community officers and which can be punished as disciplinary fault or crimes.

Secondly, as specified under Art. 2.6 of Decision 1999/352/EC, the Office shall be in direct contact with national police and judicial authorities. Indeed, OLAF must assist national judicial authorities, must cooperate with them and must provide them with the results of its own investigation activities so they can use such investigations within their national proceedings, especially when frauds present organised and cross-border dimensions (which is happening more and more often).

Finally, the Office has also non-investigative functions as it develops the strategies for the fight against fraud, and it prepares legislative and regulatory initiatives for the Commission for fraud prevention (Art. 2.2–4 Decision 1999/352/EC).

5.1.2.2 Functional Independence

Administratively, OLAF is established and integrated within the European Commission as the latter represents the financial interests of the Union. However, OLAF exerts its investigative powers with full independence from the Commission. This independence is enshrined in the preambles of Decision 1999/352/EC and of Regulation 883/2013/EU and in many other various provisions concerning actions or organisations also related to the role of Director General of the Office.

It is to point out that, in particular, such Director 'shall neither seek nor take instructions from any government or any institution, body, office or agency' (Art. 17.3 Regulation 883/2013/EU) and that the same has a right to bring an action before the Court of Justice 'if it considers that a measure taken by the Commission calls its independence into question' (Art. 17.3 Regulation 883/2013/EU).

From a regulatory point of view, it is important to point out that the appointment of OLAF Director—for a seven-year non-renewable term—is done through an inter-institutional procedure in order to neutralise any risk of interference on the exercise of the investigation function. Such procedure, on the one hand, reserves to the Commission the final decision, while, on the other hand, it requires (Art. 17.2 Regulation 883/2013/EU) a consultation with the European Parliament and the Council and a favourable opinion by the Supervisory Committee (a body with five 'external independent members', who has the role to 'keep the independence of the Office' and with whom the Director interacts on matters of investigations and relationships of OLAF with various authorities).

Both the Director's independence and the guarantee role played by the Supervisory Committee 'seek to guarantee the Office's proper conduct of investigations' (recital 5 of Decision 1999/352/EC). The Court of Justice itself highlighted the importance and peculiarity of such status by admitting an annulment proceeding

presented by the European Commission concerning a decision of October 1999—i.e., some months after OLAF was created—with which the European Central Bank attributed to its internal services the exclusive investigation competence concerning frauds and irregularities affecting financial interests of the Central Bank (CJEU, 10 July 2003, C-11/10, *European Commission v. European Central Bank*).

The European judges reached such conclusion based on two points: OLAF has an investigation competence extended to all the institutions, and the full independence of the office, which has to carry out the investigations in strict compliance with EU law and with human rights, excludes any risk of prejudice to the independence trait of the Bank. With similar reasoning, the Court overruled another decision under which the European Investment Bank wanted to regulate in a restrictive way its cooperation with OLAF (CJEU, 10 July 2003, C-15/00, *European Commission v. European Investment Bank*).

5.1.3 Follows: OLAF's Administrative Investigation Powers

5.1.3.1 Kinds and Tools of Investigation

OLAF is the sole European centralised body currently engaged in the fight against cross-border offences that was conceived as an entity with autonomous investigative powers. However, it is an administrative body; its investigations have an administrative nature and, therefore, are only pre-emptive of proper criminal investigations. As clearly specified under Art. 2 of Regulation 883/2013/EU, these investigations shall not affect 'the powers of the competent authorities of the Member States to initiate criminal proceedings'. Nonetheless, the object of these investigations is infractions that, for their nature, can be relevant not only from an administrative point of view but also from a criminal one. It is due to such intertwining that the activity of OLAF has a specific interest from our perspective of analysis.

OLAF's investigations can be internal or external.

On the one hand, external investigations are carried out within Member States or, under certain cooperation agreements, within third States, concerning private operators that are suspected to have prejudiced the EU budget, both on the revenue side and on the expenditure one, or of 'fraud', 'corruption' and 'any other illegal activity affecting the financial interests of the Union' (Art. 3 Regulation 883/2013/EU).

Internal investigations, on the other hand, are carried out concerning members and servants of European institutions, bodies and agencies when they are suspected of 'fraud', 'corruption' and 'any other illegal activity affecting the financial interests' and of the related 'serious matters relating to the discharge of professional duties' arising from employment relationships.

The procedural rules governing internal and external investigations are not exactly the same.

Both kinds of investigations are subject to the provision under which both the institutions and the European bodies and Member States must transfer to the Office,

without delay, any information concerning facts falling in the latter's competence (Art. 8 Regulation 883/2013/EU).

However, for internal investigations in the European Commission, the cooperation comprises a further development: officials and servants of such institution have the obligation to communicate, without delay, to their superior or directly, any possible piece of information on facts of criminal and disciplinary relevance that fall within OLAF's competence to carry out internal investigations. In any case, officials and servants shall in no way suffer inequitable or discriminatory treatment as a result of having communicated the information (Art. 2.1-4 Decision 1999/396/EC).

OLAF has a very limited availability of investigation instruments.

Concerning external investigations, the main tool is the possibility to carry out on-the-spot checks and inspections, as provided in Regulation 2185/1996/EC. It consists, in most cases, of inspections carried out in the premises of suspected operators and also of third parties who have a relationship with the former.

This kind of investigation is carried out in the same way as the similar administrative national controls: the applicable rules are the ones of the Member State where the investigations are carried out.

For internal investigations, the Anti-Fraud Office will be able to access, without notice, premises of institutions and any documentation existing therein. Concerning internal investigations, it is provided that OLAF will have the right to question any person to obtain useful information (Art. 4.2 Regulation 883/2013/EU). For external investigations, there is no such provision. However, this lack of explicit provision does not entail a prohibition; it is reasonable to expect that on OLAF's request, there is no legal duty to cooperate for the questioned persons if they are not servants or members of European institutions.

Finally, both for internal and external investigations, even if the regulations do not provide anything on this point, there are no reasonable grounds to exclude that OLAF can benefit from the cooperation of persons with specific technical skills.

The decision to open an internal investigation shall be taken by the Director General, *ex officio*, or—respectively for internal and external investigations—on request by the institutions or by the interested national authorities (Art. 5 Regulation 883/2013/EU).

Such request does not seem to have a binding value and therefore does not impose an obligation to act. With the aim of making more coherent and transparent the exercise of a power that remains widely discretionary, the internal organisation of OLAF (see OLAF Manual, OPOCE, Luxembourg, 2005, 74 ff. and, more recently, Guidelines on Investigation Procedures for OLAF Staff, adopted on 1 October 2013 based on Art. 17.8 Regulation 883/2013/EU) has provided that every report of an illegal act must meet three requirements to justify the initiation of an investigation: (a) it must concern a violation under the competence of the office; (b) it must contain sufficiently serious suspects, also taking into account the level of reliability of the available information; (c) the beginning of the investigation must satisfy a need for legal protection that national authorities are not able to satisfy, entirely or partially (this last rule represents an application of the principle of subsidiarity).

The requirement *sub* b) was established by case law: in the already mentioned decision of 10 July 2003, C-11/00, *European Commission*, where was established OLAF's competence also concerning investigations on the European Central Bank, the European Court of Justice highlighted that, in any case, the decision of the Director General to start an investigation 'cannot be taken unless there are sufficiently serious suspicions'.

Once the investigation activities begin, they must be carried out in a continuous way and end within a time proportionate to the circumstances and the complexity of the case. No maximum terms of investigation are fixed; however, after a 12-month period, the Director General must report to the Supervisory Committee on the reasons why it was not possible to close the investigations and on the foreseeable timing of their definition (Art. 7.8 Regulation 883/2013/EU).

The investigations must be carried out in compliance with the principle of impartiality, which represents an enforceable right for the investigated person. The case law has highlighted some elements connecting impartiality, speed and thoroughness of the investigation by pointing out that 'although legitimate when the facts are old and liable to become subject to limitation, the concern of OLAF to conduct its investigations rapidly cannot however justify a one-sided or selective inquiry into the potential responsibility' (CJEU, 6 April 2006, T-309/03, *Manuel Camos Grau v. European Commission*).

5.1.3.2 Defence Guarantees and Duties of Information

The investigation activities of OLAF, even if they are administrative and only preliminary to actions carried out by other authorities, and even if they do not entail coercive powers that can be compared to the ones of police investigations, must anyhow be carried out in respect of some minimal defence guarantees.

Firstly, in general, it is provided that 'such investigations should be conducted (. . .) with full respect for human rights and fundamental freedoms, in particular the principle of fairness, for the right of persons involved to express their views on the facts concerning them and for the principle that the conclusions of an investigation may be based solely on elements which have evidential value' (recital 12 Regulation 883/2013/EU).

Some specific provisions concern internal investigations. It is provided that when the possibility of personal involvement of an official, other servant, member of an institution or body, a head of office or agency, or a staff member arises, both the concerned party and the institution, body or agency to which he/she belongs must be informed; the information can be deferred 'on the basis of a reasoned decision by the Director-General, which shall be transmitted to the Supervisory Committee after the closure of the investigation' (Art. 4.6. Regulation 883/2013/EU).

Secondly, the aim is to grant a form of adversarial procedure: before conclusions referring to a person concerned are drawn up, OLAF must allow such person to comment on facts concerning him. Even this duty can be deferred if it is necessary to keep the confidentiality of the investigation or in case of investigation activities

falling within the competence of a national judicial authority (Art. 9.4 Regulation 883/2013/EU).

Finally, the Director General of OLAF must inform in writing the interested party concerning any possible closure of the investigations (Art. 11.7 Regulation 883/2013/EU).

5.1.4 Follows: Relationships Between OLAF and National Judicial Authorities

5.1.4.1 OLAF's Transfer of Information to Judicial Authorities and the Relevance of the Report as Evidence in National Criminal Proceedings

Upon completion of investigations, OLAF drafts a report under the supervision of the Director General, which lists the facts ascertained, assesses their possible illegal nature and gives recommendations to the competent European and/or national authorities for the further prosecutorial, disciplinary, civil and administrative actions that fall within their competence (Art. 11 Regulation 883/2013/EU). In any case, when the report drawn up following an administrative investigation reveals the existence of facts that could give rise to either criminal or disciplinary proceedings, or both, OLAF transmits the information to the competent authority.

The relationship between OLAF and the national judicial authorities becomes particularly important considering that the Anti-Fraud Office carries out administrative investigations on facts that, due to their nature, are destined to be relevant, in most cases, from a criminal point of view, as mentioned above. This is precisely one of the peculiar features of the activities of this body. It demonstrates the Office's 'ambiguity' and shows how OLAF is a significant example of the resistances characterising the path of European integration to grant strong repressive/investigative powers to bodies of the Union.

A first aspect concerns transmission to judicial authorities of information collected by OLAF during its own investigations regarding facts that could give rise to criminal proceedings. Such transmission becomes an obligation in case of internal investigations and remains discretional for the external ones (see Arts. 11.5 and 12 Regulation 883/2013/EU).

The transmission of information does not entail an obligation for national judicial authorities to act, even if they are invited to assess that information with due consideration. For the same reason, an action for annulment cannot be brought against OLAF's decision to involve the national judicial authorities, given that the concerned party can properly exercise its own rights within the possible subsequent proceeding initiated in front of such authorities (CJEU, 19 April 2005, C-521/04, *Hans-Martin Tillack*).

A second aspect that is particularly important in the framework of the relationships between OLAF and national judicial authorities concerns the relevance as

evidence that the findings of the investigations carried out by OLAF can assume within judicial proceedings (especially criminal ones) held in front of such national judicial authorities.

On this point, Art. 11.2 Regulation 883/2013/EU grants OLAF's reports the same value as evidence of similar reports drawn up by national administrative inspectors.

So a general principle that evidence collected in a European administrative context may circulate within the national judicial networks is established. However, it is limited by specific conditions provided by national regulations: a clear sign of the desire not to affect States' sovereignty in such a thorny area; it is clear that the possibility recognised to each domestic legal order of adopting various solutions concerning the use of administrative materials in internal criminal proceedings reduces the scope of this general principle. From this point of view, we understand how important it is for OLAF to take into account the procedures of the interested Member State in carrying out its investigation and in drawing up its reports, as provided under Art. 11.2 Regulation 883/2013/EU.

5.1.4.2 Judicial Authorities' Assistance

OLAF can carry out external investigations not only in the territory of Member States but also in non-Member States, as a result of bilateral or multilateral agreements with the European Commission or as provided in special clauses within financial instruments. That increases the number of possible relationships between this Office and the national judicial, police, custom and administrative authorities in non-European regions.

From this point of view, according to the common practices that characterise its activities, OLAF ends up not only carrying out its own functions as an autonomous investigative body but also assisting and cooperating with judicial authorities that are dealing with illegal acts with a cross-border nature by facilitating their interactions with investigative bodies of various kinds that are dealing with the same events or with linked events; by facilitating the exchange of information, including with international rogatory commissions; and by coordinating judicial and administrative investigation initiatives.

5.1.4.3 OLAF and the Establishment of a European Public Prosecutor's Office

It is provided that when the European Public Prosecutor's Office will function, OLAF's role will change, and its activities will be significantly more limited. Where the EPPO carries out a criminal investigation, OLAF shall not open any parallel administrative investigation on the same facts. In any case, the EPPO may request OLAF to support or complement its activity providing information, analyses, expertise and operational support; facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union; and also

conducting administrative investigations (see Art. 101 of EPPO's Regulation 2017/1939/EU).

5.1.5 Europol: Competences, Powers and Structure

5.1.5.1 Creation of Europol

The European Union Agency for Law Enforcement Cooperation (Europol) established under Regulation 2016/794/EU of the European Parliament and of the Council of 11 May 2016, is a body of the European Union operating in the area of police cooperation having the task of collecting, storing, processing, analysing and exchanging information (including criminal intelligence data) to support and strengthen the action by competent authorities of the Member States and their mutual cooperation in preventing and combating serious crimes affecting two or more Member States, terrorism and forms of crime that affect a common interest covered by a Union policy (Art. 3.1 Regulation 2016/794/EU). The differences with OLAF are immediately evident: in fact, on the one hand, this body does not have autonomous investigation powers, and, on the other hand, it operates for all purposes within a formally 'criminal' scope.

This Agency has succeeded from 1 May 2017 to the European Police Office, also called Europol, established with Council Decision 2009/371/JHA of 6 April 2009, which, in turn, substituted the Convention signed in Cannes on 26 July 1995 (Europol Convention) under Art. K.3 of the Treaty on the European Union, with the purpose of facilitating the coordination and performance of specific investigation operations by the competent authorities of Member States, and of promoting liaison arrangements between investigating authorities, both judicial and police ones, specialised in the activities of combating cross-border organised crime. It was a body established by Member States, having an intergovernmental nature.

Starting from its entry into force, the Regulation mentioned above replaces the existing regulations on this matter (meaning Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA) with the objective to fulfil three essential needs: a) to conform the legislation on Europol with the rules of the Treaty of Lisbon (Art. 88 TFEU provides that the European Parliament and the Council shall be the ones deciding the applicable regulation to be adopted 'in accordance with the ordinary legislative procedure' to determine 'structure, operation, field of action and tasks' of the body: recital 2); b) to improve its governance, also by involving the European Parliament and the national Parliaments (recitals 17–22 and 58); c) to strengthen the systems for the processing of information and data protection (recitals 23–57).

The transformation of Europol in an Agency of the European Union with institutional seat in The Hague, with legal personality and financed by a contribution written in the general budget of the Union, emphasises the control by the European Parliament on the activities of this body, even from a financial point of view, and

significantly increases its operative dimension in the framework of police cooperation, also in liaison with other cooperation units at the European level. The strengthening of the European Parliament's role of control, together with the direct involvement of national parliaments, affects one of the most problematic aspects of Europol's action, meaning the deficit of democratic control. In fact, in this regard, Art. 51.2 provides that the 'political monitoring' carried out on the activities of Europol extends to their potential impacts on 'the rights and fundamental freedoms of natural persons'. Such control will be carried over, in particular, through the transmission to a Joint Parliamentary Scrutiny Group (JPSG) of documents expressly drafted by the Agency (Art. 51.3–4), as well as through the auditions of the principal bodies of Europol (Art. 51.2.a) and of the European Data Protection Supervisor (EDPS) (Art. 51.2.b). The enhancement of the national parliaments' role is pursued mostly through their involvement in the definition of the programme objectives of Europol's activity (Arts. 12.1 and 51) and in checking the results of such activities and the achieved objectives (Arts. 11.1.c and 51.5).

5.1.5.2 Competence

Europol's competence is very broad; it includes a large number of crimes expressly listed in the annex to the decision, in particular drug trafficking; money-laundering activities; crime connected with nuclear and radioactive substances; immigrant smuggling, trafficking in human beings; motor vehicle crimes; murder; grievous bodily injury, illicit trade in human organs and tissues; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; robbery and aggravated theft; illicit trafficking in cultural goods, including antiquities and works of art; swindling and fraud; racketeering and extortion; counterfeiting and product piracy; forgery of administrative documents and trafficking therein; forgery of money and means of payment; computer crime (cybercrime); corruption; illicit trafficking in arms, ammunition and explosives; illicit trafficking in endangered animal species; illicit trafficking in endangered plant species and varieties; environmental crime; and illicit trafficking in hormonal substances and other growth promoters.

The new regulation has significantly broadened the competence of Europol, including in its mandate the following forms of crime: crimes against the financial interests of the Union; insider dealing and financial market manipulation; ship-source pollution; sexual abuse and sexual exploitation, including child abuse material and solicitation of children for sexual purposes; genocide, crimes against humanity and war crimes.

In addition, the competence is extended to criminal offences related to the ones mentioned above: according to Art. 3.2 of Regulation 2016/794/EU, this means criminal offences committed in order to procure the means of perpetrating, to facilitate or carry out or, finally, to ensure the impunity in respect of such acts.

Another peculiar area of competence is provided under Decision 2005/551/JHA on protecting the euro against counterfeiting (expressly recalled by Art. 4.4 Regulation 2016/794/EU). Europol has been appointed as the central office competent for

combatting counterfeiting of the single currency, encouraging the coordination of measures carried out to fight euro counterfeiting by the competent authorities of the Member States, even in the context of joint investigation teams.

5.1.5.3 Tasks and Powers

Given the above, the broadening of the competence of Europol made it necessary to provide more precise definition of its duties (Art. 4 Regulation 2016/794/EU). For the purpose of achieving the general objectives mentioned above (Art. 3), that Agency shall carry out, in particular, the following activities: (a) collect, store, process, analyse and exchange information, including criminal intelligence; (b) notify the Member States, via the national units, of any information and connections between criminal offences concerning them; (c) coordinate, organise and implement investigative and operational actions jointly with the competent authorities of the Member States or in the context of joint investigation teams and, where appropriate, in liaison with Eurojust; (d) participate in joint investigation teams, as well as propose that they be set up; (e) provide information and analytical support in connection with major international events; (f) prepare threat assessments, strategic and operational analyses; (g) develop, share and promote specialist knowledge of crime prevention methods, investigative procedures and technical and forensic methods and provide advice to Member States; (h) support Member States' cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support; (i) provide specialised training and assist Member States, including with the provision of financial support, in coordination with the European Union Agency for Law Enforcement Training (CEPOL); (j) cooperate with the Union bodies established on the basis of Title V of the TFEU (meaning, with Eurojust, the European Judicial Network and the European Public Prosecutor's Office) and with OLAF through exchanges of information and by providing them with analytical support in the areas that fall within their competence; (k) provide information and support to EU crisis management structures and missions established on the basis of the TEU; (l) develop Union centres of specialised expertise for combating certain types of crime falling within the scope of Europol's objectives, in particular the European Cybercrime Centre; (m) support Member States' actions in preventing and combating forms of crime that are facilitated, promoted or committed using the Internet, including, in cooperation with Member States, the making of referrals to the online service providers concerned with Internet content, by which such forms of crime are facilitated, promoted or committed.

Therefore, the main activity of Europol is focused on the improvement of exchange of information between police authorities. For that purpose, a serious and organised crime threat assessment (SOCTA), which is needed as a basis for the decisions of the Council, is carried over and a report on the situation and trends of terrorism in the European Union is prepared. In addition, Europol can request the competent authorities of the Member States concerned via the national units to

initiate, conduct or coordinate a criminal investigation on a crime falling within the scope of its objectives (Art. 6.1 Regulation 2016/794/EU).

Moreover, it is important to highlight that the same regulation points out that the attribution to Europol of the power to carry out investigative and operational actions has to be considered limited to its functions of coordination within the activities carried out jointly with the competent authorities of Member States or in joint investigation teams (Art. 4.1 point c). In this regard, among the *lato sensu* intelligence functions granted to Europol, the power to apply any coercive measures, in carrying out its tasks, has been expressly excluded (Art. 4.5).

Europol does not have any authoritative power towards competent authorities of Member States. The latter cannot be compelled to comply with requests to initiate, conduct or coordinate investigations; their only duty is to duly consider such requests and to inform Europol of their decision and of the reasons therefor, unless such communication would harm essential national security interests or would jeopardise the success of investigations under way or the safety of individuals. Before requesting the initiation of criminal investigations, Europol itself shall inform Eurojust (Art. 6.4 Regulation 2016/794/EU). This is an important duty because its aim is to provide an essential connection and cooperation function between the two bodies in order to avoid duplicating efforts and to instead promote a close complementarity of their actions.

From another point of view, the opportunity for the staff to participate in joint investigation teams with supporting functions, when those teams are investigating criminal offences within the competence of Europol, is an important one (Art. 5 Regulation 2016/794/EU). From this perspective, within the limits provided for by the law of the Member States in which a joint investigation team is operating and in accordance with the arrangement that must be reached between the Director of Europol and the competent authorities of Member States participating in the team, the staff of Europol can assist in all activities and exchange information with all members of the joint investigation team. They shall not take part in taking any coercive measures.

In addition, information obtained by a Europol staff member participating in a joint investigation team may be included in the information system referred to in Art. 18.2 Regulation 2016/794/EU with the consent and under the responsibility of the Member State that provided the information.

5.1.5.4 Europol Operative Scope in the Lisbon Treaty

Article 88.3 TFEU confirms the choice to exclude any attribution of coercive measures to Europol by pointing out that any operational action by such agency, which in any case will have to be carried out in liaison and in agreement with the authorities of the Member State or States whose territory is concerned, is always limited in the application of coercive measures, which remains in the exclusive competence of the competent national authorities.

Therefore, Europol does not have any of the characteristic powers of national police forces: not only it does not have investigation powers within the territory of Member States, but it also does not have power to conduct wiretapping, house searches or arrests.

However, it is necessary to point out that, under the specific legal basis offered by Art. 88. 2 TFEU, Art. 4.1.c of the 2016 Regulation allows to achieve a sensible broadening of the operative dimension of Europol, having included within its tasks the coordination, organisation and implementation of investigative and operational actions carried over jointly with the competent authorities of Member States or in the context of joint investigation teams, in liaison, where appropriate, with Eurojust.

Since 10 December 2014, Europol has had the possibility to access the second generation of the Schengen Information System (SIS II), and in addition it has the right to request access to the data maintained in the Visa Information System of the Schengen Area (VIS) for the prevention, detection and investigation of terrorist offences and other serious crimes. Such accesses shall be carried out through central access points in the Member States and by Europol, granting a check on the requests and ensuring compliance with Council Decision 2008/633/JHA (concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of prevention, detection and investigation of the crimes mentioned above).

Directive 2016/681/EU of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record data (PNR) for the prevention, detection, investigation and prosecution of terrorist offences and serious crimes, under which air carriers will have to transmit to the authorities of Member States the PNR data for flights from a third country to the European Union or from the latter to a third country, provides that Member States should exchange the PNR data they receive among each other and with Europol (Art. 10) when this is deemed necessary for the prevention, detection, investigation or prosecution of the forms of crime mentioned above. Such exchange of data, without affecting the other Union instruments for the exchange of information between police forces and other law enforcement and judicial authorities, should be without prejudice to the rules on police and judicial cooperation and should not undermine the high level of protection of privacy and of personal data required by the Charter of Fundamental Rights of the European Union, by the Strasbourg Convention (108/1981) on the Protection of Individuals with regard to Automatic Processing of Personal Data and by the ECHR (recital 23). It is important to recall that, during the last years, Europol increased its cooperation not only with the EU law enforcement authorities (in addition to Eurojust and OLAF, the European Central Bank (ECB), the European Monitoring Centre for Drugs and Drug Addition (EMCDDA), the European Police College (CEPOL), Frontex, with which, on 4 December 2015, it signed an operative agreement to increment cooperation in the fight of cross-border criminal activities) but also with third countries, by signing, *inter alia*, bilateral agreements with States that do not belong to the EU (e.g., Albania, Australia, Bosnia-Erzegovina, Canada, Colombia, former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Russia, United States of America (USA), Switzerland, Turkey,

Ukraine) and with international organisations (e.g., Interpol, United Nation Office for the control of Drugs and Crime prevention (UNODC) and World Customs Organization). In addition, it opened a liaison office in the United States with seat in Washington, and on 7 April 2016 it signed an agreement, with the Federal Bureau of Investigation (FBI), having the purpose of increasing the joint actions for combating foreign terrorist fighters.

5.1.5.5 The Structure

The decision-making organ of Europol is the Management Board, composed of one representative of each Member State and a representative of the Commission, each with a voting right. The Executive Director is the legal representative of Europol and is responsible for the day-to-day management of the organisation and is accountable to the Management Board. The Executive Director is appointed by the Council of the European Union for a 4-year term, renewable only once.

Article 9.c of Regulation 2016/794/EU provides that, where appropriate, the Management Board, upon a proposal by the Executive Director, may establish other internal advisory bodies taking into consideration both operative and financial requirements of the body.

5.1.5.6 National Units and Liaison Officers

Europol's structure is significantly articulated. In light of the provisions contained in Arts. 7 and 8 of Regulation 2016/794/EU, it is based on a central body under the authority of the Executive Director and single national units created by each Member State. The link between Europol and the national units is managed by liaison officers, who are seconded from such units to the central seat and subject to the national law of the Member State of origin.

Each national unit acts as the sole liaison body between Europol and the competent authorities of Member States, even if the latter can allow their authorities to have direct contact with Europol under conditions established by Member States themselves and in any case after involving the national units.

National units carry out several activities aiming to ensure a mutual exchange of information between themselves and Europol in order to make the coordination task of this agency actual and effective.

Article 7.6 of Regulation 2016/794/EU provides, in particular, that national units shall (a) supply Europol with the information necessary for it to fulfil its objectives, including information relating to forms of crime the prevention or fight of which is considered a priority by the Union; (b) ensure effective communication and cooperation of all relevant competent authorities with Europol; (c) raise awareness of Europol's activities; (d) in accordance with Art. 38.5.a, ensure compliance with national law when supplying information to Europol. Moreover, Member States are not obliged to provide information in single particular cases if that would (a) be

contrary to the essential interests of the security of the Member State concerned, (b) jeopardise the success of an ongoing investigation or the safety of an individual or (c) disclose information relating to organisations or specific intelligence activities in the field of national security.

Liaison officers, in turn, constitute the national liaison desk at Europol, and their duty is to represent the interests of national units and to facilitate the exchange of information between these units and Europol. They cooperate with Europol by communicating the information provided by the respective national unit and transmitting the information provided by Europol to the latter.

5.1.6 Follows: The Database

5.1.6.1 The Database and the Information Processing System

To carry out its tasks and to reach its objectives, Europol created and managed an electronic information system (Europol Information System—EIS) where data are entered directly by Member States—as well as by EU bodies, third countries, international organisations and private individuals—and are immediately accessible to consultation by duly authorised Europol staff, in so far as is necessary and proportionate for the achievement of its objectives, and by national authorities appointed for that purpose by the Member States (Arts. 17, 18 and 20 Regulation 2016/794/EU), which, however, have access only according to the provisions of their national law (Art. 18.2.c Regulation 2016/794/EU).

While the existing provisions allowed Europol to analyse the information only within the scope of the single working archives, the model provided in the new regulation is inspired by an integrated data management concept (IDMC), having the purpose of allowing Europol to carry out cross-checking between archives, in order to be able to identify links and connections between the various investigations and, in this way, detect trends and common modi operandi across different criminal groups, increasing the operational support abilities of the Agency and avoiding information duplication. In this perspective, both the purposes of information-processing activities (Arts. 18 and 19) and the availability of access—by Member States, Europol, Eurojust and OLAF staff—to the information stored by the Agency (Arts. 20 and 21) are strictly determined.

5.1.6.2 Forms and Methods for Personal Data Processing

Article 18 of Regulation 2016/794/EU provides that personal data can be processed only for the purpose of cross-checking aimed at identifying connections or other relevant links between information relating to suspected or convicted persons for a crime in respect of which Europol is competent (or persons who, based on factual indications or reasonable grounds, are believed that they will commit such criminal

offences), carrying out strategic, thematic or operational analyses or facilitating the exchange of information between Member States, Europol, other Union bodies, third countries and international organisations.

In particular, the processing of data for the purposes of operational analysis (Art. 18.3) will have to be performed by means of operational analysis projects that will have to point out the purpose of the processing, the categories of personal data that may be collected and the identification of the data subjects, the duration of storage of the data and the conditions for access and transfer of such data. The further processing of personal data will be allowed only to the extent it will be necessary and proportionate.

In addition, the Regulation points out (recital 24) that to improve Europol's effectiveness in providing accurate crime analyses to the competent authorities of the Member States, it should use new technologies to process data: databases should be structured in such a way as to allow to choose the most efficient IT structure. Therefore, Europol should be able to act as a service provider, in particular by providing a secure network for the exchange of data, such as the secure information exchange network application (SIENA), meaning a new generation instrument aimed at allowing fast, safe and simplified communications and information exchanges and exchanges of operational and strategic intelligence concerning crimes between Europol, Member States and the third countries with which Europol concluded cooperation agreements.

Member States, other Union bodies, third countries and international organisations will have to determine the purpose or purposes for which Europol may process the data they provide and point out any applicable restriction to access and use. In this regard, it must be pointed out (recital 26) that 'purpose limitation is a fundamental principle of personal data processing; in particular, it contributes to transparency, legal certainty and predictability and is particularly of high importance in the area of law enforcement cooperation, where data subjects are usually unaware when their personal data are being collected and processed and where the use of personal data may have a very significant impact on the lives and freedoms of individuals'.

Specific rules have been fixed (Art. 20 Regulation 2016/794/EU) on the various levels of access by Member States and by Europol staff to the information stored by that Agency, without prejudice for the right to indicate any restriction—for the access or the use, in general or specific terms—by Member States, Union bodies, third countries and international organisations under Art. 19.2. In this regard, it is provided (a) that Member States shall have access to such information, and further process the same in accordance with national law, only for the purpose of preventing and combating forms of crime in respect of which Europol is competent and other forms of serious crime, as set out in Council Framework Decision 2002/584/JHA of 13 June 2002, on the European Arrest Warrant and the surrender procedures between Member States, and (b) that Europol staff duly empowered by the Executive Director has access to information processed by Europol to the extent required for the performance of their duties and without prejudice to the obligation of discretion and confidentiality of sensitive information.

In addition, the Regulation provides (Art. 21) that Europol shall take all appropriate measures to enable Eurojust and OLAF to have indirect access to the available information on the basis of a hit/no hit system. Europol and Eurojust may conclude a working arrangement ensuring, in a reciprocal manner and within the scope of their respective mandates, access to all the information provided for cross-checking, as well as the possibility of searching the data, in accordance with the data protection guarantees provided for in this Regulation. Access to data made available by Europol will have to be limited, by technical means, to the information within the scope of their respective mandate of these Union bodies.

In addition, to prevent and combat in a more efficient way the forms of crime within its objectives, Europol will have to communicate to Member States all the information concerning them (Art. 22).

5.1.6.3 Transfer of Personal Data

Article 24 allows Europol to transfer personal data directly to a Union body, in so far as such transfer is necessary for the performance of its tasks or those of the recipient Union body.

Concerning relationships with partners, the Regulation makes the roles of both the Commission (for the assessment of the cooperation agreements) and the European Parliament more significant. In particular, Art. 25 provides that Europol may transfer personal data to third country authorities or to international organisations on the basis of a decision of the Commission finding that the third country or international organisation in question ensures an adequate level of protection (adequacy decision) or, lacking such an adequacy decision, on the basis of an international agreement concluded by the Union pursuant to Art. 218 TFEU or of a cooperation agreement allowing for the exchange of personal data concluded between Europol and that third country before the entry into force of the Regulation.

If the transfer of personal data cannot be made on the basis of an adequacy decision, an international agreement concluded by the Union or a cooperation agreement in force, the Management Board may, in agreement with the European Data Protection Supervisor (EDPS), authorise, for a period, a set of transfers if so required by specific conditions and provided that adequate safeguards are granted. In addition, the Executive Director may exceptionally authorise the transfer of personal data, on a case-by-case basis, if the transfer is necessary in order to protect the vital interests of the data subject or of another person; to safeguard legitimate interests of the data subject where the law of the Member State transferring the personal data so provides; for the prevention of an immediate and serious threat to the public security of a Member State or a third country; for the purposes of prevention, investigation, detection or prosecution of criminal offences or execution of criminal sanctions; for the establishment, exercise or defence of legal claims relating to the prevention, investigation, detection or prosecution of a specific criminal offence or the execution of a specific criminal sanction.

Finally, the Regulation deals with the functioning of the Internet Referral Unit (IRU), providing in Art. 4.1.m an explicit legal basis for the referral of Internet content to prevent and combat forms of crime that are facilitated, promoted or committed through this means, while Arts. 26 and 27 allow Europol to transfer personal data available to the public to private parties, or to receive these directly from the latter, when the transfer is deemed strictly necessary to carry out the tasks of the Agency and concerns single cases. The fundamental rights and freedoms of the data subject cannot prevail over the public interest that makes the transfer necessary.

5.1.6.4 Safeguards in Control and in Data Protection

A rather qualifying aspect of the new legislation is the provision of a high level of data protection, implemented through interventions that, overall, aim at strengthening the provisions having the purpose to prevent and sanction abuses and violations regarding the access and processing of such data.

In general, processing of personal data by Europol shall be carried out fairly and lawfully towards the data subjects. For this purpose, Europol will have to ensure that the data are (a) collected and processed for specified purposes; (b) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed; (c) stored for a period of time not exceeding the one necessary to achieve such purposes; (d) accurate and up to date; (e) kept in a form that permits identification of data subjects for no longer than necessary for the purposes for which the personal data are processed; (f) processed in a manner that ensures appropriate security of personal data (Art. 28).

Processing of personal data in respect of various categories of data subjects (Art. 30), meaning victims of criminal offence, witnesses or other persons who can provide information concerning criminal offences, or in respect of persons under the age of 18 shall be allowed if it is strictly necessary and proportionate for preventing or combating crime that falls within Europol's objectives. Sensitive data (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership and processing of genetic data or data concerning a person's health or sex life) shall be processed only if it is strictly necessary and proportionate for preventing or combating crime that falls within Europol's objectives or if those data supplement other personal data processed by Europol.

To ensure the security of personal data processing (Art. 32), Europol and the Member States shall implement appropriate technical and organisational measures. Any data subject having accessed personal data concerning him or her shall have the right to request to rectify personal data concerning him or her if they are incorrect and the right to have such data erased or the access thereto restricted if they are no longer required, without prejudice to Europol's tasks and its possibility of refusing any rectification, requesting to erase or limiting the access (Arts. 36 and 37).

Responsibilities in data protection matters are defined in Art. 38: it will be a task of Member States to ensure that the data transferred to Europol are correct and up to

date and to ensure the legality of such transfers, while Europol will have to ensure that the data received by other suppliers or resulting from the analysis of Europol itself are correct and up to date.

In addition, the correctness of how the system works is ensured through a double control: 'internal' by the Data Protection Officer (appointed by the Management Board among the members of the staff, pursuant to Art. 41.1) and 'external' by the European Data Protection Supervisor (Art. 43.1). The latter, assuming *de facto* the role previously carried out by the Joint Supervisory Body (under Art. 34 Decision 2009/371/JHA), has the task to supervise and ensure the application of the provisions 'relating to the protection of fundamental rights and freedoms of natural persons with regard to the processing of personal data by Europol'.

In the exercise of its functions, it is assisted by a collegial body – the Cooperation Board, composed of a representative of a national supervisory authority of each Member State and of the Supervisor itself (Art. 45.1). That body acts 'independently' when performing its tasks and 'shall neither seek nor take instructions from any body' (Art. 45.2).

As provided in Art. 47, any data subject shall have the right to lodge a complaint with the EDPS if he or she alleges a violation in the processing of data relating to him or her. Any action against a decision of the Supervisor shall be brought before the Court of Justice of the European Union (Art. 48). The right of the 'individual' who has suffered damage as a result of an unlawful data-processing operation to receive compensation for the damage suffered, either from Europol in accordance with Art. 340 TFEU or from the Member State 'in which the event that gave rise to the damage occurred, in accordance with its national law' (Art. 50.1), is also recognised. In the first case, the action is brought by the individual before the Court of Justice of the European Union, while in the second case it is brought before a competent national court of the interested Member State (Art. 50.2).

5.1.7 Interpol

Article 22 of Decision 2009/371/JHA provides that Europol may establish and maintain cooperative relations with the institutions, bodies, offices and agencies of the European Union and of the European Community and in particular with Eurojust, OLAF, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), the European Police College (CEPOL), the European Central Bank (ECB) and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA).

The signature of such arrangements may also concern the exchange of operational, strategic or technical information, including personal data and classified information.

Based on the related decisions by the Council of the European Union, Europol may also establish and maintain cooperative relations with third States and

international organisations, including the International Criminal Police Organisation (Interpol).

In the context we are dealing with, it is worth mentioning some details concerning the latter (called OICP using the French acronym then later named Interpol). It was created in Wien in 1923, not with an international treaty but on the basis of multilateral intergovernmental agreements. Its task was to promote the broadest support between judicial police authorities, in compliance with the limits fixed by the national laws of different States and in the spirit of the Universal Declaration of Human Rights. Its headquarters are in Lyon, and it is the most traditional reference body through which the international cooperation forms, aiming at prevention, and investigation activities concerning common cross-border criminal offences, even beyond the European territory, have been developed.

Interpol currently has 190 Member States and is composed of a central organisation, which comprises a General Assembly, an Executive Committee, a General Secretariat and some Advisers, and a peripheral organisation, represented by National Central Bureaus. It operates through its own telematics network, assisted by a database located at the General Secretariat of Lyon, which can be browsed in real time through a direct access system.

The liaison that is created between police forces seconded in the 'global' space is functional to a fruitful exchange of investigation information, whose findings are often used by national judicial authorities to formalise and send additional requests for assistance aimed at collecting evidence for judicial proceedings.

Another traditional function of Interpol is to facilitate international cooperation between the Member States, in particular by supporting them in extradition proceedings, in the transmission of international rogatories and in the search for fugitives, or in any case for persons hiding in foreign territories.

In this regard, Interpol drafted a form called a 'red notice', which lists all the data required by the main international conventions for the presentation of a request of provisional arrest for extradition purposes (e.g., data required by Art. 16 of the European Convention on Extradition 1957). In fact, the dissemination of searches through Interpol must include complete identification data of the wanted person, an indication of the final conviction or of the precautionary detention order, the criminal offence for which extradition is sought (specifying the time and place where it was committed), as well as a brief description of the facts that show the role of the wanted person and his/her responsibilities.

Once the order for searches for extradition purposes has been circulated internationally, the National Central Bureau drafts the so-called 'red notice' based on the data provided by the competent authorities of the interested Member State and sends it to Interpol. Interpol then circulates it electronically to all the national central offices of the Member States.

In fact, almost all States acknowledge the value of the 'red notice' for the request of provisional arrest for extradition purposes: some consider such notice as binding only if it comes from countries with which they have an extradition treaty; others consider it as binding in any case; others, instead, deny such binding nature by considering it almost a mere indication of the presence of the wanted person in their

territory that allows the subsequent filing of a formal request for provisional arrest through diplomatic channels or through direct correspondence between ministries of justice.

Another system for circulating searches internationally for extradition purposes is the one developed in the territory of Member States of the Convention on the Implementation of the Schengen Agreement (CISA) of 1990, today regulated by Decision 2004/533/JHA. In this system, the SIRENE division substitutes the National Central Bureau of Interpol, and Interpol's 'red notice' is replaced by specific forms that are intended to be entered in the SIS II (the new version of the Schengen Information System) as reports aimed at provisional arrest for extradition purposes (the so-called hit) or by reports entirely identical to a European arrest warrant, pending the receipt of the original, as provided by Art. 9.3 of Framework Decision 2002/584/JHA on the European Arrest Warrant and to the surrender procedures between Member States.

5.2 Centralised Bodies of Judicial Cooperation

Gaetano De Amicis

5.2.1 Eurojust and Its Original Structure

We can now consider the centralised models of judicial cooperation. The analysis will focus essentially on Eurojust, the sole European Union agency presenting these features. On the other hand, the European Judicial Network, even if it has an organised structure, operates through forms of cooperation that are essentially horizontal. Therefore, such aspect will be considered in the chapter where we will discuss that model. In this section, we will focus on the establishment of the European Public Prosecutor's Office, due to the relevance that it might have in the future.

5.2.1.1 The Establishment of Eurojust

With Decision 2002/187/JHA, the European Council created Eurojust, a supranational body with legal personality financed by the European Union. It replaced the Provisional Judicial Cooperation Unit, the 'Pro-Eurojust', created by the European Council with the earlier Decision of 14 December 2000 (2000/799/JHA).

The intention was to give effect to the purposes set by the Tampere European Council of 1999, which aimed at the establishment of a new judicial body, in order 'to reinforce the fight against serious organised crime', in the context of

investigations and prosecutions involving at least two Member States of the European Union; such judicial body also intended to rebalance, from a judicial point of view, the cooperation that until that time had been too unbalanced on the side of police, given the existence of Europol.

Then Eurojust was legitimised as a judicial pendant of Europol by the Nice European Council of 7–9 December 2000 in the regulatory framework outlined by Arts. 29 and 31 of the former TEU, which has been subsequently widened by Arts. 85 and 86 TFEU.

Through the creation of Eurojust, the European Union decided to provide itself with a structure intended to further improve the judicial cooperation among Member States through the establishment of an 'optimal coordination' of actions for criminal investigations and prosecutions carried out in the territory of Member States, in full respect of the fundamental rights and freedoms recognised in Art 6.2 TEU and by the Charter of Fundamental Rights of the European Union (recitals 2 and 18 Decision 2002/187/JHA).

In the progressive evolution of the bodies for intergovernmental cooperation, the establishment of Eurojust represented the landing place of a consolidation work at an organisational, operational and structural level, far more relevant than the previous limited judicial experiences started within the context of the 'Third Pillar', which led to the creation, in 1996 (at a bilateral level), of the framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union and, in 1998, of the European Judicial Network (which, conversely, was set up in a polycentric view, as a body operating in the territory of the various Member States through its contact points). Eurojust was conceived to offer what other entities were not able to grant: to encourage and give impetus to investigations and to promote national prosecutions.

5.2.1.2 The Objectives

The objectives are specified in Art. 3 of Decision 2002/187/JHA. It provides that Eurojust's tasks are, in particular, as follows:

- 'to stimulate and improve' the coordination, among the competent authorities of the Member States, of investigations and prosecutions, taking into account any request emanating from such authorities, and of any information provided by any European body (such as OLAF or Europol);
- to improve the different aspects of judicial cooperation, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;
- to otherwise support the competent authorities of the Member States in order to make their investigations and prosecutions 'more effective'.

The last formulation, intentionally wide and generic, proved to be suitable to include, practically, not only forms of logistic support and consultancy concerning procedural and substantial comparative law of the Member States but also, and

especially, involvement in operative activities, such as evidence collection (when investigation acts linked to the same investigation must be carried out simultaneously in more than one Member State) or the participation in acts agreed upon within the context of a joint investigation team or the transmission of letters rogatory and preliminary orders, issued during the stage preliminary to the judgment, in particular involving European arrest warrants and decisions aimed to freeze bank accounts.

The coordination of competent national authorities does not entail authoritative powers towards such authorities. This is proved by the fact that no power of taking over the proceedings is provided, nor is it possible to issue specific instructions; nonetheless, it constitutes, as mentioned above, the real innovation of Eurojust because it allows the realisation, at the same time, of a progressive approach to the objective of a vertical structure of investigation activities—through a 'light' centralisation of certain powers and functions within a supranational judicial body—and a significant departure from the 'horizontal' model of judicial cooperation based on arrangements and agreements (bilateral or multilateral) disciplined in the context of exclusively intergovernmental relationships.

5.2.1.3 The Composition

Eurojust comprises national members, one for each Member State, and a College, which is composed of those same national members. The national members can be national judges, prosecutors or police officers, provided they have an equivalent competence to the judicial authority (according to the rules that govern the structure and function of the prosecutor's office in the various national systems). Each national member can be assisted by one or more officials.

National members are seconded in compliance with the law of their Member State of origin, and they remain subject to such law, concerning both the related legal status and the judicial powers that can be carried out within their territory, as well as the term of their office.

According to Decision 2009/426/JHA of 16 December 2008, which modified Decision 2002/187/JHA, some common rules concerning the minimum term of office (4 years, renewable by the Member State of origin) and the composition of the office (in fact, each national member can be assisted by a deputy or by another person acting as an assistant) were introduced.

5.2.2 Follows: Competence, Nature and Tasks

5.2.2.1 Competence

The general competence of Eurojust includes criminal offences within Europol's competence, including some specific types of crimes, such as environmental crimes

and cybercrimes, corruption and money laundering, European fraud and, above all, participation in a criminal organisation, together with any criminal offence committed together with the previous ones (Art. 4.1.a–b Decision 2002/187/JHA).

It is a very broad competence, extended to serious forms of volume crime; the intervention of Eurojust within this scope is admitted only with reference to investigations and prosecutions involving (a) at least two Member States or (b) a Member State and a non-Member State, based on the request by a competent authority of such Member State, if Eurojust concluded a cooperation agreement with such third State or where, in a specific case, there is an 'essential interest' in providing such assistance or (c) a Member State and the Community, when investigations or prosecutions are in its sole interest, at the request either of a Member State's competent authority or of the Commission (Art. 3.1–3 of Decision 2002/187/JHA).

5.2.2.2 Tasks

Eurojust's tasks can be carried out both through the concerned national members and through the College.

Article 5.1.b of the Decision that created Eurojust provides that the intervention by the College is envisaged when it is requested by one or more national members interested in a case dealt with by Eurojust or when the investigations and prosecutions have repercussions at Union level or might escalate on a large scale, as they might affect Member States other than those 'directly concerned', or, finally, when a general question concerning the achievement of Eurojust's objectives arises. In other cases, Eurojust acts through national members.

Whether it operates in a collegial way or 'individually', such body has the same powers and can interact with the competent authorities of the Member States, asking them

1. to undertake an investigation or prosecution concerning specific acts;
2. to accept that one of the interested authorities may be considered in a 'better position' to undertake an investigation or prosecution concerning such acts (and it is not a secret that such 'acceptance' might lead to relevant issues in countries where there exists a principle of mandatory prosecution);
3. to coordinate the concerned authorities;
4. to set up a joint investigation team, in compliance with the relevant cooperation instruments;
5. to provide Eurojust with any necessary information to perform its tasks.

When the request is made by Eurojust's College, the competent authorities of interested Member States might decide not to comply with it, but they have a duty to provide the reasons for such non-compliance (Art. 8) and to inform the requesting body about such a decision. Only in exceptional circumstances of prejudice the negative decision can be communicated without indicating the reasons. Conversely, when Eurojust acts trough the concerned national members, the purpose of the

request is only to have an 'assessment' on the possibility to undertake one of the above-mentioned activities from the competent authorities of Member States.

The overall framework of Eurojust's duties originally provided has gradually become broader, thanks to the progressive contribution of the practitioners and to the dispositions provided in other regulatory instruments enacted by the Council of the Union.

In detail, (a) Art. 10 of the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, enacted on 16 October 2001, provides that competent authorities of the requesting Member State may report to Eurojust any issue encountered regarding the execution of a letter rogatory concerning the banking sector, to solicit the coordination in view of 'a possible practical solution'; (b) Art. 16 of the Framework Decision on the European Arrest Warrant provides that Eurojust must advise the executing judicial authority if two or more requests were made by two or more Member States that issued an arrest warrant for the same person; (c) Art. 17 of the same Decision provides that Eurojust must be informed of the reasons for the delay in the execution of an arrest warrant in a Member State; (d) Art. 4 of the Decision of the Council of the European Union, adopted on 6 December 2001 on the protection of the euro against counterfeiting established a tight cooperation of the competent authorities of Member States, the European Central Bank, the national central banks, Europol and Eurojust concerning proceedings of euro counterfeiting and related offences.

Eurojust's tasks concerning the operative coordination of investigations related to international terrorism and the improvement in effectiveness of the overall European strategy in fighting such criminal events are particularly significant. In fact, Art. 3.2 of Decision 2003/48/JHA of 19 December 2002 and, later, Arts. 2.2, 3 and 5 of Decision 2005/671/JHA of 20 September 2005, on the exchange of information and cooperation concerning terrorist offences, provide, as a rule, the collection and communication to Eurojust of a broad variety of information concerning the proceedings and convictions for terroristic events.

Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism modified Art. 2.6 of Decision 2005/671/JHA. It provides that each Member State shall ensure that information gathered in criminal proceedings in connection with terrorist offences is made available as soon as possible to the competent authorities of another Member State where the information could be used in the prevention, detection, investigation or prosecution of such offences in that Member State, unless sharing of information would jeopardise current investigations or the safety of an individual or when it would be contrary to essential interests of the security of the Member State concerned.

Recital 7 of the Directive highlights that the cross-border nature of terrorist offences requires a strong coordinated response and cooperation within and between the Member States, as well as with and among the competent Union agencies and bodies to counter terrorism (including Eurojust and Europol). To that end, taking into account the global character of terrorist offences, an efficient use of the available tools and resources for judicial cooperation should be made by promoting the use of joint investigation teams and coordination meetings facilitated by Eurojust, which

are deemed necessary in particular with a view to securing and obtaining electronic evidence.

In addition, the Directive provides, as effective mean of combatting terrorism on the Internet, the removal at its source of online content constituting a public provocation to commit a terrorist offence (Art. 21). For this purpose, Member States (recital 22) should cooperate with third countries in seeking to secure the removal of such online content from servers within their territory, to the point of providing for the establishment of mechanisms to block access from the Union territory to such content.

Finally, as a measure to facilitate cooperation and coordination of criminal proceeding, the Directive provides for the centralisation of criminal proceedings, if possible, in a single Member State (Art. 19.3). To this end, the authorities of the Member States may have recourse to Eurojust, which will have to take into account the following factors: (a) the Member State in the territory of which the offence was committed, (b) the Member State of which the offender is a national or resident, (c) the Member State that is the country of origin of the victims; (d) the Member State in the territory of which the offender was found.

5.2.2.3 Database and Supervisory Body

To carry out its tasks, Eurojust sets up and maintains a database: for that purpose, it can process personal data by automated means or in structured manual files.

Extremely strict security rules are established for the protection of data collected by Eurojust. The correct processing of data is granted by a Joint Supervisory Body.

Such body is composed of judges (not members of Eurojust) or of a person holding an office giving him sufficient independence. They are appointed by each Member State.

In particular, it is composed of three permanent members appointed by each Member State and of one or more *ad hoc* judges, who take part in the work of the agency only for the examination of an appeal concerning personal data originating from the Member State that appointed them.

The Joint Supervisory Body has the difficult task of verifying compliance with the principles and rules established for the protection of personal data and of hearing appeals against decisions adopted in the first instance by Eurojust, lodged by the holders of the right to access data that concern themselves (Arts. 19 and 20 of the Decision). Decisions adopted by the Joint Supervisory Body are final and binding for the controlled body (Art. 23.8), while the exercise of its duties cannot affect the competence of national judges.

5.2.3 *Follows: Eurojust's Implementation in the Member States of the European Union*

The implementation of the Decision that created Eurojust in the various Member States was strongly diversified and not always satisfactory.

The majority of Member States appointed a prosecutor (only Austria and Spain appointed a judge). On the other hand, the national members, even if they kept their status of judge or prosecutor when they were appointed to Eurojust, could no longer exert the judicial powers that were granted to them in their Member State of origin. The Commission decided that this was not in line with the spirit and the letter of the Decision that created Eurojust, whose Arts. 2 and 9, in particular, confer on national members competences and powers of a judicial nature.

On this point, the European Commission found positive exceptions in Finland, Ireland, Sweden, the United Kingdom and Portugal, where it seems that national members kept, even if in different manner and in different extents, the judicial powers granted to them before they had been appointed in their new office. For example, in Sweden and in Finland, national members can exert their powers in the whole national territory, while the national member of the United Kingdom, due to its position as Crown Prosecutor, has the power to request judicial support and to access the information contained in the national records, but it seems that he/she cannot exert his/her other judicial powers.

An example of effective implementation of the Decision that created Eurojust came from Portugal, whose national member is a deputy general prosecutor who can receive a request for judicial assistance from other Member States and can, in certain cases, respond directly to such requests and can even add additional elements to a request sent by a Portuguese prosecutor (e.g., in case of urgency or on the latter's request). Finally, in certain cases, he/she can cooperate directly with the authorities of other countries, being also able to participate in joint investigation teams.

The problematic issues connected to the consequences of the enlargement of the Union, to the scarce homogeneity of the judicial powers of national members of Eurojust and to the differences between national implementing law had been pointed out already in the Eurojust 2004 annual report, where it was highlighted that 'if even one National Member is not empowered to act as envisaged in the Decision, this situation poses a problem, not only for the individual National Member, but for the whole unit whose work with that person will be restricted and at a lower level than the Decision intended. Any chain is only as strong as its weakest link.'

5.2.4 Follows: Eurojust's Strengthening in Decision 2009/426/JHA

5.2.4.1 The Modifications

The significant transformation observed at the judicial cooperation level after the enlargement of the Union, the progressive assertion of the mutual recognition principle, the increase of direct contact between competent national authorities, together with the connected need to receive, for that purpose, a higher level of assistance and support, especially in the most complex cross-border cases, and the relevance of the new judicial and police cooperation tools having the purpose to fight, on a European level, the most serious types of organised crime, the fight of which needed a stronger impetus and coordination activity (a significant example being the instrument of joint investigation teams), lead to significant changes in the Eurojust regulations to improve its structure and the way it operates in order to make it able to perform its functions more effectively.

Therefore, on 16 December 2008 (the same year where new regulations were adopted for both the Network and Europol), Decision 2009/426/JHA on the strengthening of Eurojust, which significantly modified the original Decision 2002/187/JHA, was adopted.

The 2009 Decision is primarily characterised by a resolute strengthening of the judicial powers granted to the national member.

This is confirmed by a series of elements.

On the one hand, the national member may ask the national competent authorities to undertake special investigation measures or any other measure justified by the investigation or by the criminal proceedings (while before he would propose any request only as a suggestion: he asked to 'assess whether'). Correspondingly, national authorities will have to give reasons for any refusal, while other Member States have the duty to make sure that they respond without delay to the requests of the national member (Art. 6.2).

On the other hand, it is provided (Art. 9.3) that the national member shall have at least equivalent access to information as would be available to him in his role as a national judicial authority, including criminal records and registers of arrested people, of investigation and DNA, as well as any other registers of its Member State of origin containing 'information necessary for him to be able to fulfil his tasks'.

In addition, entirely new is the attribution of powers to the national member in his capacity of competent judicial national authority acting according to the national law (Art. 9.a). In fact, the 2009 Decision fixes a 'minimum' common basis of powers that all Member States must grant to their own national member in their role as 'national authority', which they would have if they would act as internal judicial authority. Such powers can be distinguished in three categories:

– 'ordinary powers' (Art. 9.b) relating to the management of requests and decisions concerning judicial cooperation, which permit to receive, transmit, facilitate,

follow up and provide supplementary information in relation to the execution of requests themselves (excluded in any case any direct execution): such powers permit the National Member to act as a 'transmission channel' and to facilitate the execution of requests from or destined to the Member State of origin;
– 'powers exercised in agreement with a competent national authority' (Art. 9.c): their exercise can be delegated, on a case-by-case basis, to the national member by the competent national authority. In this way, the national member can be authorised to issue, complete and execute, in his Member State, requests for, and decisions on, judicial cooperation; order, in his Member State, investigative measures considered necessary at a coordination meeting organised by Eurojust to provide assistance to competent national authorities; authorise and coordinate controlled deliveries in his Member State;
– 'powers exercised in urgent cases' (Art. 9.d) and where it is not possible to contact the competent national authority in a timely manner (being understood that the latter, as soon as it will be identified or contacted, will have to be promptly informed regarding the exercise of such powers). In these situations, Eurojust national members can authorise and coordinate controlled deliveries in their Member State and execute requests for judicial cooperation. Without any doubt, this is the power with the most relevant content, which marks the real qualitative leap in the powers granted to the national member.

However, the innovative range of these provisions is largely disempowered by the possibility, very wide and with blurred profiles, for Member States not to provide the national member with the second and third category powers, when this would be against constitutional rules or fundamental aspects of their domestic criminal justice system, regarding the division of powers between police, prosecutors and judges, the functional division of tasks between prosecution authorities or the federal structure of the Member State concerned (Art. 9.e). This means that, for example, the Eurojust national member will not be granted the power to execute a request of judicial cooperation in urgent cases if he/she is a prosecutor and in the interested Member State the execution of the request falls within the competence of a judge (e.g., the execution of a European arrest warrant).

If a Member State exercises such power of derogation, then the national member is only entitled to submit a non-binding proposal to the competent national authority to exercise the powers at stake.

5.2.4.2 Strengthening of the College

Decision 2009/426/JHA also strengthens the role of Eurojust's College: the latter is asked to issue a written non-binding opinion in two situations that present operative difficulties. The first is when two or more national members cannot agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned (Art. 7.2).

It is one of the most relevant operative aspects of the overall framework of the activities carried out by Eurojust, which since 2003 has adopted specific guidelines having the objective to prevent and solve, even if only in principle, any possible situation of conflict of jurisdiction and the resulting risk of *ne bis in idem*.

Eurojust's role as a 'privileged mediator', with a view to negotiating a shared solution to avoid multiple criminal proceedings being carried out at the same time, is outlined also in Art. 12.2 of Framework Decision 2009/948/JHA of 30 November 2009 on the prevention and resolution of conflicts related to the exercise of jurisdiction in criminal proceedings (see Sect. 10.2.3).

The other hypothesis in which the College is asked to issue a written non-binding opinion to concerned Member States is when a competent authority communicates to Eurojust recurrent refusals or difficulties concerning the execution of requests for, and decisions on, judicial cooperation (in particular regarding instruments giving effect to the principle of mutual recognition) and it was not possible to solve the question by 'mutual agreement' between the competent national authorities or with the intervention of the respective national members (Art. 7.3).

In both cases, when the competent authorities of concerned Member States decide not to comply with the indications comprised in the College's written opinion, they have to communicate to Eurojust 'without delay' their decision and the reasons on which it is grounded.

5.2.4.3 The New Types of Coordination

Article 5.a of Decision 2009/426/JHA provides for the creation, within Eurojust, of an 'On-Call Coordination' (OCC), which is constantly available to receive and process requests and to intervene in urgent cases. To that end, it is the duty of each Member State to ensure that its own OCC representative within Eurojust (which can be the national member, its deputy or an authorised assistant) is able to intervene 24 hours a day, 7 days a week.

It also established the constitution in each Member State of a 'Eurojust national coordination system' (ENCS), which has the double objective of consolidating and implanting at the national level the role of such organism and of obliging Member States to ensure, within themselves, effective coordination, both for the relationships with Eurojust and for the actual and effective participation in the other European networks of judicial cooperation in criminal matters. In fact, ENCS, whose operations are under the responsibility of the national correspondents of Eurojust, should ensure the coordination of the work carried out by a plurality of actors that have a key role in the context of judicial cooperation: they are, other than the same Eurojust national correspondents, the national correspondent for terrorism, the national correspondents of the European Judicial Network and, in addition, up to three other contact points of the same Network, other than the correspondents of other European networks. ENCS members keep their position and their status according to their national law (Art. 12).

ENCS's function is to facilitate the execution of Eurojust's work within the Member State. More specifically, its objectives are to ensure that the Case Management System (CMS) receives the information in an effective and reliable way, to help to determine if a case should be managed with the assistance of Eurojust or of the European Judicial Network, to help the national member to identify the appropriate national authorities to execute the judicial cooperation requests, and to maintain close relationships with the Europol national unit.

5.2.4.4 Exchange of Information

Before the adoption of Decision 2009/426/JHA, there was no duty for national authorities to exchange information with Eurojust, except for information concerning terrorist offences (Decision 2005/671/JHA). The exchange of information concerning judicial files primarily occurred when a national authority had an interest in doing so or when it had asked for Eurojust's assistance in a specific case.

Instead, following the new decision, the exchange of information is expressly regulated, and in some cases it is provided as mandatory and systematic.

In fact, Art. 13 provides that Member States shall ensure that their Eurojust national member is informed without undue delay of any case in which at least three Member States are directly involved, provided that the requests for, or decisions on, judicial cooperation have been transmitted to at least two of them, when the offence involved is included in the lists set out in the rule (trafficking in human beings, sexual exploitation of children and child pornography, drug trafficking, trafficking in firearms, corruption, fraud affecting the financial interests of the Union, counterfeiting of the euro and money laundering), when there are factual indications that a criminal organisation is involved or when there are indications that the case may have a serious cross-border dimension.

Member States shall also ensure that national members are informed of the creation of a joint investigation team, of cases where conflicts of jurisdiction have arisen, of controlled deliveries and of repeated difficulties or refusals regarding the execution of requests for, and decisions on, judicial cooperation.

Even if the objectives of this exchange of information are not expressly mentioned in Decision 2009/426/JHA, it is plausible to think that the aims are both to favour a strategic view of the case, which allows to highlight the most important practical difficulties observed in judicial cooperation, and to identify possible connections or connecting elements among different cases.

5.2.4.5 Relationships with Other Bodies

Finally, it is important to point out that the decision sets out a regulatory framework that allows Eurojust to project itself outside the European judicial area by establishing and maintaining cooperative relationships not only with the institutions, the bodies and the agencies of the European Union—such as Europol, OLAF,

Frontex, the European Judicial Training Network (Art. 26)—but also with non-Member States and international organisations (Art. 26.a).

From that perspective, to facilitate judicial cooperation with countries that are not members of the European Union, an additional innovation consists in the possibility for Eurojust to post liaison magistrates to a third State after signing a cooperation agreement with that third State (Art. 27.a).

5.2.5 Follows: Eurojust's Key Role in the Lisbon Treaty

In addition, the Lisbon Treaty outlines new perspectives for Eurojust. Even if Art. 85.1 TFEU does not entitle this body to exercise criminal prosecution, evidently due to a compromise, it still provides that, in any case, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, can grant Eurojust relevant powers for the initiation of criminal investigations, for 'proposing the initiation of prosecutions' (which should then be continued by the competent national authorities), as well as for the resolution of conflicts of jurisdiction in order to strengthen judicial cooperation, in close connection with the European Judicial Network.

In other words, Art. 85 TFEU, while restating that Eurojust maintains the traditional tasks to support and strengthen coordination and cooperation between national investigating and prosecuting authorities, in the context of its general role as 'facilitator' of judicial cooperation, it also opens the door to autonomous interventions by such body. The possibility to initiate criminal investigations and to prevent and resolve conflicts of jurisdiction—not anymore on an advisory basis but in operational terms, which might also be associated with the exercise of authoritative powers towards national organs—outlines a new set of features of Eurojust, which moves it closer to a body that exercises criminal prosecution.

It is precisely in this context that it is possible to place the adoption of the European Parliament Recommendation of 7 May 2009 (2009/2012 (INI)) concerning the development of an EU criminal justice area. It contains an invitation to Member States to fully implement without delay the Decision on the strengthening of Eurojust, in particular with regard to Eurojust's competences that make it more similar to a public prosecutor, namely 'the resolution of conflicts of jurisdiction' and the 'power to undertake investigations or prosecutions' (point j).

Moreover, in the current complicated transition phase, it seems that the full implementation of such objectives will depend substantially on Eurojust's ability to initiate operative synergies not only with Europol but also with OLAF, to avoid duplication or overlapping of concurrent activities managed by bodies required to act in the same sector and with substantially the same coordination powers (at least concerning European frauds and other criminal offences affecting the financial interests of the European Union).

In this regard, the need for a progressive involvement of OLAF, Eurojust and Europol in a rational and coherent framework of cooperative relationships has been highlighted.

The agreements subscribed by Eurojust under Art. 26 of Decision 2009/426/JHA with the other two entities (with regard to OLAF we refer to the agreement entered into on 28 September 2008, and with regard to Europe we refer to the agreement entered into on 1 January 2010) are going in this direction. They provide, among other things, the exchange of information on cases that concern frauds or other criminal offences against the financial interests of the EU; mutual assistance in the same cases, spontaneous or on request, to ensure the respective coordination of activities; cooperation in the participation and constitution of joint investigation teams, an objective that has always had significant strategic value; the creation of the respective contact points (e.g., national members and members of the judicial unit of OLAF) in order to solve potential practical problems that might be encountered in the joint management of activities; regular consultations and close cooperation in their respective enforcement actions, with the mutual exchange of operative, strategic and technical information, and the coordination of the activities of judicial and police authorities; joint support to national authorities even through special preparatory meetings before determining the main goals in crime suppression; the mutual exchange of information about cases where those bodies exercise their right to ask Member States to initiate an investigation.

The full functionality of such cooperation arrangements and agreements appears to be, ultimately, a highly desirable objective in the framework of the new models of 'direct' cooperation, which are focused on the implementation of the fundamental principle of mutual recognition of judicial decisions and 'ordered' on the basis of simplified and fast relationships governed by principles of rationality, effectiveness and proportionality of their mutual activities.

In this way, it would be possible to preserve the peculiarities and the specific heritage of each respective entity while arranging the transition to a new direct system of relationship coordinated by the European Public Prosecutor's Office, whose functional tasks, over time, will be destined to progressively combine both the parallel activities of coordination of investigations—which today are entrusted, according to 'variable geometry' criterion, to the European agencies mentioned above—and the exercise of criminal prosecution for offences affecting European legal interests.

On 17 July 2013, the European Commission adopted a proposal of regulation (COM (2013)535 final) on the institution of a European Union Agency for Criminal Justice Cooperation that should replace Eurojust. The objective of the proposal is to rationalise the current rules by substituting Decisions 2002/187/JHA and 2009/426/JHA; transferring the existing structure into the new framework outlined by the Lisbon Treaty, including through the provision of a tight relationship with the European Public Prosecutor's Office (see Sect. 5.2.6); and granting the European Parliament and the national parliaments a specific role in evaluating the activities of this body, strengthening in this way its democratic legitimation, by respecting its operative independence. Nevertheless, such proposal does not seem to modify in a

significant way the powers of such a body and therefore does not realise the new structure provided for in Art. 85.1 TFEU.

A partial agreement on such regulation proposal, even if with significant differences compared with the original document and, in certain cases, with a regression in respect of the powers granted to Eurojust in the 2009 Decision, has nevertheless been reached during the European Council of December 2014. Such agreement contains, on one hand, a definition of the administrative and financial governance of the body, which would be granted to an executive board, of which the Commission will be a member, being on the contrary excluded from any operative activities of the Agency; a better definition of the powers of the College, which will have to focus on the operative issues; a reference to an ancillary competence of the Agency in supply support, on request, regarding criminal offences different from the ones expressly listed; and a broadening of the Agency's powers concerning the investigation acts and of mutual recognition provided in the Directive regarding the European Investigation Order in criminal matters, 2014/41/EU of 3 April 2014. On the other hand, some choices on qualifying points seem to be compromising or unsatisfactory. For example, within the scope of Member States' legislation, the main features of national members have not been sufficiently harmonised; no clear line of separation between the competences of the Agency and those of the European Judicial Network have been identified concerning cases that can presume the intervention of both. The issue of the conflicting judicial features of national members has not been solved, where the fact that the grant of powers is non-homogeneous is considered one of the weak points of Eurojust, so important that it reduces significantly its operative effectiveness and its significance in the whole European Union territory.

Finally, further critical points concern the failure to broaden information flows by national authorities and, more than that, the failure to grant the Agency with binding powers for the coordination of cross-border investigations. Instead, together with the connected need to create in every Member State a national coordination system, the recommendations to Members States on the final report drawn up on December 2014 by the evaluation Group created by the Council of the Union (GENVAL) on the practical implementation of the decisions for the creation and implementation of Eurojust in 2002 and 2009 were focused precisely on these profiles to facilitate a higher operational capacity of the joint investigation teams and to develop a higher cohesion between national members (the contact point of the European Judicial Network and Eurojust national correspondents).

5.2.6 The Perspective to Establish a European Public Prosecutor's Office (EPPO)

Roberto E. Kostoris

A further fully innovative perspective outlined in the Lisbon Treaty concerns the creation of a European Prosecutor's Office. Even on this point, Art. 86 TFEU uses

almost the same wording as the formulation contained in Art. III-274 of the lapsed constitutional treaty by providing that 'in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust'.

The idea to create a 'centralised' Prosecutor's Office at the European level was born from the need to fight fraud and other cross-border criminal offences affecting the financial interests of the European Union, the commission of which has been facilitated by abolishing borders after the Schengen Agreement, while the activities of the judicial and police bodies risked being limited within state borders and hampered by considerable differences between the legislation of EU Member States.

A first project of the European Prosecutor's Office was included in the *Corpus iuris* for the protection of the financial interests of the European Communities elaborated in 1997 and was then improved in a second version dated 2000 (the so-called Florence version). It was a project requested by the European Commission and drafted by a group of academics from different countries directed by Prof. Delmas-Marty. It outlined the structure and the features of such entity, the way it would carry out its investigation activities and the framework of its relationships with the national judicial authorities, in a very broad context, including also a substantial part concerning provisions on criminal offences falling in the competence of this body, aimed at the protection of the financial interests of the Community. Notwithstanding the high interest raised by such proposal, the Tampere Council of Europe of 15–16 October 1999 failed to take the creation of the new entity into consideration, and it chose the 'softer' option consisting in creating a unit of judges (Eurojust) having the task to facilitate the 'good coordination' between national authorities responsible for prosecutions, and to 'provide support during the investigations' concerning cases of organised crime, by cooperating tightly with the European Judicial Network to simplify the execution of letter rogatories; such choice was then 'codified' in Arts. 29.2 and 31 of the Nice Treaty. The Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor presented by the European Commission on 11 December 2001 (COM (2001)715 final) had no better luck; it re-enacted the perspectives of the *Corpus iuris* by further developing them and even by adopting different solutions.

Article 86.1 TFEU introduces, for the first time, an express juridical basis for the creation of the European Prosecutor's Office (EPPO), delegating the regulation of the structure and powers of this entity to future regulations. What Art. 86 points out clearly is that the judgment phase of proceedings initiated by such entity will have to be held in front of the competent national authorities.

Article 86.1 provides that the proposal of regulation must be approved by a unanimous resolution of the Council, subject to the approval by the European Parliament. If such unanimous consent is not reached, it may still be possible to initiate an enhanced cooperation of at least nine Member States.

Also in this case a group of academics coordinated by Prof. Ligeti drafted a preliminary project of 'model rules'. However, such project, which drew a valuable

configuration of the EPPO, did not find support by the Commission, which, on the juridical basis of Art. 86.1 TFEU, issued on 17 July 2013 a different proposal of regulation for the creation of the European Public Prosecutor's Office (COM (2013) 534 final). Such text received, however, negative reactions from various States. Therefore, it was followed by several rewritings by the Council—the most significant being on 14 May 2014, during the Greek presidency—which changed it significantly. The redrafts drawn up in the following years did not provide great changes. Notwithstanding, on 7 February 2017, the Council registered the absence of unanimity on the draft regulation. On 3 April 2017, a group of 17 Member States (later followed by other four Member States) notified the European Parliament, the Council and the Commission that they wished to launch an enhanced cooperation on the establishment of the EPPO. Finally, on 12 October 2017, the Council, after the approval by the European Parliament, has adopted Regulation 2017/1939/EU on the establishment of EPPO. In any case, the EPPO shall start to be operative on a date to be determined by a decision of the Commission once the EPPO will be set up, which shall not be earlier than 3 years after the entry into force of the regulation. We shall focus on the main aspects of such text, even pointing out the most significant differences from the original text of the proposal of 2013.

5.2.7 Follows: The Structure of the Body

Roberto E. Kostoris

5.2.7.1 Institutional Aspects

Starting with the institutional aspects, the EPPO constitutes a body of the Union with legal personality (Art. 3), which benefits from independence guarantees (Art. 6) and shall be accountable for its activities to the other European institutions (Parliament, Council, Commission), to which it gives an annual information report (Arts. 6 and 7).

5.2.7.2 Office Structure

The proposal of 17 July 2013 showed a decentralised and 'light' structure of the EPPO, which included, on the one hand, a central office consisting in the European Prosecutor and its four substitutes and, on the other hand, the Delegated Prosecutors deployed on the territory, at least one for each Member State, operating, if the Member State so provides, as national prosecutors, cumulating a double function (the 'double hat' principle). This relationship between the European Prosecutor, substitutes and the Delegated Prosecutors was heavily hierarchic. The substitutes

had to operate under the supervision of the Prosecutor, and the Delegated Prosecutors had to comply with the instructions and orders of the latter, who could move the case or allocate it to himself/herself and also decide the revocation of delegates when they no longer possess the requisites required to keep their functions.

In the event of conflicting assignments, the European Prosecutor could instruct them to give priority to their functions as Delegated Prosecutors. As members of the EPPO office, they had to work under the exclusive direction of the European Prosecutor and had to comply with his/her orders in the conduct of investigations and in the prosecution choices.

The most significant redraft of that text was performed on 14 May 2014 by the Council during the Greek presidency and still characterises in its main aspects the current Regulation. The two-level structure, central and peripheral, remains. However, while at the peripheral level the Delegated Prosecutors remain, the central level is no more light and composed only of a single organ, but it is composed of a plurality of organs with a single or collegial structure: the College, whose members are the Chief European Prosecutor and the European Prosecutors, one for each Member State; the Permanent Chambers, which comprise the Chief Prosecutor or one of his/her substitutes who chair them and two permanent members; the Chief European Prosecutor (who is the head of the EPPO and who represents the EPPO vis-à-vis the EU institutions and the Member States and third parties: Art. 11) and its substitutes; the European Prosecutors; and the Administrative Director (Art. 8), who shall manage administrative and budgetary aspects of the EPPO (Art. 19).

The allocation of tasks between the various organs of the office appears to be rather complex. The College—which shall be responsible for the general oversight of the activities of the EPPO—has to monitor EPPO's activities and to take strategic decisions on the management policies concerning its repressive activities, without being involved in the investigations (Art. 9). The Permanent Chambers must monitor the investigation activities and the exercise of prosecutions, granting the College strategic decisions implementation (Art. 10). Therefore, they are involved in the single judicial cases that are attributed to them on the basis of a system of random allocation, monitoring and directing the investigations and prosecutions and ensuring their coordination in cross-border cases; they shall currently take all the relevant decisions on the cases (such as bringing the cases to judgment, dismissing them, applying a simplified prosecution procedure, referring them to the national authorities, reopening an investigation) but cannot manage them directly. Conversely, concrete investigation and repressive activities are assigned to the Delegated Prosecutors, which shall have the same powers as national prosecutors (and may also exercise function as national prosecutors) and which can make proposals to the Permanent Chambers on the decision that the latter will have to take, without having the power to take such decisions themselves (Arts. 13 and 36). Finally, the supervision of investigations and prosecutions concerning their Member States is assigned to the European Prosecutors (Art. 12). In this way, they represent the drive belt between the competent Chamber and the Delegated Prosecutors. Moreover, the European Prosecutors can also be delegated by the Permanent Chambers to exercise the powers to bring a case to judgment or to dismiss it, when such delegation can be

duly justified with reference to the degree of seriousness of the offence or the complexity of the proceedings in the individual case, when the damage caused by the offence is less than euro 100,000. In any case, such delegation can be reviewed and may be withdrawn at any time on the request of one of the Members of the Permanent Chambers (Art. 10).

In conclusion, it is a very complex and heavy structure that risks not to grant a sufficient degree of efficiency in the fight against transnational crime. In any case, the transition from the hierarchical to the collegial model and the close link between European Prosecutors and European Delegated Prosecutors, which are both expression of the same State, show the will by Member States to control the activity of European repression.

5.2.8 Follows: EPPO's Competence, Investigations and Prosecutions

Roberto E. Kostoris

5.2.8.1 Competence

On the basis of Art. 86 TFEU, Art. 22 of the Regulation confirms that the EPPO will be competent in respect of criminal offences affecting the financial interests of the Union. Therefore, the choice that, starting from the *Corpus iuris*, has always linked the creation of a European prosecuting office to the repression of criminal offences affecting the financial interests of the Union shows to be already confirmed. These criminal offences directly affect the Union's budget, by depriving it of huge resources, and are disadvantageous for all Member States' taxpayers.

For its part, the 'mother' rule in Art. 86.4 TFEU does not limit that body's competence solely to this kind of criminal offences, by specifying that the European Council will be allowed to enact (even after the creation of the office) a decision extending such competence also to the fight against serious crimes that have a cross-border dimension (for example, international terrorism). But to this end will be necessary a unanimous resolution of the European Council, subject to the approval by the European Parliament and the opinion of the Commission.

The criminal offences affecting financial interests of the Union taken into account by Art. 22 of the Regulation are those that are provided for in Directive 2017/1371/EU of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, as implemented by national law. As regards offences referred to in Art. 3.2.d of Directive 2017/1371/EU, the EPPO shall be competent when they are connected with the territory of two or more Member States and involve a total damage of at least EUR 10 million (except, when the damage is less than such amount, if the case has repercussions at Union level or if an official or other servant

of the Union or members of the institutions of the Union could be suspected of having committed the offence: out of this latter case, the EPPO, with the consent of the competent national authorities, could equally exercise its competence if it appears that such body is better placed to investigate or prosecute: Art. 25).

The Regulation considers EPPO's competence as shared (Art. 25 and recital 13): indeed, such provision, which regulates the relationship between EPPO and law enforcement authorities of Member States, specifies, in particular, that such authorities, in addition to having to communicate to EPPO every information in respect of a criminal offence within its competence, shall not exercise their own competence in respect of the same criminal conduct if the EPPO decides to exercise its competence (either by initiating an investigation or by deciding to use its right of evocation).

Moreover, it is provided that the EPPO will also be able to exercise its competence concerning crimes inextricably linked to criminal conducts that fall within its competence (Art. 22), It is the so-called 'ancillary competence', which will be set following consultations between the EPPO and the national investigation authorities, but, in case of disagreement, it will be decided by the competent national judges.

5.2.8.2 Procedural Safeguards and Basic Principles of the Activities of the EPPO

Article 5 establishes that the EPPO shall ensure that its activities respect the rights enshrined in the Charter, and, for its part, Art. 41 specifies that it shall grant especially the rights of suspected and accused persons, including the right to a fair trial and the right of defence, with specific regard also to the five EU directives in this field. Moreover, it is provided that these persons, as well as other persons involved in EPPO's proceedings, shall have in addition all the procedural rights applicable to them under national law, including the possibility to present evidence, to request the appointment of experts or expert examination and hearing of witnesses and to request the EPPO to obtain such measures on behalf of the defence (Art. 41).

Furthermore, Art. 5 provides that the EPPO shall be bound by the principles of rule of law and proportionality in all its activities. In another perspective, it states that EPPO's investigations and prosecutions shall be governed by the Regulation and that national law can be applied only to the extent that a matter is not regulated by it. It is added that, unless otherwise specified in the regulation, the applicable national law shall be the law of the Member State whose European Delegated Prosecutor is handling the case. Finally, it is specified that where a matter is governed by both national law and the regulation, the latter shall prevail.

5.2.8.3 Investigations

EPPO's investigations shall be carried out in the territory of each Member State and in an 'impartial' manner: seeking all relevant evidence whether inculpatory and exculpatory (Art. 5). A case shall as a rule be initiated and handled by a European

Delegated Prosecutor from the Member State where the focus of the criminal activity is (criterion of *locus commissi delicti*), or, if several connected offences within the competence of the EPPO have been committed, from the Member State where the bulk of the offences has been committed (Art. 26). However, the EPPO—and, for it, the European Delegated Prosecutors—can also decide to exercise its right of evocation when the competent authorities of a Member State—which must inform the EPPO of that without undue delay (Art. 24)—has initiated an investigation in respect of a criminal offence for which the EPPO could exercise its competence (Art. 27).

At least, in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request searches, freeze instrumentalities or proceeds of crime, seize criminal proceeds, intercept electronic communications to and from the suspect or accused person, obtain the production of stored computer data, track and trace an object by technical means and perform every other measure available to prosecutors under national law (Art. 30), including the arrest or pre-trial detention of the suspect or accused person or the issuance of a European arrest warrant (Art. 33).

As a rule, such investigations will be carried out by Delegate Prosecutors, but, given their limited resources and the lack of European police bodies, they will necessary have to rely on the competent national authorities to carry out the investigations, with the result that national authorities should play a decisive role in European investigations.

5.2.8.4 Evidence Rules

Not many rules refer to the subject of evidence in the draft regulation. Indeed, it is only provided that the evidence should be free to move across all States, even when the national law provides different admissibility conditions. On this point, a mutual recognition system is adopted, and more specifically a 'passive' one (see Sect. 7.1.1). Moreover, it is provided that the power of the trial court to freely assess the evidence presented by the defendant or the prosecutors of the EPPO is not affected (Art. 37). However, the possibility to establish a unitary regulation of the European evidence applicable to EPPO's activities has been surrendered. Certainly, such a regulation would have had the advantage of being simplified and clearer and could represent an important step in the direction of the harmonisation of evidence rules in the EU area.

5.2.8.5 Exercise of Prosecution and the Judgment Phase

When the handling European Delegated Prosecutor considers the investigation to be completed, he/she shall submit a report to the supervising European Prosecutor containing a summary of the case and a draft decision whether to prosecute before a national court or to consider a referral of the case, dismissal or simplified prosecution procedure. The supervising European Prosecutor shall forward these

documents to the competent Permanent Chamber, eventually accompanied with his/her own assessment, and the Permanent Chamber will take its decision on the case (Art. 35).

Concerning the exercise of prosecution, the draft regulation does not make any explicit reference to the 'mandatory' model, but a control over the dismissal of the case where prosecution has become impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, by the Permanent Chamber is provided (Art. 39). With the dismissal, the EPPO may refer the case to OLAF or to a national competent authority, either administrative or judicial. A simplified prosecution procedure is also provided that aims at the final disposal of a case on the basis of terms agreed with the suspect, which the European Delegated Prosecutor may propose to the competent Permanent Chamber to apply in accordance with the conditions provided for in national law (Art. 40).

In compliance with what is provided under Art. 86 TFEU, the judgment phase is carried out in front of the competent national judges applying national rules; in this phase, the Delegated Prosecutors will have the same powers as national public prosecutors. Again, in this perspective, national authorities are going to play a leading role.

5.2.8.6 Judicial Review of the Court of Justice

The role of the Court of Justice is limited with regard to EPPO's activities. It can give preliminary ruling concerning only some cases, among which the validity of procedural acts of the EPPO if the question is raised on the basis of EU law; the interpretation or the validity of provisions of EU law, including the Regulation; and questions related to EPPO's competence. In addition, the Court of Justice can review the decisions of the EPPO to dismiss a case in so far as they are contested directly on the basis of EU law and has jurisdiction in any dispute relating to compensation for damage caused by the EPPO or concerning arbitration clauses contained in contracts concluded by the EPPO (Art. 42).

5.2.8.7 Processing of Information and Data Protection

The EPPO—and namely the European Delegated Prosecutors—shall be able to obtain any relevant information stored in national criminal investigation and law enforcement databases (Art. 43) and establish a Case Management System that shall contain a register of information obtained by the EPPO, an index of all case files and all information from the case files stored electronically (Art. 44). The draft regulation provides also a complex system of data protection and processing of personal data by the EPPO, which includes their collection, time limits for their storage, rights, condition and limits for right of access by the data subject and possible involvements of the European Data Protection Supervisor (Arts. 47–89).

5.2.8.8 Relationships Between the EPPO and the Other European Bodies

In addition, the Regulation provides tight relationships between the EPPO, other European bodies, the authorities of Member States that do not participate in enhanced cooperation on the establishment of the EPPO, the authorities of third countries and international organisations. First of all, these relationships shall be established with Eurojust (Art. 100).

The two bodies shall establish and maintain a close relationship based on mutual cooperation. To this end, the European Chief Prosecutor and the President of Eurojust shall meet on a regular basis to discuss issues of common concern. The EPPO, for its part, may associate Eurojust with its activities concerning cross-border cases, sharing information, including personal data, and inviting Eurojust or its competent national members to provide support in the transmission of its decisions or requests for mutual legal assistance.

It is also provided that the EPPO shall have access to information in Eurojust's Case Management System and that EPPO shall take appropriate measure to enable Eurojust to have access to information in its Case Management System.

EPPO shall establish with Europol a relationship whose modalities will be set out through a working arrangement (Art. 102). The EPPO shall establish also close relationship with OLAF, aimed to ensure that all available means are used to protect the Union's financial interests through the complementarity and support of OLAF to the EPPO. The principle is that, where the EPPO conducts a criminal investigation, OLAF shall not open any parallel administrative investigation into the same facts. Nevertheless, the EPPO may request OLAF to support or complement its activity providing information, analyses, expertise and operational support; facilitating coordination of specific actions of the competent administrative authorities and bodies of the Union; or conducting administrative investigations (Art. 101).

5.2.9 Follows: Future Perspectives

Roberto E. Kostoris

As it can be seen, EPPO's Regulation is not, as a whole, widely satisfactory. Probably there are more shadows than lights. However, we are used to seeing that EU law often develops through a small-step logic.

In this perspective, the Regulation could be considered not an arrival point, but a starting point in order to face new challenges in view of a closer judicial cooperation in the fight against the most serious transnational crimes.

Further Reading

Bachmaier L (2012) La cooperación judicial en asuntos penales en Europa: consideraciones prácticas, situación actual y propuestas de futuro. In: Colomer G, Vilar B, Cuadrado C (coords) El derecho procesal español del siglo XX a golpe de tango. Liber Amicorum en homenaje a Juan Montero Aroca, Tirant lo Blanch, Madrid, pp 1203 ff

Bachmaier Winter L (2015) The potential contribution of a European Public Prosecutor in light of the proposal for a regulation of 17 July 2013. Eur J Crime Crim Law Crim Justice, pp 121 ff

Barbe E (2007) L'espace judiciaire européen. La documentation Francaise, Paris

Blasi Casagran C (2016) El Reglamento de Europol: un nuevo marco jurídico para el intercambio de datos policiales en la Unión Europea. Revista General del Derecho europeo, no. 40

Böse M (2012) Ein europäischer Ermittlungsrichter - Perspektiven des präventiven Rechtsschutzesbei Errichtungeiner Europäischen Staatsanwaltschaft. Rechtswissenschaft Zeitschriftfürrechtswissenschaftliche Forschung, pp 172 ff

Brodowski D (2017) Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick. Zeitschrift für Internationale Strafrechtsdogmatik, pp 11 ff

Camaldo L (ed) (2014) L'istituzione del Procuratore europeo e la tutela penale degli interessi finanziari dell'Unione Europea. Giappichelli, Torino

Covolo V (2015) L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraud. Nomos, Baden-Baden

Covolo V (2017) Regulation 833/2013 - concerning investigations conducted by OLAF: a missed opportunity for substantial reforms? Eur Crim Law Rev, pp 151 ff

Csúri A (2012) The changing structure of actors involved in the protection of EU finances. Eucrim, pp 79 ff

Damaskou A (2015) The European Public Prosecutor's Office. A ground-breaking new institution of the EU legal order. New J Eur Crim Law, pp 126 ff

De Amicis G (2009) La "nuova" Rete giudiziaria europea ed il suo rapporto con Eurojust. Cass. pen., pp 1710 ff

De Amicis G (2010) Il "rafforzamento" di Eurojust nella prospettiva del Pubblico ministero europeo: finis an transitus? In: Zanetti E, Corso C (eds) Studi in onore di M. Pisani, II. La Tribuna, Piacenza, pp 111 ff

De Angelis F (2012) L'espace judiciaire pénal européen: une vision se concretise. Eucrim, pp 75 ff

de Hert P, Papakonstantinou V (2016) The new police and criminal justice data protection directive: a first analysis. New J Eur Crim Law, pp 7 ff

Delmas-Marty M, Vervaele JAE (eds) (2000) The implementation of the Corpus Juris in the Member States: penal provisions for the Protection of European Finances (4 vol). Intersentia, Cambridge

Durdevic Z (2013) Judicial control in pre-trial criminal procedure conducted by the European Prosecutor's Office. In: Ligeti K (ed) Toward a prosecutor for the European Union. Vol. I – A comparative analysis. Hart, Oxford, pp 986 ff

Erkelens LH, Meij AWH, Pawlik M (eds) (2014) The European Public Prosecutor's Office: an extended arm or a two-headed dragon? Springer, Heidelberg

Erbežnik A (2015) European Public Prosecutor's Office (EPPO) – too much, too soon and without legitimacy? Eur Crim Law Rev, pp 209 ff

Faletti F (2017) The European Public Prosecutor's Office and the principle of equality. Eucrim, pp 25 ff

Fernando Aparicio JM (2004) El nascimento del fiscal europeo. Revista de derecho comunitarioeuropeo 17:231 ff

Giudicelli-Delage G, Manacorda S, Tricot J (2015) Le contrôle judiciaire du parquet européen. Nécessité, modèles, enjeux. Societe de Legislation Compareé, Paris

Göhler J (2015) To continue or not: who shall be in control of the European Public Prosecutor's dismissal decisions? New J Eur Crim Law, pp 102 ff

Gonzales-Herrero Gonzales J, Butincu MM (2009) The collection of evidence by OLAF and its transmission to the national judicial authorities. Eucrim, pp 92 ff
Grasso G, Illuminati G, Sicurella R, Allegrezza S (eds) (2013) Le sfide dell'attuazione di una procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni. Giuffrè, Milano
Hamran L, Szabova E (2013) European Public Prosecutor's Office – Cui Bono? New J Eur Crim Law, pp 23 ff
Inghelram JFH (2011) Legal and institutional aspects of the European Anti-Fraud Office (OLAF). An analysis with a look forward to a European Public Prosecutor's Office. Europa Law Publishing, Groningen
Jourová V (2016) The cost(s) of Non-Europe in the area of freedom, security and Justice the European Public Prosecutor's of CE as a Guardian of the European taxpayers' money. Eucrim, pp 94 ff
Klip A (2016) European criminal law: an integrative approach, 3rd edn. Intersentia, Cambridge
Kostoris RE (2013) Pubblico ministero europeo e indagini "nazionalizzate". Cass. pen., pp 4738 ff
Kostoris RE (2015) The perspective to establish a European Public Prosecutor's Office: lights and shadows of a work in progress. Towards scientific criminal law theories. CCLS (College of Criminal Law Science) Tenth Anniversary Anthology of Papers from International Academic Partners. Law Press China, Beijing, pp 771 ff
Kostoris RE (2015) A European Public Prosecutor Office against Euro-financial crimes: which future? J East-Eur Crim Law (2), pp 27 ff
Kuhl L (2008) The future of the European Union's financial interests. Eucrim, pp 186 ff
Kuhl L (2013) Framework for coordination between judicial authorities and OLAF. In: Luchtman M (ed) Choice of forum in cooperation against EU financial crime. Freedom, security and justice and the protection of specific EU-interests. Eleven International Publishing, Utrecht, pp 91 ff
Kuhl L (2015) L'expérience de l'Office européen de lutte anti-fraude. In: Giudicelli-Delage G, Manacorda S, Tricot J (dir) Le contrôle judiciaire du parquet européen. Nécessité, modèles, enjeux. Société de législation comparée, Paris, pp 178 ff
Lassalle A (2005) Ministere public européen et organes de procedure europeens: les enjeux de l'articulation horizontale. In: Giudicelli-Delage G, Manacorda S (sous la direction de) L'integration penale indirecte. Societè de Legislation Comparè, Paris, pp 211 ff
Ligeti K (ed) (2013) Toward a prosecutor for the European Union, Vol. I – A comparative analysis. Hart, Oxford
Ligeti K, Marletta A (2016) EU criminal justice actors: accountability and judicial review Vis-À-Vis the EU Citizen. New J Eur Crim Law, pp 175 ff
Ligeti K, Simonato M (2013) The European Public Prosecutor's Office: towards a truly European prosecution service? New J Eur Crim Law, pp 7 ff
Lopes Da Mota JL (2008) The heart of the future European Public Prosecutor. Eucrim, pp 62 ff
Lopes Da Mota JL (2003) A Eurojust e a emergência de un sistema de justiça penal europeo. Revista portuguesa de ciências criminal, pp 177 ff
Marletta A (2016) Interinstitutional relationship of European bodies in the fight against crimes affecting the EU's financial interests. Past experience and future models. Eucrim, pp 141 ff
Marstaller M (2016) The legality principle: an effective way to minimise the European prosecutors' influence on substantive criminalisation? Eur Crim Law Rev, pp 161 ff
Mitsilegas V (2009) EU criminal law. Hart, Oxford
Nilsson HG (2011) Judicial cooperation in the EU. Eurojust and the European Public Prosecutor. In: Guild E, Carrera S, Eggenschwiler A (eds) The area of freedom, security and justice ten years on: successes and future challenges under the Stockholm programme. CEPS, Bruxelles, pp 73 ff
Novokmet A (2017) The European public prosecutor's office and the judicial review of criminal prosecution. New J Eur Crim Law, pp 374 ff
Nowak C (2016) The European Public Prosecutor's Office and national authorities. Cedam, Padova

Panait R (2015) Information sharing between OLAF and national judicial authorities. The advantages of a supranational structure and the legislative limitations specific to a European hybrid body. Eucrim, pp 64 ff
Parizot R (2015) The future EPPO: what role for the CJEU? New J Eur Crim Law, pp 538 ff
Pi Llorens M (2017) El nuevo mapa de las agencias europeas del Espacio de Libertad, Seguridad y Justicia. Revista de Derecho Comunitario Europeo, pp 77 ff
Rafaraci T (ed) (2007) L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia. Giuffrè, Milano
Salazar L (2006) Constitution pour l'Europe, programme de La Haye et ministère public européen. In: Ruggieri F (ed) La protection des interets financiers de l'Union et le role de l'Olaf vis-à-vis de la responsabilité penale des personnes morales et des chefs d'entreprises et admissibilité mutuelle des preuves. Bruylant, Bruxelles, pp 159 ff
Sicurella R (2017) Preparing the environment for the EPPO. Fostering mutual trust by improving common legal understanding and awareness of existing common legal heritage. Proposal of guidelines and model curriculum for legal training of practitioners in the PIF sector. New J Eur Crim Law, pp 476 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Simonato M (2016) OLAF investigations in a multi-level system. Legal obstacles to effective enforcement. Eucrim, pp 136 ff
Spencer JR (2012) Who's afraid of the big, bad European Public Prosecutor? Camb Yearb Eur Leg Stud, pp 363 ff
Stefanou C, White S, Xanthaki H (2011) OLAF at the crossroads. Action against EU fraud. Hart, Oxford
Tricot J (2005) Ministere public europeen et systemes penaux nationaux: les enjeux de l'articulation vertical. In: Giudicelli-Delage G, Manacorda S. (sous la direction de) L'integration penale indirecte. Societé de Legislation Comparé, Paris, pp 181 ff
Van Den Wyngaert C (2004) Eurojust and the European Public Prosecutor in the Corpus Juris model: water and fire? In: Walker N (ed) Europe's area of freedom, security and justice. Oxford University Press, Oxford, pp 231 ff
Vervaele JAE (2008) The shaping and reshaping of Eurojust and Olaf. Eucrim, pp 180 ff
Vervaele JAE (2009) From Eurojust to the European prosecution service in the European judicial area. The beginning of a European criminal procedural law. In: Espina Ramos JA, Carbajosa IV (ed) The future European Public Prosecutor's Office. Fiscalia General del Estado, pp 125 ff
Vervaele JAE (2010) Quel statut pour le Ministère Public? European enforcement agencies in the area of freedom, security and justice. In: Cour de Cassation (ed) Quelles perpectives pour un Ministère Public Europèenne? Dalloz, Paris, pp 171 ff
Wade ML (2013) A European public prosecutor: potential and pitfalls. Crime Law Soc Change 59:439 ff
Weyembergh A (2011) The development of Eurojust: potential and limitations of article 85 of the TFEU. New J Eur Crim Law, pp 75 ff
Weyembergh A, Armada I, Brière C (2015) Competition or cooperation? State of play and future perspectives on the relation between Europol, Eurojust and the European Judicial Network. New J Eur Crim Law, pp 2 ff
White S (2011) Operational activities and due process. In: Stefanou C, White S, Xanthaki H (eds) OLAF at the crossroads. Action against EU fraud. Hart, Oxford, pp 77 ff
White S (2013) Towards a decentralizated European Public Prosecutor's Office. New J Eur Crim Law, pp 23 ff
Wieczorek I (2015) The EPPO draft regulation passes the first subsidiarity test: an analysis and interpretation of the European Commission's Hasty approach to national parliaments' subsidiarity arguments. Germ Law J, pp 1247 ff
Zwiers M (2011) The European Public Prosecutor's Office. Analysis of a multilevel criminal justice system. Intersentia, Cambridge

Chapter 6
Horizontal Cooperation

Gaetano De Amicis

Contents

G. De Amicis (✉)
Italian Court of Cassation, Rome, Italy
e-mail: gaetano.deamicis@giustizia.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_6

6.1 Types and Instruments of Police Cooperation

6.1.1 Police Cooperation from the Schengen Agreement to the Treaty of Amsterdam

After having addressed 'vertical' cooperation, it is now time to focus on the forms and instruments of 'horizontal cooperation' between national authorities. Let us start with police cooperation.

Police cooperation started officially only in 1976 with the establishment of working groups (the so-called Trevi group), whose purpose was to analyse terrorism-related phenomena, organisational issues and aspects connected to training police services.

In 1989, four working groups were in operation (terrorism, police cooperation, organised crime and free movement of persons) under the guidance of a group of high-ranking officers; the group was tasked with preparing the decisions that the Council of Ministers of the EU was expected to adopt.

This model of cooperation established the basis for the forms of intergovernmental cooperation later activated with the Schengen Agreement and the Treaty of Maastricht.

The Convention Implementing the Schengen Agreement (CISA), signed on 19 June 1990 and entered into force in 1995, abolished internal controls between the signatory States in order to allow the free movement of persons within this common area, and it created a single external border, where the checks for entering the Schengen area are performed pursuant to identical procedures. As a result, common rules for visas, for the right to asylum and for external border controls were adopted. However, 'compensatory measures' have also been introduced to support the free movement of persons with the aim of improving cooperation and coordination between the police services and the national judicial authorities in order to safeguard the internal safety of Member States and effectively combat organised crime.

As will be shown in more detail, it is in this context that the Schengen Information System (SIS) and the second generation Schengen Information System (SIS II, which replaced the first one) were developed. These systems include a database that allows the competent authorities of the Member States to exchange information concerning the identity of specific categories of people and goods.

Furthermore, the CISA provides for the possibility of seconding liaison officers in the various Member States with the task of coordinating the exchange of information related to terrorism, drugs, organised crime and organisations promoting illegal

immigration. Furthermore, a cross-border 'right of surveillance' and a cross-border 'right of hot pursuit' were established, which allow police officers to continue the surveillance and hot pursuit of a suspect even in the territory of another State.

In turn, the 1992 Treaty of Maastricht specified the 'matters of common interest' with regard to which police cooperation needed to be promoted (i.e., terrorism, drugs and other forms of international crime). The Treaty envisioned the establishment of the European police office (Europol), eventually established in 1995, and set up a system for the exchange of information extended to the whole Union.

The 1997 Treaty of Amsterdam, entered into force on 1 May 1999, introduced the concept of an 'Area of freedom, security and justice' and further specified the objectives and sectors in which it was necessary to implement police, customs and judicial cooperation in order to guarantee a high level of security in the Member States while also enhancing Europol's role.

This way, police cooperation within Europe was able to focus on enhancing the administrative and operative cooperation between police services, even through the support provided by Europol, and also on the possibility of promoting liaison agreements between investigative bodies (judicial and police) specialised in combating organised crime.

Furthermore, the Schengen area was progressively expanded to almost all of the Member States of the Union, while Schengen's *acquis* was included in the legislative framework of the European Union by means of an additional protocol to the Treaty of Amsterdam.

6.1.2 Police Cooperation in the Treaty of Lisbon

The Lisbon Treaty (Art. 87 TFEU) further developed the functioning mechanisms of the police cooperation by introducing a normative basis aimed at 'associating' all the relevant authorities of the Member States, including police services, customs services and other services tasked with law enforcement functions, specialised in the prevention or identification of crimes and the corresponding investigations.

For this purpose, the European Parliament and the European Council will be able to establish, by resorting to the ordinary legislative procedure, measures concerning (a) the collection, storage, processing, analysis and exchange of information; (b) support to the training of staff and to the cooperation for the exchange of personnel, equipment and research into crime detection; and (c) common investigative techniques for identifying serious cases of organised crime.

Furthermore, by voting according to a special legislative procedure (which requires a unanimous vote and the prior consultation of the European Parliament), the Council will be able to adopt further measures concerning the operative cooperation between the aforementioned authorities, with the possibility—should unanimity not be reached—of establishing enhanced cooperation upon the initiative of at least nine Member States.

However, both procedures (ordinary and special) are not applicable to measures representing a 'development' of Schengen's *acquis* (Art. 87.3 TFEU).

Finally, another important provision is worth noting: Art. 89 TFEU provides that the Council, voting according to a special legislative procedure, by a unanimous vote and with prior consultation with the European Parliament, may establish the conditions and the limits pursuant to which the judicial and police authorities of the Member States may operate in the territory of another Member State in connection and in agreement with the authorities of the same Member State.

With this provision, the Lisbon Treaty substantively endorses the common practice already in place after the attacks of 11 September 2001 of promoting cooperation between the special intervention units of the Member States in order to effectively address crises occurring inside the territory of one of them. Decision 2008/617/JHA adopted by the Council on 23 June 2008 moved in the same direction. The Decision established rules and general conditions to allow the 'special intervention units' of one or more Member States to operate in the territory of another Member State that is facing a crisis determined by criminally relevant facts and that is suitable to represent a serious threat to persons, goods, institutions or infrastructures.

6.1.3 The Instruments of Police Cooperation: Cross-Border Surveillance

Having said that, a more specific assessment of the operating procedures of the police cooperation must necessarily follow from the acknowledgment that the borderless area established under the Schengen Agreement facilitates the movement of criminals from one country to another. In such a situation, different investigation strategies must be adopted. It is necessary to be able to conduct activities that are not limited to national boundaries and to benefit from a safe, reliable and efficient network of information. As regards the first profile, it is necessary to allow two fundamental and strictly connected investigation activities beyond the national boundaries: surveillance and pursuit.

With regard to the former, Art. 40.1 CISA provides that police officers, who, in the context of a criminal investigation conducted in their own country, are currently surveilling an individual who is presumed to have participated in an extraditable criminal offence, are authorised to continue the surveillance activity in the territory of another Member State, if this latter has authorised cross-border surveillance in response to a request for assistance made in advance. On request, the surveillance will be assigned directly to the officers of the Member State on whose territory the surveillance is conducted.

In extremely urgent circumstances, when the prior authorisation of the other State cannot be requested, the officers tasked with the surveillance are allowed to continue the surveillance of an individual across the border, provided this individual is

suspected of having committed one or more of the crimes included in a specific list (which includes, among others, murder, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, illicit drug trafficking and violation of laws concerning arms and explosives) and provided the crossing of the border is immediately reported to the authority of the State in whose territory the surveillance is continued and the request for assistance is immediately submitted, outlining the reasons for crossing the border without prior authorisation. In this case, the possibility of continuing the surveillance is prevented when the concerned State requests the suspension of the activity or refuses to authorise the continuation of the surveillance within 5 h after the border was crossed.

In any case, some general conditions must be respected, such as the following: the surveillance officers cannot use their service weapons except for self-defence, cannot enter into private homes and places not accessible to the public and cannot apprehend or arrest the individual subject to surveillance.

6.1.4 Cross-Border Pursuit

Moving now to the cross-border pursuit, Art. 41 CISA provides that when officers are pursuing an individual in their own country who was caught in the act of committing or of participating in one of the offences for which cross-border surveillance is allowed without prior authorisation, or of an extraditable crime, those officers are authorised to continue the pursuit without prior authorisation in the territory of another Member State when this latter's competent authorities, given the particular urgency of the situation, could not be notified in advance of the entry or when these authorities are unable to reach the scene in time to take over the pursuit. The same rules also find application when the individual that is being chased has escaped from prison.

The pursuing officers are nonetheless expected to contact the competent authorities of the other Member State no later than when the border is crossed, and the pursuit must stop as soon as such State requests it. In this case, upon request of the pursuing officers, the competent local authorities shall challenge the pursued person in order to establish the person's identity or to make an arrest. Conversely, if no request to stop the pursuit is presented, and the competent authorities cannot intervene quickly enough, the pursuing officers may detain the person pursued until the officers of the State in whose territory the pursuit is taking place, who must be informed immediately, are able to establish the person's identity or make an arrest.

In any case, the pursuit will have to be carried out in adherence to the procedures established by the concerned State in the statement attached to the CISA and under certain conditions, such as the prohibition against using service weapons—except in cases of self-defence—and the prohibition to enter into private homes and places not accessible to the public, in analogy to what is established for cross-border surveillance; furthermore, the pursuing officers must be easily identifiable and are expected

to report to the local authorities after every mission and to remain at their disposal, upon request of those authorities, until the circumstances of their action have been clarified.

Finally, it should be pointed out that during the surveillance and pursuit, the officers operating in the territory of the other State are considered officers of this latter State with respect to offences committed against them or by them (Art. 42).

6.1.5 Secondment of Liaison Officers

Pursuant to Art. 47 CISA, the Contracting States may conclude bilateral agreements providing for the secondment, for a specified or unspecified period, of liaison officers from one Contracting State to the police authorities of another Contracting State.

The purpose of the secondment of liaison officers is to further and accelerate cooperation between the States by providing assistance with regard to the exchange of information aimed at combating crime by means of both prevention and law enforcement, with regard to the implementation of requests for mutual police and judicial assistance in criminal matters and, finally, with regard to the needs related to the tasks assigned to the authorities responsible for external border surveillance.

It should be noted that the liaison officers are assigned the task of providing advice and assistance within the limits of the instructions provided by the seconding State and by the one in which they are seconded, but they are prevented to take independent police action.

Finally, the Contracting States may agree, within a bilateral or multilateral framework, that the liaison officers of a Contracting Party who are seconded in third States may also represent the interests of one or more Contracting States. Pursuant to such agreements, the liaison officers seconded in third States provide information to other Contracting States, upon request or on their own initiative, and perform duties on their behalf within the limits of their competences.

6.1.6 The Exchange of Information

The system of police cooperation designed by the Schengen Agreement introduces a detailed regulation on the exchange of information based on (Art. 39.1 CISA) the general principle pursuant to which the Contracting States undertake to ensure that their respective police authorities cooperate and assist each other, in adherence to national laws and within the limits of their competences, for the purposes of preventing and detecting criminal offences, provided that national laws do not reserve the corresponding request to the judicial authorities and that such request (or its implementation) does not imply the application of coercitive measures by the requested State.

From this perspective, requests for assistance and the corresponding answers may be exchanged between the central bodies responsible in each Contracting Party for international police cooperation.

Furthermore, in the context of such system (Art. 39.2), the written information provided by the requested State may be used by the requesting State as evidence of the facts subject to investigation only 'with the consent of the competent judicial authorities of the requested Contracting Party'.

Furthermore, Art. 46 provides that, in special cases, each Contracting State, in adherence to its national law and even without having been formally requested to do so, may notify the concerned State of any information that may be important in helping it combat future crimes and prevent offences against or threats to public policy and public security.

The exchange of information is usually managed by a central body; however, in especially urgent cases, it may be performed directly by the concerned police authorities, provided this does not violate national laws. However, in this case, the central body must be notified without delay.

This set of regulations were replaced by Framework Decision 2006/960/JHA of the Council of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union for the purposes of conducting criminal investigations or criminal intelligence operations in all those cases in which the investigations or the operations involve crimes for which a European Arrest Warrant (EAW) may be issued (see Art. 2.2 Framework Decision 2002/584/JHA) or the corresponding or equivalent crimes provided for in national laws. Since the list of these crimes is rather extensive, the area of application is quite broad; beyond this area, however, the previous regulation remains in effect.

In order to prevent national legislation from hindering an effective and timely exchange of information and intelligence, Framework Decision 2006/960 establishes the basic rule pursuant to which the communication of these elements between the competent authorities of the Member States cannot be made subject to conditions stricter than those applicable at national level (Art. 3.3). In this regard, after establishing a general duty to share information (Art. 3), the Framework Decision sets out common rules in order to standardise the profiles concerning the procedure that must be followed to request and obtain information (Art. 5), the time limits for the answer (Art. 4), the channels and the language used for the communication (Art. 6) and the reasons that may justify a refusal to provide information and intelligence.

In any case, the 2006 Framework Decision followed a traditional approach and refused to adopt not only the exchange mechanisms based on direct and online access to foreign databases but also the adoption of common rules on the protection of data once this information is exchanged.

A cautious approach was also taken in deciding the (limited) area of application of the Framework Decision: as indicated by Art. 1, the Framework Decision aims to facilitate the exchange of existing information and intelligence and does not establish any duty for the Member States to collect and store the information for purposes of providing it to the foreign authorities.

The request to communicate information and intelligence—aimed at detecting, preventing or investigating a crime—presupposes that there is a reason to believe that this information is available in another Member State. Therefore, the request must be motivated and must specify the reasons for assuming the existence of such availability, the purpose for requesting information and intelligence and the link between such purpose and the person who is the subject of the information and intelligence (Art. 5).

In this regard, Art. 1.4 plays an important role as it indicates that the Framework Decision does not introduce an obligation for the Member States to provide information and intelligence to be used as evidence in court, nor does it establish a right to use such information for this purpose, unless the State providing the information has consented to such use.

With a view to safeguarding the need to exchange information quickly and effectively to the maximum extent possible—a need that is balanced with the requirement to avoid significant harm to the essential interests of the requested State—the Framework Decision (Art. 10) establishes the principle pursuant to which the request for information and intelligence is binding, but the competent authority may refuse to provide them if there are factual reasons to assume that the provision of the information or intelligence would undermine national security, the security of persons or the success of ongoing investigations or intelligence operations or when the request is irrelevant or disproportionate (this would be the case, for example, for a request concerning proceedings for a crime punishable with a maximum of 1 year of imprisonment).

The Framework Decision therefore does not affect (Art. 1.2) the agreements between Member States and third countries and the instruments of the European Union concerning mutual assistance or mutual recognition and aims to facilitate the procedures for the exchange of information and intelligence, such as the Convention of 18 December 1997 established pursuant to Art. K.3 TEU, on mutual assistance and cooperation between customs administrations.

6.1.7 The Enhancement of Cross-Border Cooperation in the Treaty of Prüm and the 'Principle of Availability of Information'

Council Decision 2008/615/JHA on the enhancement of cooperation in the fight against terrorism and cross-border crime (also known as the 'Prüm Decision') had the effect of significantly enhancing the instruments of cooperation between the police authorities with regard to cross-border exchange of information.

The *Prüm Treaty* was signed on 27 May 2005 and entered into force on the 1 September 2006 between Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain. Its purpose was to enhance the police cooperation regulated by the Schengen Agreement by specifically granting access to DNA databases. It is a

multilateral international convention that was subsequently joined by other countries.

The Prüm Treaty stands as an example of 'enhanced' cooperation achieved outside of the EU framework; it was subsequently incorporated in the legal framework of the EU by Decision 2008/615/JHA.

Unlike the aforementioned Framework Decision 2006/960/JHA, Decision 2008/615/JHA falls squarely within the approach drawn by the Hague Programme adopted by the European Council of 4–5 November 2004.

This Programme was originally enacted to 'enhance freedom, security and justice within the European Union' in the aftermath of the terrorist attacks in New York and Madrid in 2001 and 2004, respectively. Among its priorities were planning new strategies for combating crime, a substantial strengthening of the ability of national authorities to exchange information and the use of new technologies in order to ensure both mutual access to national databases and the interoperational character of those same databases.

This approach of a close inter-exchange of information led to the establishment of the fundamental 'principle of availability of information' in the Hague Programme, pursuant to which Member State's law enforcement authorities who need information to perform their functions of preventing, detecting and investigating crimes were granted the right to obtain such information by the authorities of another Member State, which are under the obligation to make this information available and/or transmit it to the former authorities for the aforementioned purposes. This represented a significant change that reaffirmed the principles of free movement and mutual recognition in criminal matters within the European Area. These principles, which were originally conceived with regard to goods and products, have found application over time to capitals, services, judicial decisions and intangible properties such as data and information collected by public authorities.

Decision 2008/615/JHA is receptive to this model and clearly supports the direct exchange of information focused on online access to foreign databases. In fact, Member States are under an obligation to authorise the national contact points of the other Member States to access their own automated data files concerning DNA profiles, fingerprints and vehicle registrations (Arts. 3, 9, 12) in order to perform an automated search of the information or index-data included therein.

More specifically, access to DNA profiles represents the most significant element because it allows access to a basin of new and crucial data that were not known before. The Decision indicates that Member States are obligated to establish and manage national DNA databases for criminal investigations (Art. 1) and, provided some conditions are met, when the DNA profile of an individual currently in the territory of the requested Member States is missing, Member States are expected to provide criminal assistance by collecting and analysing a biological sample of such individual in order to then transmit the corresponding DNA profile to the requesting State (Art. 7).

The adoption of the 'Prüm Decision' should urge EU Member States to fill the gaps existing in national legislation with regard to DNA databases and mandatory

collection of biological samples by implementing the necessary and appropriate domestic regulations.

It should also be noted that the European Crime Prevention Network (EUCPN)—established with Decision 2001/427/JHA, then abrogated and replaced by Decision 2009/902/JHA of the Council, and composed of a Board of National Representatives, a Secretary and contact points that may be designated by each Member State—is vested with the task of not only facilitating cooperation, contacts and exchange of information and experiences between actors operating in the area of crime prevention but also collecting and communicating information, including best practices on the ongoing prevention measures.

To the principle of availability of information must correspond necessarily an adequate level of protection for data and rights of an individual. In this regard, more specifically, reference must be made to Directive 2016/680/EU of the European Parliament and the Council, adopted on 27 April 2016, whose purpose is to harmonise various national laws concerning protection of natural persons in respect of the processing of their personal data by the competent authorities for purposes of prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties and on the free movement of such data. This Directive repealed the prior Framework Decision 2008/977/JHA. The purpose of the 2016 Directive, which must be implemented in the Member States' legal systems by 6 May 2018, is to ensure a high and uniform level of protection for personal data belonging to natural persons and to facilitate the exchange of personal data between the competent authorities of the Member States with a view to ensuring an effective judicial and police cooperation in criminal matters without precluding the possibility for single EU States to enact more extensive guarantees for the protection of the data subject with regard to the processing of personal data. More specifically, the Directive indicates that the processing of personal data must be carried out in compliance with some principles (legality, proportionality, limited purpose of the processing, liability for the accuracy and the updating of data) and recognises broad guarantees to the data subject (from the right to be informed and to access, to that to rectification and erasure, up to the possibility to lodge a complaint or an appeal with a supervisory or judicial authority). The transfer of data to a third country or an international organisation must be performed only if it is necessary for the purpose of prevention, investigation, detection or prosecution of criminal offences and the execution of criminal penalties and prevention of threats to public security (Arts. 35 ff.) and in any case only with the prior authorisation to the transfer of the Member State where the data was collected, unless the threat to public security or to the vital interests of a Member State or a third country is so immediate to make the timely issuance of a prior authorisation impossible. Finally, the Directive also provides for the need to implement adequate technical and organisational measures to protect the confidentiality and safety of data by requesting Member States to implement mechanisms for their preservation and to choose a national supervisory authority that is independent and vested with powers of investigation and intervention.

6.1.8 Schengen Information System (SIS and SIS II) and SIRENE Division

The Schengen Information System (SIS), included in Arts. 92–119 CISA and operational since 1995, has represented an important structure for the exchange of information. It was designed as a 'compensatory measure' to the opening of borders to facilitate the free movement of persons by preserving a high level of security within the Area of Freedom, Security and Justice (AFSJ), including public security within Member States. At the same time, it also promoted operational cooperation between police and judicial authorities in criminal matters. On 9 April 2013, the SIS was replaced by the second generation Schengen Information System (SIS II) established with Council Decision 2007/533/JHA.

The SIS II, which, in many respects, has reaffirmed the provisions of the SIS, represents an advanced centralised data-processing system. It includes a national section established in the territory of each Contracting State (the so-called SIRENE units, an acronym that stands for Supplementary Information Request at the National Entries) and a central unit for technical support located in France.

The SIRENE national office operates as a contact point for the Member States and must be operational 24 h a day for analysis, assistance and technical support.

Member States are expected to report data concerning (a) individuals wanted for arrest, both for purposes of extradition and handover on the basis of a EAW: this is an important innovation introduced by SIS II; moreover, a copy of the EAW will be attached to the alert, thereby making the next step of the procedure easier and simpler; (b) missing persons; (c) witnesses, individuals summoned or sought to be summoned to appear before the judicial authorities in order to be subjected to a penalty implying deprivation of personal liberty; (d) individuals, vehicles, boats, airplanes and containers that are under surveillance, even in their transfers; (e) property sought for seizure purposes or representing evidence in criminal proceedings; (f) vehicles, weapons, registered banknotes, lost or stolen documents and means of payment.

With regard to individuals, the entered data, in addition to providing the name, specific physical characteristics, date and place of birth, nationality and information on whether the individual is armed, is violent or has escaped, must also include the person's biometric data (photographs and fingerprints), which may only be used to confirm the identity of a person who has been already identified.

The data are rigorously protected, and the access to them is limited to police, border control, customs and judicial authorities within their respective competences in the context of criminal proceedings.

For its part, Europol has access to the alerts concerning persons wanted for arrest for purposes of extradition or surrender, to those concerning individuals, vehicles, boats, airplanes and containers subject to controls, in addition to the alerts concerning evidence and the aforementioned objects or documents; conversely, Eurojust's national members, in addition to the aforementioned alerts and the alerts concerning persons wanted for arrest for purposes of extradition or surrender, have

access to alerts concerning witnesses and individuals summoned to appear before the judicial authorities and missing persons.

If a Contracting State deems that the inclusion of an alert is incompatible with its national rules, its international obligations or essential national interests, it may request that alert be 'flagged' and that the action required in the alert not be performed. This may occur also to avoid an arrest for the purpose of surrendering an individual when the competent judicial authority has refused to enforce the EAW pursuant to national rules. In fact, the mere alert in the SIS II of a person wanted for arrest would have the same effect of a request for provisional arrest.

The processed personal data are protected pursuant to the provisions of the 1981 Convention of the Council of Europe for the Protection of Individuals with regard to automatic processing of personal data.

Searches on SIS generate 'hits' (positive alerts) every time that the indications concerning a person or an object correspond to those of an existing alert. Once a 'hit' is received, law enforcement authorities may request supplementary information on the individual or the object addressed in the alert through the network of SIRENE offices.

Finally, everyone has the right to access the data relating to him/her stored in the SIS II and may request the appropriate authorities to correct or delete the data included therein. To this purpose, any individual may bring an action before the courts or the authority competent under the law of any Member State, also in order to obtain any compensation.

6.1.9 The Customs Cooperation in the So-Called Naples II Convention and the Financial Intelligence Units

6.1.9.1 The Cooperation Between Custom Authorities (the So-Called Naples II Convention)

Without prejudice to the competence of the EU in the area of customs, a convention was established on 18 December 1997 pursuant to Art. K.3 old TEU concerning mutual assistance and cooperation between custom authorities, also known as the 'Naples II' Convention. This Convention aims to allow these authorities to prevent, detect and punish violations of national and EU customs provisions. This Convention has been ratified by all the Member States, and it entered into force on 23 June 2009.

This instrument established a system for coordinating requests for mutual assistance. This coordination is provided by central coordinating unit, which the Member States must establish within their own customs authorities. However, this does not exclude the possibility, in case of emergency, of establishing direct cooperation between the other services of the Member States' customs authorities. Naturally, the central coordinating units will have to be informed of any action involving such direct cooperation.

The 'Naples II' Convention identifies three types of assistance: on request, spontaneous and cross-border.

The first type of assistance comprises a request for information; for surveillance of suspects, places, goods; for enquiries or for carrying out 'ancillary' activities, such as notifications.

Spontaneous assistance requires that the competent authorities of each Member State assist the competent authorities of other Member States by communicating information, transmitting documents and carrying out special watch, even without a prior request from the former.

Of special importance is the possibility of using the results of both the requested and spontaneous activities as evidence in the Member State where the applicant authority is based, even though within the limits established by the national laws of such State.

Finally, cross-border assistance implies cooperating to prevent, investigate and prosecute particularly serious crimes like illegal trafficking of drugs, arms, toxic waste and nuclear materials. Moreover, such form of assistance may entail the cross-border pursuit even without prior authorisation from the competent authorities of the concerned State and the continuation of surveillance in the territory of another State with methods that are similar to those of the corresponding mechanisms established by the already mentioned CISA, in addition to the possibility of performing controlled deliveries and covert operations and of establishing joint investigation teams with the involvement of the investigating judicial authorities.

Generally, assistance may be refused anytime it may cause harm to the public order or if it may harm the essential interests of the Member State, especially in the area of data protection, or when the scope of the action requested—especially with regard to the special forms of cooperation indicated under Title IV—is manifestly disproportionate compared to the seriousness of the alleged infringement.

The scope of the Convention covers all cases of cross-border illegal trafficking and the laundering of money deriving from such activities.

6.1.9.2 The Role of the Financial Intelligence Units (FIUs)

With Council Decision 2000/642/JHA of 17 October 2000, an instrument was adopted for regulating the exchange of information between the Financial Intelligence Units (FIUs) established by EU Member States to fight money laundering and financing of terrorism.

These units are vested with the tasks of collecting and analysing the information received pursuant to Directive 91/308/EEC in order to establish the possible presence of connections between suspicious financial operations and criminal activities.

The Decision of the Council therefore formalised the notion of FIUs and assigned a legal status to an informal definition previously developed within the 'Egmont Group', with the purpose of developing the information circuit through a 'multi-disciplinary' organisation of the units based primarily on an integration of financial, investigative and judicial knowledge.

Generally, the FIUs are based at the police or judicial authorities or at the administrative bodies responsible for reporting to the financial authorities and are expected to exchange with the homologous authorities all the available information that may be useful for the investigations on the financial operations connected with the money laundering and the natural or legal persons that may be involved in it, even in the absence of a specific request.

The transmitted information may also be used in the context of investigations or criminal proceedings in the requesting Member State, unless the transmitting Member State has prohibited its use pursuant to domestic legislative limits or due to the risk that such use might compromise national criminal investigations or be clearly disproportionate compared to the legitimate interests of a natural or legal person or of the Member State. On the basis of the same conditions, the FIU may refuse to communicate the requested information, giving adequate reasons for the refusal.

In practice, the exchange of information is conducted in adherence to the provisions included in the bilateral agreements concluded from time to time by the interested FIUs (the so-called memorandum of understanding).

Finally, the processing of personal data must respect Framework Decision 2008/977/JHA of the Council, the Convention of the Council of Europe no. 108 of 28 January 1981 and Recommendation R (87) 15 of 17 September 1987 of the Committee of Ministers of the Council of Europe regulating the use of personal data in the police sector.

The Platform of the European FIU, chaired by the European Commission, is composed of representatives of the FIUs of the Member States and is the appropriate place for discussions concerning international cooperation and the FIUs' application of EU rules. Specifically, it is where the FIUs develop proposals to revise EU legislation and where they coordinate with each other to participate in the activities of the 'Egmont Group'.

The FIU.net represents the decentralised information network among the FIUs of the European Union. It allows the structured exchange of information on a multilateral basis, guaranteeing operational standardisation, immediacy and the security of exchanges. The network is co-funded by the European Commission and is managed through a board composed of the FIU partners and of the Commission itself and through a bureau hosted by the Dutch Ministry of Justice.

6.2 Types and Instruments of Judicial Cooperation

6.2.1 The Evolution of the Principle of Investigative Coordination Within the European Legislative Framework

The most significant feature of the judicial cooperation is mainly represented by the connection and coordination of the investigation activities. This is indeed its peculiar

feature, even if it has developed at a later stage, since at the early stages only forms of cooperation based on rogatory letters and extradition requests existed and the ideas of 'sharing', 'consultation' and 'coordination' were absent.

At the international level, the first important statements highlighting the need to establish an investigative coordination in the development of strategies to fight organised crime can be found in Recommendation 1 of the Action Plan to combat organised crime (97/C 251/01), adopted by the Council of the European Union on 28 April 1997, and in point 35 of the Recommendation R (96) 8 on crime policy in Europe in a time of change, adopted by the Council of Europe on 5 September 1996.

The former made reference to the need to establish within each national system a central body with the 'overall responsibility' of coordination of the fight against organised crime based on the premise that only an action planned by a centralised supporting structure of a non-bureaucratic nature, but characterised by flexibility requirements and performing 'ancillary' functions, would be able to provide an inter-exchange of information and an efficient and informal assistance to the various competent domestic authorities.

The latter identified a broader need and invited Member States to elaborate procedural laws suitable to guarantee the 'simultaneous' coordination of the multi-lateral judicial assistance between the Member States involved in the investigation activities (preferably by resorting to practical and informal—rather than legal—instruments).

A 'targeted' declination of the principle of investigative coordination in a trans-national perspective still emerged from Art. 4.2 of Joint Action 98/733/JHA of 21 December 1998 on the punishment for participation in a criminal organisation in the Member States of the European Union, which invited the national authorities that have jurisdiction in respect of acts of participation in a criminal organisation to 'consult one another with a view to coordinating their action in order to prosecute effectively, taking account, in particular, of the location of the organisation's different components in the territory of the Member States concerned': the coordination is therefore objectively connected for the first time, through the reference to the concept of an 'effective' criminal prosecution, to the express purpose of improving the quality standards of the investigative activity.

The activation of an appropriate consulting and coordination mechanism between judicial authorities in relation to the methods of execution of the international rogatory letters was then stimulated by Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters. This joint action invited both the requesting and requested authorities, where possible, to 'consider jointly' how the difficulties that may arise might be overcome 'where the assistance requested cannot be executed in whole or in part' (see Art. 1.3.d).

However, it was only after the European Council of Tampere held on 15–-16 October 1999 that the need to strengthen and simplify the judicial cooperation in the investigations on cross-border crime began to hold central importance, thanks to the recommendation sent to the Member States to establish Eurojust—namely, the body vested with the task of facilitating an effective coordination of the investigations between the national prosecution authorities—and the express recognition of

the 'foundational' value represented by the principle of mutual recognition of judicial decisions (both in civil and criminal matters) for the cooperation.

With the adoption of Decision 2002/187/JHA of 28 February 2002 setting up Eurojust and the subsequent application of the provisions included in Arts. 29 and 31 of the former TEU to this new judicial entity, the concurrent perspectives of the investigative coordination and of a more effective functioning of the various profiles of the judicial cooperation have become deeply intertwined, eventually finding—at least within the European Union—a balancing and mediation point within the multilateral dimension that characterises the functions and powers of the new judicial structure.

From this perspective, the Italian State Anti-Mafia Division represents an important model. Its activity aims to make the cooperation between the various national authorities responsible for the investigations concretely operative, without removing any of their investigative powers and without overlapping with them though a relationship of a hierarchical primacy.

The Decision establishing Eurojust provided the guidelines of a tripartite (or twofold) intersubjective relationship between (a) the national member; (b) the national correspondent(s), if designated; and (c) the competent judicial authorities of the various Member States. These subjects, while acting according to different organisational, structural and functional criteria, are all expected to rely in their interactions on their capacity for dialogue and on fluid relationships—even at an operational level—which necessarily require a long time to be developed but may be promoted by the possibility—originally provided by Art. 13 of the Brussels Convention of 29 May 2000 and now by Art. 89 TFEU—offered to Eurojust's national member to participate in the activities of a joint investigation team, provided this participation is not prohibited by the laws of the State in which the team operates.

Ultimately, the establishment of Eurojust—which is currently the only supranational judicial structure in the world promoting the coordination of investigations on cross-border crime—envisions the transition from a model of 'national' enhanced cooperation, that is, confined within the Member States (pursuant to the formula established by the 1997 Action Plan), to models of coordination between judicial authorities of various Member States on whose territory multiple and connected investigations are conducted on especially serious crimes. Furthermore, Eurojust's 'laboratory' also marked the transition from an informal and purely voluntary form of cooperation to a 'structured' and, above all, vertical and centralised coordination of the investigations and criminal prosecutions, achieved by means of a body vested with authorising powers able to 'optimize' the quality and the results of the cooperation, despite its lack of significant sanctioning powers in case of the non-compliance of the Member States' competent national authorities.

From this point of view, it is clear the difference from other 'structured', but non-vertical, forms of investigative cooperation that bring about a direct and joint intervention of the various national 'actors' of the judicial cooperation in criminal matters, albeit within a legislative framework that is still affected by an intergovernmental vision. We are referring here to the European Judicial Network and to the office of the liaison magistrate, which will be addressed shortly. Reference could

also be made, under a different profile and *de iure condendo*, to the different forms of cooperation that might be implemented on the basis of the new legislative basis established by Art. 89 TFEU. In fact, such article provides for the possibility for both judicial and police authorities to 'operate in the territory of another Member State in liaison and in agreement with the authorities of that State', thereby opening a significant first breach in the traditional principle of territoriality in the exercise of criminal jurisdiction, not only during the investigation, but also during the trial.

6.2.2 Types and Methods of the Coordination

Finally, the challenges presented to the international community by an increasingly transnational crime have increased the number of forms of assistance requiring an ongoing and constant 'operational coordination' between the authorities of the interested States or, even more, joint operations on the basis of an agreement entered into from time to time with regard to each specific case, even if not necessarily within a centralised, vertical and organically structured activity of coordination.

These are activities performed in the territory of one or more States for the purposes of carrying out investigations that are not aimed at collecting evidence in the strict sense and that traditionally fell in the area of police cooperation since police bodies were also authorised to participate in them. Today, conversely, such activities are increasingly 'attracted' within the mechanisms typical of the judicial cooperation in light of the increasing importance that the presence of public prosecutors play in their context; this is also the reason why they are addressed here. We are referring to the joint investigation teams, to the infiltration or covert operations and to the controlled deliveries. Cross-border surveillance may also be subject to judicial coordination, but only in more qualified terms; for this reason, such form of surveillance was addressed within the part dedicated to police cooperation.

From a different point of view, the inefficiency shown by the traditional forms of judicial cooperation based on an agreement has long prompted the judicial authorities to explore the practicability of more expedited and direct cooperation mechanisms suitable to replace the traditional rogatory letter, such as the spontaneous transmissions of information, or the so-called joint execution of the rogatory letters, while respecting *lex loci* principle and foreign State's consent.

Let us now examine the main features of these various operational models, starting from two structured forms of cooperation: that of the liaison magistrates and that of the European Judicial Network.

6.2.3 The Liaison Magistrate

Joint Action 96/277/JHA of 22 April 1996 established a framework for the exchange of liaison magistrates, that is, magistrates with particular expertise in the area of

judicial cooperation, with the purpose of making the application of the existing rules in this area easier by institutionalising an 'informal' channel of communication between the various national authorities.

The office of the liaison magistrate—especially common in France and also in Italy, Germany, Spain and the United Kingdom—is regulated by the rules enacted in the host State. The office was originally established to facilitate, at a bilateral level, the functioning mechanisms of the judicial assistance and to ensure that the rogatory letters could be drafted in the more appropriate forms and pursuant to the appropriate techniques in order to use the evidence collected abroad in the national proceedings. The stable contacts maintained by the liaison magistrate with the judicial authorities of the State where he/she is seconded allow him/her to follow the execution stage of the requests for assistance in their entirety, especially when the assistance must be provided in a coordinated form, thereby involving multiple judicial districts or multiple liaison magistrates sent by different States in the same territory.

More specifically, the liaising functions comprise the following activities: (a) providing information on specific requests for judicial cooperation, including in the preparatory stage for the formal transmission of the request, both in general and with regard to specific measures whose implementation abroad is requested; (b) following the development and the time required for the corresponding dossier at the competent judicial authority; (c) performing, sometimes, functions of channel for transmitting the request for assistance in order to effectively transmit it; and (d) promoting, especially in the most complex cases, meetings for the exchange of information and coordination between the investigating magistrates and the criminal investigation police officers who, in the various interested States, investigate cross-boundary crimes that are mutually connected, with the additional possibility of collecting extremely precious information with a view to defining possible common investigation strategies, which are suitable, in turn, to translate into new requests for judicial assistance that must be agreed upon, also with regard to time and manner of execution, by the same investigative bodies, or into subsequent common investigations.

The office of the liaison magistrate is especially useful in the stage preceding the establishment of an international rogatory commission. In fact, the liaison magistrate may not only promote appropriate contacts and an informal exchange of information, but may also directly control the possible pending or the state of development in the requested State of the criminal proceedings concerning the crimes under investigation in the requesting State or connected facts.

As previously indicated, the establishment of liaison magistrates derives form privileged relations between States, founded on bilateral or multilateral agreements based on Joint Action 96/277/JHA. This represents the main difference between the liaison magistrates and a body that will be addressed in the next paragraph: the European Judicial Network, which conversely represents an institutional structure, branched and extended to the various territories of the single Member States. Nonetheless, the possibility of a certain degree of similarity between the functions performed by these bodies and the risk of overlapping made coordination necessary: for this reason, Art. 2.4 of Joint Action 98/428/JHA, which established the European

Judicial Network, provided for the possibility to link the liaison magistrates to the European Judicial Network by the Member State appointing them, in accordance with the procedures to be laid down by that State.

6.2.4 The European Judicial Network

6.2.4.1 The Establishment

The European Judicial Network, which was established in the aftermath of Joint Action 98/428/JHA of 29 June 1998, has increased the possibility of facilitating the coordination mechanisms in the context of judicial cooperation between the EU Member States through the establishment of 'contact points' in each of them. The functioning of such body is essentially bilateral, as indicated by Art. 4.3 of the Joint Action, which provides for 'coordination of judicial cooperation in cases where a series of requests from the local judicial authorities in a Member State necessitates coordinated action in another Member State'.

6.2.4.2 Composition and Functions

The composition of the body (Art. 2 of the Joint Action) includes, on one hand, the central authorities responsible for international judicial cooperation and the judicial authorities or other competent authorities with specific responsibilities in the same area, 'taking into account the constitutional rules, legal traditions and internal structure of each Member State' and, on the other hand, as previously indicated, one or more 'contact points' established in each Member State, in accordance with its internal rules and internal division of responsibilities, so as to ensure effective coverage of the whole of its territory and of all forms of serious crime, including—as expressly provided—organised crime, corruption, drug trafficking, terrorism and, following Recommendation 10 of the European Union strategy for the beginning of the new millennium on the prevention and control of organised crime adopted by the Council in March 2000, crimes related to illegal immigration.

The contact points of the Network are expressly defined in the Joint Action as 'active intermediaries' with the task of facilitating judicial cooperation between Member States through the exchange of information and periodic meetings; they can be consulted both by the competent authorities of their own State or of another Member States and by the contact points of other Member States.

The main function of the contact points of the Network is to provide legal and practical information to the national legal authorities, to support these authorities in effectively preparing requests for judicial cooperation and to facilitate the coordination of judicial cooperation in cases where a series of requests from the local judicial authorities in a Member State necessitates coordinated action in another Member State.

6.2.4.3 The Changes Introduced by Decision 2008/976/JHA

With Decision 2008/976/JHA of 16 December 2008 concerning the European Judicial Network, the Council of the EU abrogated the previous Joint Action 98/428/JHA and revised the structure and methods of operation of this important body on the basis of the positive experience developed for more than 10 years in the various sectors of judicial cooperation.

The revision was also suggested by the new legislative framework outlined by the Lisbon Treaty, by the extension of the Union to the central and eastern European countries between 2004 and 2007 and by the consequences of the first applications of the principle of mutual recognition (with regard to the European Arrest Warrant, freezing and seizure of assets and the European Evidence Warrant), where circulation of judicial decisions within the European Union is based on direct relationships between the national judicial authorities.

While the 2008 Decision reaffirms the aforementioned general features of the Network, the main novelty compared to Art. 2 of Joint Action 98/428/JHA is represented by the widening of the Network's reference subjects, in partial analogy to the choice already made in the corresponding provision of Art. 12 of Decision 2002/187/JHA that established Eurojust. Indeed, the new offices of the national correspondent and the tool correspondent for the European Judicial Network, established within the contact points that each Member State must appoint, join the central authorities responsible for international judicial cooperation, the judicial authorities or other competent authorities with specific responsibilities in the same area (Arts. 2.3 and 4).

These two new offices add to the traditional role of 'active intermediaries' with the task of facilitating judicial cooperation between Member States' additional significant competences represented by the tasks assigned to them by Art. 4 of Decision 2008/976/JHA. Specifically, the national correspondent is called upon to perform the delicate role of internal coordination for all the aspects concerning the functioning of the various contact points located on the territory, a task that is significantly demanding and onerous, especially in those countries (such as Italy, France, Germany) that include a significant number of contact points.

In fact, this subject is responsible, in its own Member State, (a) for issues related to the internal functioning of the Network, including the coordination of requests for information and replies issued by the competent national authorities; (b) for liaising with the Secretariat of the European Judicial Network, including the participation in the meetings referred to in Art. 6; and (c) furthermore, where requested, for giving an opinion concerning the appointment of new contact points.

Conversely, the tool correspondent is called upon to ensure that the information concerning its own Member State is faithfully provided and constantly updated. Such information concerns the full details of the contact points in each Member State; the legal and practical information concerning the judicial and procedural systems in the Member States, including the texts of the relevant legal instruments; and, above all, an information technology tool allowing the requesting or issuing

authority of a Member State to identify the competent authority in another Member State to receive and execute its request for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition.

Among the various functions of the contact points, especially timely and important—mainly for the exchange of expertise and knowledge that it promotes—is the innovative provision (Art. 4.3) allowing these subjects to organise training sessions on judicial cooperation for the benefit of the competent authorities of their Member State, where appropriate in cooperation with the European Judicial Training Network.

This Network was established in 2000 by the EU Member States with the so-called Charter of Bordeaux between the institutions responsible for the training of magistrates. Its objectives include enhancing the level of mutual knowledge of the legal and judicial systems of the Member States and improving the methods of functioning of judicial cooperation within the European Union.

In this regard, it is important to note that the choice to 'codify' the need for training of magistrates at a European level (Arts. 81.2.h and 82.1.c, TFEU) was a propelling factor for the enhancement and strengthening of the new judicial cooperation based on the principles of direct communication and inter-jurisdictional dialogue. In fact, pursuant to these provisions, the European Parliament and the Council, by resorting to the ordinary legislative procedure, adopted the necessary measures aimed at, among other things, supporting 'the training of the judiciary and judicial staff'.

The improvement of the training in the judiciary is therefore an essential component of the ongoing project of developing a judicial area effectively based on the principles and fundamental rights indicated by Art. 6 TEU.

Furthermore, from this perspective, it becomes clear that improving the knowledge of EU legal instruments and the corresponding legal and judicial systems of the Member States, as well as developing linguistic skills that promote a direct dialogue between judicial authorities, are objectives that may be fulfilled only through the enactment of close organisational cooperation with (and between) all the European judicial bodies (first and foremost with the European Judicial Network and the Judicial Network in civil and commercial matters, as well as with Eurojust).

6.2.4.4 The Network's Operative Instruments

The European Judicial Network has progressively taken on effective operative instruments that are primarily represented by collections of information (the so-called *fiches belges*) aimed at facilitating the requests for cooperation concerning a series of investigative measures and activities (together with the corresponding parameters of competence, conditions and prerequisites).

Additionally, important operative instruments are represented by the Atlas and Solon projects. The former is a European electronic map that allows collecting information to identify the authorities that are competent to grant the requests for judicial assistance. The latter makes the most frequently used terms in the area of

judicial cooperation available in English, French and Spanish in order to promote the development of a homogeneous legal terminology.

Decision 2008/976/JHA added another tool to the above instruments that is extremely important specifically for the improvement of the operational activities performed by the Network in its relationship with Eurojust: it is a secure telecommunications connection (Art. 9), established with the purpose of promoting the flow of data and of requests for judicial cooperation between Member States, including through the connection with the Case Management System of Eurojust referred to in Article 16 of Decision 2002/187/JHA. Furthermore, the secure telecommunications connection may also be used for their operational work by the national correspondents for Eurojust (including those designated for counter-terrorism activities), the national members of Eurojust and liaison magistrates appointed by such body.

It should also be noted that despite the positive experience connected to the various organisational and operational modules adopted by the Network, the content of the information that the Network is able to provide is still very much limited. Indeed, the contact points are precluded from knowing the information linked to the investigations and the dossiers; in fact, the contact points only have access to the legal and practical information concerning the judicial and procedural systems of the Member States and the relevant legislative texts, the list of judicial authorities of each Member State, the complete data on the contact points of each Member State and the information technology tool, which must be constantly updated by the designated correspondent, aimed at identifying the authorities of the Member State that are competent to receive and process requests for judicial cooperation.

6.2.4.5 The Relationship with Eurojust

Decision 2008/976/JHA considers the cooperation between the Network and Eurojust as strategic but also in need of clarification. With regard to the functional relations, the boundaries between the two bodies, mutually autonomous but also structurally complementary, were identified in the bilateral or multilateral dimension of the corresponding areas of activity. In fact, the European Judicial Network has operated primarily in the context of bilateral relations, with the purpose of simplifying the execution of requests for judicial assistance, while Eurojust has relied on the possibilities offered by its databases to coordinate and improve the multilateral definition of the ever-increasing issues connected to the new needs of functioning of the judicial cooperation in criminal matters, not only at the execution stage but also at the stage prior to the rogatory. Generally, Eurojust has therefore represented an important development compared to the Network: while the latter is established in the European territory and mainly performs informational support functions, Eurojust is a centralised body, with specific functions for coordinating national investigations.

Nonetheless, the Network entertains a ‘privileged’ relationship of cooperation with Eurojust (Art. 10 of Decision 2008/976/JHA) concerning the ‘consultation and complementarity’, through the establishment of an informal consultative ‘micro-

chamber' between the various contact points of a Member State, Eurojust national member of the same Member State and the new figures of the national correspondents for the European Judicial Network and Eurojust.

This constant exchange of information between the Judicial Network and Eurojust is guaranteed primarily by the possibility of making not only the aforementioned centralised information available to this latter structure but also the important operative instrument of the secure telecommunications connection established by Art. 9 of Decision 2008/976/JHA, whose use for exchanging information and requests for judicial cooperation between the various Member States of the European Union is also made possible for the performance of Eurojust's operational activities.

A further exchange of information—also focused on the operational side of Eurojust's activity of coordination—is provided by Art. 10.b, which allows the contact points of the Network to inform, on a case-by-case basis, their own national member of all proceedings that they deem Eurojust to be in a 'better position' to deal with.

The criteria to activate such further exchange of information include, for example, the urgency requested by specific investigations, the complexity and 'multilateral character' of the dossier, the need to prevent and address any conflict of jurisdiction.

Furthermore, upon invitation of the European Judicial Network, Eurojust's national members may participate in the meetings routinely organised by the Network (Art. 10.c).

In conclusion, the need for the two judicial bodies to coexist—albeit within the framework of a 'redefinition' of their collaboration, in order to avoid any pointless overlapping—represents the well-established guidelines of the EU institutions, as indicated by Art. 85.1.c TFEU, which identified among the tasks to be assigned to Eurojust the strengthening of the judicial cooperation also through a 'close cooperation with the European Judicial Network'; likewise, the need to preserve a framework of relationships between the two bodies based on the principle of complementarity and mutual consultation is reaffirmed also in recital 19 of Decision 2009/426/JHA on the strengthening of Eurojust, which also emphasises the need to maintain the Network's specificities.

Within its new functional articulation, therefore, the Network operates—albeit being formally autonomous—as Eurojust's 'operating man' by increasing its capacity for investigative coordination through a more rational and effective organisation of the contact points located in the territory of the European Union.

6.2.5 Spontaneous Transmission of Information

One of the most interesting forms of collaboration between judicial authorities, true and proper 'cornerstone of effective coordination at the pre-rogatory stage', with the aim of collecting the elements necessary to establish a set of information prodromal

to a subsequent investigation strategy focused on the collection of evidence, is represented by the 'spontaneous transmission of information'.

Originally established by Art. 10 of the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in Strasbourg on 8 November 1990, this institution is based on the need to not subject the support provided to foreign judicial authorities carrying out criminal proceedings to the condition of filing a specific, formal request for assistance.

Spontaneous exchanges of information—limited to the area of cooperation between police authorities—had been already regulated by Arts. 39 and 46 CISA of 1990. Subsequently, this new form of collaboration was recognised in all the most important international conventions on judicial cooperation in criminal matters. For example, the following conventions can be cited: Art. 7 of the Brussels Convention of 29 May 2000 on Mutual Assistance in Criminal Matters; Art. 11 of the II Additional Protocol to the Strasbourg Convention of 1959; Art. 18.4 of the UN Convention on Transnational Organized Crime of 15 December 2000; Art. 26 of the Convention of the Council of Europe on Cybercrime, adopted in Budapest on 23 November 2001; Art. 56 of the UN Convention Against Corruption, signed in Merida on 31 October 2003; Art. 34 of the Convention of the Council of Europe on Action Against Trafficking in Human Beings, signed in Warsaw on 16 May 2005; and Art. 20 of the Convention of the Council of Europe, on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Financing of Terrorism, signed in Warsaw on 3 May 2005.

Subject to the clear limit of respect for national law and of possible harm to the investigations or pending proceedings, the exchange of information aims to urge the State that owns the information to share its knowledge with other interested States, in the framework of a new spirit of cooperation based on the principle of international solidarity in the fight against serious crime. The communication may be aimed at not only facilitating and expediting a subsequent request for assistance pursuant to the forms requested by the relevant provisions included in the conventions but also helping the receiving party to initiate or carry out the investigation or the proceedings.

The possibility of imposing conditions on the use of information and of obligating the receiving authorities to respect these conditions does not diminish the usefulness of this form of cooperation—which is often essential for a subsequent coordination of the investigation activities at a transnational level—because the circumstance that a prior request is not required is, in itself, suitable to prove a real and proper reversal of the rigid contractual idea of the *do ut des* ('give and take'), which has traditionally characterised the functioning of the most important treaties in the area of judicial assistance in criminal matters.

Furthermore, the fact that the Convention qualified the transmission of information as merely discretionary should not be read as assigning a different 'value' to this information compared to the information that can be obtained through a mandatory rogatory request since the Convention has left the possibility of regulating the conditions and limits of its use to the domestic legal orders of the Member States.

6.2.6 Joint Investigation Teams

6.2.6.1 Joint Investigation Teams as the Preferred Instrument for Non-rogatory Assistance

A form of operational and 'non-rogatory' assistance aimed at investigating and repressing crimes involving the territory of two or more States is the one concerning the ability of establishing joint investigation teams. The general rules concerning their establishment and functioning are provided in a uniform way by Art. 13 of the Brussels Convention of 29 May 2000, adopted by the Council pursuant to Art. 34 of the old TEU, concerning the Mutual Assistance in Criminal Matters, and by Art. 20 of the II Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959, adopted on 8 November 2001.

The possibility of establishing joint investigation teams is also provided by other international treaties: by Art. XXI of the Bilateral Agreement between Italy and Switzerland of 10 September 1998 on Judicial Assistance, by Art. 19 of the UN Convention on Transnational Organized Crime of 15 December 2000 and by Art. 49 of the UN Convention Against Corruption of 10 December 2003; these provisions, however, do not include procedural rules in this area.

The importance of such a model of cooperation is confirmed by the fact that in the agreements between the United States and the European Union concerning extradition and judicial mutual assistance adopted by the Council of the European Union on 6 June 2003, a specific regulation was included on the establishment and operations of the joint investigation teams in order to facilitate investigations and criminal prosecutions involving one or more Member States and the United States of America.

Within the European Union, delays in ratifying the Brussels Convention and concerns determined by the events of 11 September 2001 led to the adoption of an additional legal act: Framework Decision 2002/465/JHA of the Council of 13 June 2002, which reaffirms the content of Art. 13 of the Brussels Convention in its entirety with the purpose of enabling the entry into force of the provisions concerning the joint investigation teams before the entry into force of the other provisions of the Convention.

While not being limited to the fight against specific crimes, this institution is conceived in Framework Decision 2002/465/JHA as a primary instrument for the fight against terrorism, drug trafficking and human trafficking. Having said that, a team may be established provided that the investigation conducted by a Member State appears to be complex and characterised by a broad scope and by a connecting element with investigations carried in other Member States or when multiple Member States investigate crimes that require a coordinated and joint action due to the circumstances of the case.

6.2.6.2 The Setting Up Agreement and the Operational Rules

The request to establish a team may be presented by any interested Member State or even by Europol and Eurojust: within the area of its coordination activities, this latter is allowed to request the competent authorities of the interested Member States to assess the need to establish a joint investigation team, pursuant to Art. 6 of Decision 2002/187/JHA.

The Formation Agreement entered into by the competent authorities of the interested States—identified by the respective domestic legal systems—is then expected to determine the specific purpose of the team, its duration and the persons who are supposed to join it (these will be chosen from among police officers, public prosecutors, judges or other individuals, such as experts in specific areas and representatives of Eurojust, Europol, Olaf, or third-party States, such as the United States). Eurojust's national members may be considered full members of the team and may use the corresponding powers only when acting as national judicial authorities. In any case, the involvement of Eurojust in the teams is especially encouraged in light of the function of centralised coordination it performs.

With regard to the procedure for establishing the agreement, the principle of direct transmission of the requests for assistance between competent judicial authorities finds application (Art. 6 of the Brussels Convention): central authorities—such as the Ministries of Justice—are therefore excluded from playing any role in this.

Consistent with this view is also Art. 5 of the US–EU Agreement on extradition and mutual legal assistance in criminal matters signed in Brussels on 6 June 2003, which is, in any case, without prejudice to special circumstances such as the 'exceptional complexity', the 'broad scope' or the presence of 'other circumstances' requiring a 'more central coordination' in the concrete case, allowing the States to agree on the use of 'other appropriate channels of communication' in such cases.

The direction of the team is assigned to a representative of the competent authorities of the State in whose territory the investigation is carried out; this representative will act in adherence to the national law of his/her own country and may provide instructions to the other members of the team. These latter, for their own part, are expected to perform their functions 'taking into account the conditions set by their own authorities in the agreement on setting up the team'.

6.2.6.3 Application of the Lex Loci and Use of the Information Collected

The team must in any case operate in adherence to the law of the Member State in which it operates. From this perspective, the members of the team are allowed to carry out investigations consistently with the laws of the State in which they operate, subject to the prior consent of the competent authorities of this latter State and of those of the seconding Member State. The application of the *lex loci* rule has important consequences. In fact, it is clear that, from this perspective, the decision to carry out investigations in one territory rather than another may have relevant

consequences on the ability of using the evidence collected. This may lead to the risk of so-called forum shopping already at the stage when the agreement is formed.

In fact, the possibility of using the information obtained by the members of the investigation team is of primary importance. Pursuant to the Brussels Convention and to the 2002 Framework Decision, this is possible (a) for the reasons indicated in the act establishing the team, (b) for preventing a serious and immediate threat to public security (if this does not hinder the investigations already initiated by the authorities of the interested Member State) and (c) for detecting, investigating and prosecuting other criminal offences, subject to the consent of the Member State where the information became available (consent that, in any case, can be refused only when using that information may cause harm to the criminal investigation in the concerned Member State or when the concerned Member State may legitimately refuse the request for judicial assistance). However, looking beyond these general indications, which appear to hint at a rather broad and non-technical concept of the permissible use of evidence, what is clear is that the possibility of using the collected information in the proceedings will be dependent on the domestic rules of each Member States in whose territory this information is expected to be used.

Under a more general profile, it is worth indicating that the actual efficacy of this institution as a valid alternative to the instrument of the international rogatory letter will be essentially dependent on the likelihood of using the information provided by the various national legislations; in fact, it will indeed be up to the national legislations to establish if and within what limits the evidence collected through the joint investigation team may be used in national proceedings.

Ultimately, the joint investigation teams represent the main instrument for the coordination and simultaneous execution of cross-border investigations. In fact, they direct the cooperation in the direction of the subsequent sharing of the evidence collected, especially within the European Union, where supranational police and judicial bodies vested with specific powers of coordination such as Eurojust and Europol operate. However, the success and effective operation of this institution are significantly conditioned by the awareness of the *sui generis* character of the activity carried out by the investigation team—an activity that is not connected to the transmission of a fully fledged 'request' from one State to another pursuant to the traditional relationships of international judicial assistance—and by the scope of the task that may be assigned to the joint investigation team, which may well reach beyond and be much more diversified than the ordinary content of a request for judicial assistance.

It should also not be forgotten that the instrument of joint investigation teams promotes increased contacts between investigators that may lead to a better knowledge of foreign legal systems, overcoming linguistic barriers and jointly designing strategies to fight crime, which over time may generate positive effects and may prompt a more indirect harmonisation of the various national legislation.

Practical problems may arise in the case of joint investigations involving EU Member States and non-EU States due to the absence of centralised structures for coordinating investigation activities outside of the EU but primarily due to the possible risk of cases of *bis in idem* (double jeopardy), which may be made worse

by the complexity of the criminal context and by the 'fractioning' and different qualification of the crimes.

Therefore, in this regard, it will be very important to establish specific external limits applied by agreement and accepted by the States that are a party to the agreement establishing the basis for the common investigation (for example, Art. 54 of the Schengen Convention, which embraces—within certain limits—the *ne bis in idem* principle, a principle that has never been considered part of the recognised customary international law). In any case, it will be necessary to resort to informal mechanisms of consultation and cooperation in order to prevent and address possible conflicts of jurisdiction between the States interested by the joint investigation activity (a perspective that was implemented by Art. 15.5 of the UN Convention Against Transnational Organized Crime, signed in Palermo on 15 December 2000).

6.2.7 Controlled Deliveries and Infiltration or 'Covert' Investigations

Controlled deliveries and covert investigations represent two additional forms of operative coordination. They are usually included under the category of so-called special investigation techniques, and their uniqueness consists in the fact that they adapt to the reality of the crimes they fight, without stopping crimes in order to more efficiently perform the investigations.

The relevant legislation is represented for both activities by the Brussels Convention of 29 May 2000 on Mutual Assistance in Criminal Matters and by the II Additional Protocol to the Strasbourg Convention of 1959 (respectively, Arts. 12 and 18 for the controlled deliveries and Arts. 14 and 19 for the covert investigations), which are inspired by various European and extra-European laws (think, for example, of Art. 73 CISA but also Art. 20 of the UN Convention Against Transnational Organized Crime of 15 December 2000).

With an almost identical text, Art. 12 of the Brussels Convention and Art. 18 of the II Additional Protocol establish that each Member State undertakes 'to ensure that, at the request of another Member State, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences'. Conversely, with regard to the possibility of undertaking operations conducted by infiltrated or covert agents, this condition does not apply (curiously): the cross-border covert investigations will therefore be allowed even in case of less serious crimes.

With regard to both these instruments, the rule concerning adherence to the law of the State in which the activity is performed also finds application; however, while regarding the controlled deliveries, the classic scheme of judicial cooperation, based on the transmission of a request for assistance on which the competent authorities of the requested Member State are called upon to decide case by case, is able to find application; in the case of an infiltration operation, a specific agreement must be

entered into (in advance) by the requesting State and the requested State. The agreement is required to regulate the 'preparation', 'control' and 'duration' of the operation; the 'detailed conditions' of the operation; and the 'security' and 'legal status' of the infiltrated agents. The need for an inter-State agreement, which overlaps with that established by the competent investigation authorities, raises questions: in fact, such circumstance seems to evoke an intergovernmental logic that had been abandoned in favour of the current forms of cooperation. Furthermore, such a prior agreement appears to be dysfunctional, especially in light of the fact that such activity must be performed fluidly and in a timely manner.

Rather, it should be noted that the covert activities may be easily designed within a joint investigation team, possibly under Eurojust's coordination.

Further Reading

Aprile E, Spiezia F (2009) Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona, Ipsoa, Assago, pp 220 ff

Barbe E (2007) L'espace judiciaire européen. La documentation Francaise, Paris

Braum S, Covolo V (2013) From proven fragmentation to guaranteed data protection within the virtual criminal law enforcement area: a report on personal data protection within the framework of police and judicial cooperation in criminal matters. In: Ligeti K (ed) Toward a prosecutor for the European Union, a comparative analysis. Hart Publishing, Oxford

Covolo V (2015) L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude. Nomos, Baden-Baden

Covolo V (2016) L'échange d'informations entre autorités administratives et judiciaires. Premiers éclaircissements tirés de l'arrêt WebMindLicences, C-419/14. Eucrim, pp 146 ff

De Amicis G (2007) Cooperazione giudiziaria e corruzione internazionale. Verso un sistema integrato di forme e strumenti di collaborazione tra le autorità giudiziarie. Giuffrè, Milano

De Amicis G (2009) La "nuova" Rete giudiziaria europea ed il suo rapporto con Eurojust. Cass. pen., pp 1710 ff

De Angelis F (2012) L'espace judiciaire pénal européen: une vision se concrétise. Eucrim, pp 75 ff

de Hert P, Papakonstantinou V (2016) The new police and criminal justice data protection directive: a first analysis. New J Eur Crim Law, pp 7 ff

Di Paolo G (2010) La circolazione dei dati personali nello Spazio giudiziario europeo dopo Prüm. Cass. pen., pp 1969 ff

Galgo A (2006) La Red Judicial Europea. Int Rev Penal Law 77:299 ff

Gless S (2010) Police and judicial cooperation between the European Union Member States. Results and prospects. In: Fijnant C, Ouwerkek J (eds) The future of police and judicial cooperation in the European Union. Martinus Nijhoff, Leiden, pp 25 ff

Hochmayr G, Ligocki D (2016) Der Strafregisteraustausch in der Europäischen Union und das Recht auf Resozialisierung. Zeitschrift für Internationale Strafrechtsdogmatik, pp 159 ff

Iuzzolino G (2006) Le squadre investigative comuni. In: VV.AA., Diritto penale europeo e ordinamento italiano, Giuffrè, Milano, pp 47 ff

Klip A (2016) European criminal law: an integrative approach, 3rd edn. Intersentia, Cambridge

Luchtman M (ed) (2013) Choice of forum in cooperation against EU financial crime. Freedom, security and justice and the protection of specific EU-interests. Eleven International Publishing, Utrecht

Melillo G, Spataro A, Vigna PL (eds) (2004) Il coordinamento delle indagini di criminalità organizzata e terrorismo. Giuffrè, Milano

Meško G (2017) Police cooperation in the European Union, supported by strengthening the EU internal security's external dimension. Eur J Crime Crim Law Crim Just, pp 109 ff
Mitsilegas V (2009) EU criminal law. Hart Publishing, Oxford
Panait R (2015) Information sharing between OLAF and national judicial authorities: the advantages of a supranational structure and the legislative limitations specific to a European hybrid body. Eucrim, pp 64 ff
Rafaraci T (2007) Lo Spazio di libertà, sicurezza e giustizia nel crogiuolo della costruzione europea. In: Rafaraci T (ed) L'area di libertà, sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia. Giuffrè, Milano, pp 3 ff
Rijken C, Vermeulen G (2006) Joint investigation teams in the European Union: from theory to practice. Asser Press, The Hague
Sabatier M (2001) La coopération policière européenne. L'Harmattan, Paris
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Vallines García E (2006) Los equipos conjuntos de investigación penal en el marco de la cooperación entre los Estados de la Unión Europea. Colex, Madrid
Zarza AG (2015) Exchange of information and data protection in cross-border criminal proceedings in Europe. Springer, Heidelberg

Part IV
Mutual Recognition, Harmonization and Traditional Intergovernmental Models

Chapter 7
The Principle of Mutual Recognition

John R. Spencer

Contents

7.1 Mutual Recognition and Movement of Judicial Decisions

7.1.1 Mutual Recognition as the 'Corner Stone' of Judicial Cooperation in Criminal Matters

Mutual recognition, in European criminal justice, is the principle that decisions of criminal courts and other competent authorities of one Member State are to be accepted by the courts and competent authorities of the other Member States and enforced on the same terms as their own. 'Mutual recognition entails the acceptance of judgments issued by national criminal courts, reflecting their domestic criminal justice systems. A court in the executing Member State is under the obligation to recognise and execute the judgment from its counterpart in the issuing Member State

J. R. Spencer (✉)
University of Cambridge, Cambridge, UK
e-mail: jrs1000@cam.ac.uk

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_7

with the minimum of formality and with limited grounds of refusal' (Mitsilegas), or as another writer puts it, mutual recognition in criminal law enshrines 'the idea of a European space within which judicial decisions adopted in a Member State may circulate freely, in the sense that they must be recognized and enforced in any other Member State' (Vernimmen-Van Tiggelen).

Mutual recognition is a principle that has two aspects: one passive and one active.

The passive sense is that the decision or ruling of a criminal court in one Member State is to be given the same effect by the legal system of another Member State as it would give to an analogous decision or ruling of its own.

For example, if in one Member State a person classified as a 'recidivist' is liable to receive a heavier sentence, the same legal consequence will follow even if the previous conviction occurred in another Member State. And similarly, a previous acquittal or a previous conviction in another Member State must be given the same weight—for example, in deciding whether the person concerned is now liable for prosecution.

In an active sense, it means that courts of each Member State not only must accept as valid the decisions and orders of the courts and authorities of the other Member States but must also take positive steps to enforce them.

For example, if a competent court in Germany issues a warrant for the arrest of a person who is currently in Italy or in France, the Italian or French courts, if requested, must then arrest the German, detaining him and surrendering him to Germany.

From this it will be already clear that 'mutual recognition' represents a fundamental tool of judicial cooperation. The idea of using it in the context of criminal justice was first publicly floated at the Cardiff Council in June 1998 and then put forward with greater emphasis at the Tampere Council in October 1999. Point no. 33 of the Conclusions of the Presidency at Tampere was as follows: 'The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply to both judgments and to other decisions of judicial authorities.'

In 2001, this statement of principle was followed up by the publication of a document from the Commission and the Council of Ministers for Justice and Home Affairs setting out a programme of legislative measures to give effect to the principle. Of these proposed measures, some have since come into existence, although not all of them. The earliest and the best known of the resulting instruments is the European Arrest Warrant (EAW). A major step towards the official consecration of the mutual recognition principle was then taken when it was given a prominent mention in the Lisbon Treaty. The opening words of Art. 82.1 of the TFEU now provide that 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions'.

7.1.2 The Order Model and the Grounds of Refusal

Although the acceptance of the mutual recognition principle in criminal justice has brought about important changes—most obviously, the replacement of extradition by the European Arrest Warrant—the idea itself was not completely revolutionary. The 'passive' version of the mutual recognition principle already operated in criminal justice, albeit to a limited extent. The *ne bis in idem* principle, for example, was already applied by some Member States in such a way as to bar a further prosecution, even where the previous criminal proceedings had taken place in another country. The United Kingdom was among these Member States, where this rule had existed since the nineteenth century.

Furthermore, some precursors to the 'active' form of mutual recognition already existed too, in the shape of earlier procedures by which one Member State was sometimes able to invoke the assistance of another to give effect to its rulings and decisions. Before the EAW was created, Member States could—at least in theory—obtain the surrender of those whom they wished to bring to justice, or force to serve a sentence previously imposed, by means of extradition—the heavy and formal procedure that must still be employed if the suspect or convicted person is outside the European Union.

Similarly, courts and judicial authorities could in principle seek from other Member States to collect evidence by invoking the process known as mutual legal assistance.

This too was regulated by conventions to which all—or at any rate most—of the EU Member States subscribed: the European Convention on Mutual Assistance in Criminal Matters of 1959, the Schengen Agreement of 1985 and the EU Mutual Legal Assistance Convention of 2000. Within the EU, these mechanisms have been replaced by a new instrument of mutual recognition for cross-border evidence gathering: the European Investigation Order (see Sect. 9.1.7).

Obviously, these older legal procedures were designed to serve the same end as the new 'mutual recognition' instruments, namely to ensure that one Member State would be able to obtain from another Member State a measure essential or desirable for its criminal proceedings. However, the later instruments differ from the earlier ones in a number of important respects.

In the first place, whereas the older legal procedures were based on a request that could be ignored or refused by the requested Member State, the procedures of mutual recognition are based on an order, with which the other State is expected to comply. Under the older instruments, the requested Member State enjoyed, in principle, an unlimited power of refusal. Furthermore, even when the request had been granted, the State enjoyed broad discretion with regard to the procedures that could be used to implement the request, which the State could assess on a case-by-case basis. With the instruments of mutual recognition, by contrast, the requested State is, in principle, bound to implement the order and may be required to implement the order according to the manner imposed by the requesting State.

Of course, in practice, the contrast between the old system and the new is not quite as stark as this because the line between the two is blurred: for example, the 2000 EU Mutual Legal Assistance Treaty, which was 'request based', sometimes allowed the requesting State to specify how it wants the task carried out.

And similarly, the new mutual recognition instruments always set out certain stated grounds on which execution may be refused. Such grounds of refusal typically enshrine some breach of fundamental rights or reflect the fact that the measures were adopted as a consequence of conduct that, in the legal system of the requested State, does not amount to a criminal offence. Clearly, reservations of this sort limit—to a greater or lesser extent—the effectiveness of mutual recognition since they all represent exceptions to the 'command model' represented by the order.

But in principle the line is clear. The older instruments and procedures follow, broadly speaking, a 'request model', whereas the new mutual recognition instruments, by contrast, follow a 'command model'—alias 'order model'.

Another important difference between the older procedures and the new ones based on mutual recognition concerns the role played by the executive power in the context of the older procedures. In extradition, for example, the judicial authorities of the requested State would make an extradition order, but the final decision as to whether or not it would be implemented would be taken by a minister: a politician, not a member of the judiciary. This is the reason why the older procedures were called 'intergovernmental'. By contrast, under the new instruments of mutual recognition, like the EAW, the political element is excluded.

There are two further respects in which mutual recognition in criminal justice can be seen as an evolution rather than a revolution.

First, by the time of the Cardiff Council in 1998, a mutual recognition regime had already long existed within Europe in the parallel context of civil justice. In 1968, the Brussels Convention—properly known as the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters—was adopted by the European Economic Community. This created a regime under which the recognition and enforcement of judgments in civil and commercial matters henceforth became virtually automatic as between the Member States of the EEC (as it then was). In 2001, a revised version of the Brussels scheme was created by Regulation 44/2001/EC.

Second, mutual recognition regimes have long been in operation in a number of federal States, even in the potentially more contentious context of criminal justice. The most obvious example is the United States of America. Article IV.1 of the Constitution of the USA provides that 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings in every other State. And the Congress may by general laws prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof.' Article IV.II further provides for inter-State extradition 'on demand of the executive authority' of the State to which a fugitive offender has fled. A similar mutual recognition system also operates as between the component parts of what is—at least for now—one of the Member States of the EU, namely the United Kingdom. For internal legal purposes, the UK consists of three legal systems (and hence three systems of criminal justice)

that are formally distinct—and in some important respects, significantly different: England and Wales, Scotland and Northern Ireland. But the decisions of the criminal courts in each constituent part of the UK are automatically recognised by the courts of the others, which when called upon to do so will also take the necessary action to see that they are enforced. It was against this historical background that, in the late 1990s, the British government took the lead in promoting mutual recognition as the solution to the problems of trans-border criminal justice within the EU.

7.1.3 Mutual Recognition and 'Free Movement' of Judicial Decisions

Central to the aims of the EU (and of the EC before it) is the promotion of the free movement of persons, services, goods and capital. It is in relation to the promotion of these famous 'four freedoms' that mutual recognition of legal decisions is often justified.

The principle was first established in a famous decision of the Court of Justice (CJEU, 20 February 1979, C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, *'Cassis de Dijon'*) concerning the free movement of goods. In that case, the Court indicated that liquor manufactured according to the standards of one Member State was allowed, in principle, to circulate freely in other Member States, even when the latter had enacted different internal manufacturing standards.

In the context of judgments of the civil courts, particularly in commercial matters, the link between mutual recognition and free movement is obvious. These four freedoms mean, in essence, free cross-border trade. Cross-border trade is obviously facilitated if the decisions of the civil courts in commercial matters are automatically recognised throughout the rest of the EU and obviously impeded if they are not.

That the 'four freedoms' are similarly advanced by the mutual recognition of the decisions of the criminal courts is less obvious, even though attempts are made to argue this position. What is clear beyond dispute, however, is that freedom of movement, particularly of persons, necessarily brings along with it a fifth and unwanted freedom, namely the free movement of criminals and crime. At the simplest and most obvious level, open borders and cheap transport between Member States make it easier for criminals to make their escape across national borders. It also means an increase in trans-border crimes—for example, smuggling and carousel fraud—where part of the offence takes place in one country and part of it in another. To deal with these problems, it is necessary to ensure that the criminal justice systems of the different Member States can work together effectively, which in practice means moving towards a system of mutual recognition.

In the criminal context, then, mutual recognition is indeed connected with free movement—but in the sense that it is needed to cope with the unintended consequences of free movement rather than necessary to promote it.

Out of the idea that the free movement of persons, goods, services and capital is a good and that mutual recognition of court judgments will help to achieve it, a further and composite notion has evolved: the notion of 'free movement of judgments'. Here the proposition is that just as goods should circulate freely among the Member States, so too should decisions of the courts.

We see this notion expressed in, among other places, the preamble to Regulation 44/2001/EC on the recognition and enforcement of civil judgments, where recital 6 provides that in order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument that is binding and directly applicable. Paragraph 10 then specifies that for the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

However, as various commentators have pointed out, the analogy between the free movement of goods and the free movement of court decisions is potentially misleading. In the first place, the free movement of goods requires the Member States to abstain from action, whereas free movement of court judgments requires that these are implemented and enforced.

When we talk about securing the free movement of (say) beer, we mean that, where beer has been brewed in one Member State according to the public health and labelling standards there required, other Member States should not intervene to prevent its distribution within their borders. By contrast, when we talk about securing the free movement of court judgments, we mean that when the court in one Member State has made an order, the legal systems in the other Member States must take active steps—for example, by having someone arrested or his house searched or his property impounded—to ensure that the foreign judgment is enforced.

And quite apart from this theoretical point, the practical policy considerations that justify the free movement of commodities do not necessarily justify the free movement of decisions of the courts. Despite their differences of language and perhaps physical appearance, Finns and Maltese and Slovaks and Irishmen all have digestive systems that are essentially the same, and food that will not poison one may be safely eaten by the other. The same is not necessarily true, however, of the internal workings of the legal systems of the different Member States, each of which has its own set of internal checks and balances. In consequence, a court order or decision that will work justice within the context of the legal system for which it was made will not necessary work justice if it is then enforced in the context of another.

This difficulty becomes clear when we examine a proposal, made first in the conclusions of the Tampere conference and repeated at intervals thereafter, for an instrument to secure the 'free movement of evidence' in criminal proceedings. The idea here is said to be that if a piece of evidence has been lawfully obtained in any Member State according to the rules existing there, it should then be automatically admissible in criminal proceedings in any other Member State. But this proposition

can be interpreted in different ways. If interpreted narrowly, it could simply mean that where local formalities for evidence gathering have been complied with, the resulting piece of evidence should be admissible in criminal proceedings in another Member State even if in that country different formalities would have been required.

Under this limited interpretation, the 'free movement of evidence' principle would mean, for example, that if the law of State X required searches carried out at the office of a lawyer to be notified in advance to the president of the local bar but no such rule existed in State Y, judges in court proceedings in State X would not be permitted to exclude evidence gathered as a result of a search carried out without notice in State Y on the ground that such notice would have been necessary had the search been carried out in State X. If interpreted according to this view, the principle of 'free movement of evidence' would probably be beneficial.

However, on a wider reading, the principle could mean that any piece of evidence gathered lawfully in any other Member State would then be automatically admissible in criminal proceedings elsewhere, irrespective of any rule of evidence that would otherwise exclude it, for example, irrespective of the principle that requires oral testimony for certain matters, like the hearsay rule in English law.

On this interpretation, a written statement lawfully taken from a witness in State A, where written statements are generally admissible as a substitute for oral evidence, would then become automatically admissible in State B, where oral evidence is normally required and written witness statements are normally excluded.

As a country's rules of criminal evidence are usually devised to operate as an integrated package the combined elements of which are meant to guarantee a just result, 'free movement of evidence' so interpreted could produce injustice.

7.1.4 Mutual Recognition and Mutual Trust

The principle of free movement, upon which the proposal to introduce a virtually automatic system of recognition and enforcement of the decisions of the criminal courts of other EU Member States was based, was based upon the notion of 'mutual trust'. The underlying idea was that it is safe to assume that the legal system of any EU Member State is sufficiently reliable for the decisions of their criminal courts to be normally accepted at face value, an assumption that cannot necessarily be made in respect of criminal judgments from other parts of the world, which must be treated with greater caution. This trust is said to be justified because the Member States share common values, among which are democracy and—of particular importance in the context of criminal proceedings—respect for human rights. This respect is said to be demonstrated by the fact that all EU Member States are parties to the European Convention on Human Rights.

The preamble to the EU Programme of Measures to implement the principle of mutual recognition in criminal matters adopted by the Council on 12 October 2000 stated that 'Implementation of the principle of mutual recognition of decisions in

criminal matters presupposes that member States have trust in each others' criminal justice systems'.

This pronouncement could have been read in two different ways. It could have been read as meaning that such trust was already implicit and established. Alternatively, it could have meant that the establishment of a system of mutual recognition required, first and foremost, the adoption by all Member States of qualitative standards in their criminal justice systems suitable to justify that mutual trust. In concrete terms, the second interpretation would have required legislation about mutual recognition to be accompanied by legislation guaranteeing, among other things, minimum rights for defendants.

However, when the EU took its first and most dramatic step towards mutual recognition in criminal cases, it did so on the basis that mutual trust already existed and was justified. Thus, the EAW was created in 2002 with no sign of any 'flanking measures' to ensure that the criminal justice systems of all Member States provided adequate guarantees for suspects and defendants.

Motivated largely by concerns about the quality of criminal justice in some Member States, moves to create 'flanking measures' then later followed. But after several years of fraught negotiations, in 2006, the attempt to negotiate a framework decision guaranteeing minimum rights for suspects and defendants had to be abandoned, largely on account of political opposition coordinated by the United Kingdom. Three years later, however, the UK reversed its position and supported the initiative of the Swedish presidency to renew the project. In November 2009, the Council formally adopted what it called a 'Roadmap' setting out a series of proposed legislative measures designed to safeguard the position of suspects and defendants.

Under the constitutional arrangements established by the Lisbon Treaty, these measures will now be enshrined in directives; six of these have already been enacted: the first of these measures, a directive on rights to interpretation and translation, was adopted in 2010 (Directive 2010/64/EU); the second, on the right to be informed in criminal proceedings, was adopted 2 years later (Directive 2012/13/EU); the third (Directive 2013/48/EU), on the right to defence, was approved on 22 October 2013; the fourth directive (Directive 2016/343/EU), on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, was enacted on 9 March 2016; the fifth directive (Directive 2016/800/EU), on procedural safeguards for children who are suspects or accused persons in criminal proceedings, was adopted on 11 May 2016; the sixth directive (Directive 2016/1919/EU), on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant proceedings, was approved on 26 October 2016; other guarantees set out by the Roadmap still remain to be implemented, and further instruments are currently under discussion.

These measures are put forward on the basis that they are necessary to build up mutual trust, an element that is now considered as an indispensable precondition for the satisfactory development of mutual recognition. At first sight, this seems rather odd. One might have thought that measures designed to ensure that defendants get a fair deal would be justified on the wider basis that they are a necessary aspect of the 'area of freedom, security and justice', which is one of the avowed aims of the EU to

create, rather than as something needed to make sure that a system of mutual recognition operates effectively. However, the problem here is one of legislative competence. The EU's competence to legislate in the area of criminal procedure is contained in Art. 82.2 TFEU, which restricts it to measures 'necessary to facilitate mutual recognition of judgments and judicial decisions'.

Obviously, these new directives will improve the position of defendants and suspects if those Member States whose criminal justice systems currently fail to protect the rights they guarantee carry out their obligation to implement them and hence, it is hoped, will ensure that other Member States are more ready to give effect to their judgments and orders.

7.2 Mutual Recognition and Harmonisation of National Legislations

7.2.1 Mutual Recognition Versus Harmonisation: 'Vertical' and 'Horizontal' Solutions

For dealing with problems of trans-border crime within the EU, there are in principle two possible methods of approach.

What is sometimes called the 'vertical solution' is where the EU creates a set of uniform rules, applicable in all the Member States. This set of centralised rules may be self-sufficient, that is, suitable to find direct application in the Member States. Furthermore, the power to implement these rules may be assigned to a new central authority. In this situation, it would be possible to speak of a strong vertical approach, in other words, of a 'legislative standardization'. A weaker form of the vertical solution is where rules are established by the European Union, which the Member States are then required to implement through the adoption of additional domestic implementing rules, as with directives. This weaker form of vertical solution produces 'harmonization' or 'approximation' of national legislation. As against either of these forms of vertical solution there is the 'horizontal solution', whereby the responsibility to act, catch and prosecute offenders is left in the hands of the individual Member States, applying their own national laws, and the role of the EU is limited to coordinating the process.

The 'vertical solution' was the one the EU adopted in the sphere of competition law, and attempts have also been made to use it as the method for dealing with budgetary fraud against the Union's financial interests. OLAF, the EU anti-fraud office, is a central agency charged with the task of investigating frauds against Community finances, in whichever Member State they may be committed. Upon completion of an administrative investigation, OLAF's role comes to an end, and the file is handed over to the public prosecutor of the Member State concerned to prosecute the offender (see Sect. 5.1.4.1)—a next step that does not always happen.

The *Corpus Juris* project, which proposed 'criminal provisions safeguarding the financial interests of the European Union', was developed by a group of legal academics in 1997 upon request of the European Parliament and under the aegis of the European Commission; a revised version was produced in 2000. This project put forward the idea of a uniform code of criminal offences of budgetary fraud, to be enforced by a European Public Prosecutor, using a uniform set of procedural rules and powers applicable in all Member States, plus a European public prosecutor for the prosecution of these crimes on the basis of common procedural rules, with powers that could be exercised in all Member States, a perspective that will be favoured by the Treaty of Lisbon (Art. 86 TFEU) and that will lead to the Regulation of 12 October 2017 on the establishment of a European Public Prosecutor's Office (see Sect. 5.2.6).

The *Corpus Juris* project attracted strong hostility in certain Member States that are opposed to what they see as Brussels interference with their criminal justice systems. The opposition was particularly strong in the United Kingdom, but recognising the reality of problems of trans-border crime in general, and budgetary fraud in particular, the UK took the lead in proposing a 'horizontal solution' as an alternative. This alternative consisted, as we have already seen, of the principle of mutual recognition—helped on its way by a new agency, Eurojust, designed to encourage the Member States to coordinate their efforts to prosecute trans-border crimes.

Furthermore, in parallel with EU instruments establishing mutual recognition have come other instruments that aim to ensure that certain types of crime can always be prosecuted somewhere by requiring all Member States to assume extra-territorial jurisdiction over them. To give one example out of many, the 2011 Directive on preventing and combating trafficking in human beings and protecting its victims (2011/36/EU)—which replaced the previous Framework Decision 2002/629/JHA—requires Member States to assume jurisdiction not only over human trafficking offences committed on their territory but also over those committed by their nationals, and as additional measure, it authorises them to assume jurisdiction in a wider range of other situations too.

However, it should be noted that the choice to use mutual recognition as an alternative to a 'vertical solution' is, in and of itself, contradictory. A key element in the 'vertical solution' is the introduction of uniform rules, centrally determined, and applicable, at least indirectly, throughout all Member States. But it is widely said that, in reality, mutual recognition can only work, if at all, if the laws of the different Member States are broadly similar. In consequence, even with mutual recognition, a significant degree of harmonisation may be required.

This point is usually made in connection with mutual recognition in the 'active' sense, where to enforce a judgment issued by the court of another, one state is required to take some positive action—for example, a house search or the taking of statements from reluctant witnesses—which under its own laws, may be either prohibited or permitted only in different cases and pursuant to different procedures.

At first sight, extradition raises fewer difficulties of this sort since here the Member State is required to perform activities that are uniform in all legal

systems—namely the arrest of a wanted person and his or her surrender to another country. Under the law of extradition, as it stood before the introduction of the EAW, difficulties could arise because of the requirement of the 'double criminality' (the requirement that the conduct of the wanted person should constitute a crime in both the requesting and the requested State). Under the regime of the European Arrest Warrant, however, 'double criminality' is no longer invariably required: it is sufficient for the person to be accused or suspected of one of the 32 crimes listed in Art. 2 of the Framework Decision. However, this provision merely includes a list of crimes (e.g., 'corruption', 'deception', 'fraud' . . .) without providing any definition of them. This arrangement could potentially give rise to difficulties where the requesting State issues an EAW for an offence with a name that appears on the Framework Decision list but the details of which do not amount to that type of crime—or indeed any crime at all—under the law of the requested State.

The mutual recognition instruments created up to now have usually tried to head off problems of this sort by creating explicit exceptions to the normal automatic duty to recognise the foreign order. Thus, under Art. 4 of Framework Decision 2002/584/JHA, a Member State may refuse to surrender a person where his/her behaviour is 'regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State . . .': in this way and under these conditions, a Member State can avoid surrendering a person for an act that did not constitute a criminal offence according to its domestic law.

The most recent mutual recognition instruments, however, are created on the premise that further harmonisation is not required. However, as we have seen, Art. 82 of the TFEU now expressly empowers the EU to establish minimal rules in relation to various aspects of criminal justice to the extent that this is 'necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension'.

7.2.2 A Summary of the Principal Pieces of Legislation of Mutual Recognition

The movement towards mutual recognition in criminal justice has already produced a substantial *corpus* of EU legislation.

As regards mutual recognition in the 'passive sense', the most significant text exists outside the main body of EU legislation. It is Arts. 54–58 CISA (Convention on the Implementation of the Schengen Agreement) of 19 June 1990 (a treaty concluded in 1985 and brought within the framework of the EU by the Amsterdam Treaty in 1997). These provisions make the *ne bis in idem* principle applicable as between the different Member States. Another instrument requiring 'passive' recognition is Framework Decision 2008/675/JHA, which provides for the recognition of convictions issued in other Member States. Another similar instrument, albeit

much older, is the Convention of 17 June 1998 (98/C 216/01), designed to ensure the mutual recognition of driving disqualifications.

Certainly, the most significant instrument requiring mutual recognition in the 'active sense' is the famous Framework Decision 2002/584/JHA, which created the European Arrest Warrant. Other 'active' mutual recognition instruments are Framework Decision 2003/577/JHA concerning the enforcement of freezing of asset measures and seizures, Framework Decision 2005/212/JHA on the confiscation of assets, instruments and money connected to a crime, Framework Decision 2005/214/JHA for the mutual recognition of fines, Framework Decision 2006/783/JHA for the mutual recognition of confiscation orders, Framework Decision 2008/909/JHA on mutual recognition of prison sentences or sentences mandating deprivation of liberty for purposes of their enforcement, Framework Decision 2008/947/JHA on the mutual recognition of sentences and judgments suspended on probation and Framework Decision 2009/829/JHA on the mutual recognition of supervision measures as an alternative to provisional detention. Lastly, there is the European Investigation Order, which entered into force on 22 May 2017. This replaced the European Evidence Warrant, an earlier instrument of more limited effect created by Framework Decision 2008/978/JHA.

7.2.3 Objections to Mutual Recognition in the Context of Criminal Law

The concept of mutual recognition in criminal justice is not without its critics.

Some Member States have pointed out that some instruments that find their origin in mutual recognition are incompatible with their national constitutions. The answer here is simple, at least when viewed from the perspective of EU law. It is a well-known fact that one of the fundamental principles of EU law, as developed by the Court of Justice, is that EU law has primacy over national law, including provisions of national constitutions. So where an EU instrument is incompatible with the constitution of a Member State, it will be the duty of that Member State to solve the problem, if necessary by amending the constitution. This presupposes, of course, that the EU instrument itself is valid; and also that it can be applied in the national system without infringing basic principles of internal criminal justice, such as non-retroactivity and legal certainty (CJEU 5 Dec 2017, C-42-17, Tarrico II).

In the *Advocaten voor de Wereld* case (CJEU, 3 May 2007, C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*), the validity of Framework Decision 2002/584/JHA creating the European Arrest Warrant was challenged in the ECJ on a number of grounds, one being that to require Member States to surrender persons wanted for offences on the 'Framework Decision List', even where their behaviour was not a crime under the law of the requested State, offended against the 'principle of legality'. This challenge was rejected.

Because the EAW has suppressed the double criminality requirement, at least with regard to the 32 types of crimes specified by the Framework Decision (see Sect. 8.2.1.2), it has been said to be wrong and oppressive to require a Member State in which a certain type of conduct is lawful to help another Member State, under whose laws it is a crime, to punish it.

The validity of this argument depends, surely, on where the conduct in question took place. If a Member State is trying to assert extraterritorial jurisdiction over acts done in another country where they were lawful, this is indeed oppressive. But it is not necessarily oppressive if the acts took place within the borders of the requesting Member State. It is surely reasonable to expect everyone, including foreigners, to respect the law of the lands in which they find themselves. And in principle, it is also reasonable, surely, to expect the Member States of the EU to help their fellow Member States to ensure that their national laws are obeyed within their national boundaries. Only if the national law itself was genuinely oppressive of fundamental rights—for example, contravening the provisions of the European Convention on Human Rights—would it be oppressive to require another Member State to help in its enforcement.

A further objection, which revolves around the fact that these instruments are based on an 'order' that in principle is binding for the judicial authorities of the requested State, is that they potentially expose defendants to the risk of criminal proceedings that are oppressive or unfair.

The point can be illustrated by an English case (*Symeou v Public Prosecutor's Office*, Patras [2009] EWHC 897). A fight broke out among a group of British youths on a holiday in Greece, in the course of which one of them was killed. Long after the survivors had returned to the UK, the Greek authorities issued an EAW for the return of Symeou, to face trial for involuntary homicide. Resisting his surrender, Symeou alleged that the evidence against him consisted of false statements beaten out of his fellow holidaymakers by the Greek police, an allegation that the youths concerned confirmed. In the old days of extradition, Symeou's surrender would have required the consent of the Home Secretary—who, if he believed the statements had indeed been obtained by violence, might perhaps have refused the extradition request. But under the new regime of the European Arrest Warrant, the British courts were obliged to surrender him on the basis that the allegations about the way the evidence had been obtained would be investigated in Greece at the eventual trial. In June 2011, the Greek court acquitted him, but only after he had been held for 2 years in Greece awaiting trial, much of it custody.

Indeed, the instruments of mutual recognition are based on the assumption that the criminal courts of the Member States will enforce one another's orders and decisions with few, if any, questions asked. This policy is satisfactory only if the criminal justice systems of all the Member States provide adequate protection for defendants, and prompt and effective means for putting right mistakes if they occur. From this point of view, it should be noted that the 'Roadmap' issued by the Council in 2009 had the very purpose of ensuring—albeit rather belatedly—adequate standards of protection for the criminal justice systems of all the Member States.

To some extent, a solution to this problem is provided by the existence grounds for refusal. But this solution is only a partial one because grounds for refusal limit the duty to enforce the judicial decisions only with regard to specific situations. Furthermore, their very existence is in conflict with the logic of mutual recognition, understood as the unconditional enforcement of an order. But despite this, additional grounds for refusal have often been introduced by the Member States in their national laws implementing framework decisions and directives: for example, the law enacted in the United Kingdom for the implementation of the European Arrest Warrant now carries two new grounds for refusal, neither of which appears explicitly mentioned in the Framework Decision: disproportionality and the fact that the requesting State has not yet made a decision to charge the wanted person or to send him for trial.

The CJEU was initially reluctant to accept that the courts of Member States could lawfully refuse, within the mutual recognition context, to execute an order from a judicial authority in another Member State on human rights grounds not expressly listed in the framework decision or directive under which the order had been issued. But in *Aranyosi and Caldararu* (CJEU, 5 April 2016, C-404/15 and C-659/15/PPU, *Aranyosi and Caldararu*), a decision of the Grand Chamber in April 2016, the possibility was cautiously admitted.

A final criticism of mutual recognition, as it is emerging in criminal justice, focuses on its lack of regulation in the matter of jurisdiction.

When the principle of mutual recognition was introduced in the civil context in 1968 by the Brussels Convention, the primary purpose was to focus on the establishment of clear rules determining which country's courts had jurisdiction over what types of matter. In the criminal context, by contrast, this has not happened. Instead the EU, when creating instruments prescribing new criminal offences, has tended merely to require all Member States to establish extraterritorial jurisdiction over them. This means that, in practice, the first Member State to take action is also the one that has exclusive jurisdiction, and a consequence of this rule is that if the Member State, after the proceedings have commenced, decides—even unwisely—to abandon the proceedings, the *ne bis in idem* becomes an obstacle to the commencement of other proceedings in any other Member State that, like the first, could in theory have claimed jurisdiction. This is clearly an unsatisfactory situation and has led to calls for the adoption of a 'global approach' by the Union in the fight against crime, in which clear rules about jurisdiction would be prescribed.

Further Reading

Albert J, Merlin JB (2016) Is the EU ready for automatic mutual recognition. . . in the fight against crime? Eucrim, pp 60 ff

Alegre S, Leaf M (2004) Mutual recognition in European judicial cooperation: a step too far too soon? Case study: the European arrest warrant. Eur Law J 10(2):200 ff

Bachmaier Winter L (2015) Mutual recognition instruments and the role of the CJEU: the ground for non execution. New J Eur Crim Law 6(4):505 ff

Bantekas I (2007) The principle of mutual recognition in EU criminal law. Eur Law Rev, pp 365 ff
De Hoyos Sancho M (2005) El principio de reconocimiento mutuo de resoluciones penales en la Uniòn Europea: Asimilaciòn automatica o corresponsabilidad? Revista de Derecho Comunitario Europeo 22:807 ff
Delmas-Marty M (sous la direction de) (1997) Corpus Juris, introducing penal provisions for the purpose of the financial interests of the European Union. Economica, Paris
Erbežnik A (2014) Mutual recognition in EU criminal law and its effects on the role of a national judge. In: Peršak N (ed) Legitimacy and trust in criminal law, policy and justice. Routledge, London, pp 131 ff
Gless S (2013) Zum Prinzip der gegenseitigen Anerkennung. ZStW, pp 353 ff
Janssens C (2013) The principle of mutual recognition in EU law. Oxford University Press, Oxford
Jimeno Bulnes M (2016) Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar. Editorial JM. Bosch, Barcelona
Klip A (2016) European criminal law: an integrative approach, 3 edn. Intersentia, Cambridge
Mazza O (2009) Il principio del mutuo riconoscimento nella giustizia penale. La mancata armonizzazione e il mito taumaturgico della giurisprudenza europea. Riv. dir. proc., pp 393 ff
Mitsilegas V (2009) EU criminal law. Hart, Oxford
Mitsilegas V (2015) Judicial concepts of trust in Europe's multi-level security governance. Eucrim, pp 90 ff
Mitsilegas V (2015) The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice. New J Eur Crim Law 6(4):457 ff
Morgan C (2010) The potential of mutual recognition as a leading policy principle. In: Fijnant C, Ouwerkerk J (eds) The future of police and judicial cooperation in the European Union. Martinus Nijhoff, Leiden, pp 231 ff
Ostropolski T (2015) The CJEU as a defender of mutual trust. New J Eur Crim Law, pp 166 ff
Ouwerkerk J (2011) Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters. Intersentia, Cambridge
Ouwerkerk J (2017) The potential of mutual recognition as a limit to the exercise of EU criminalisation powers. Eur Crim Law Rev, pp 5 ff
Parisi N (2011) Riconoscimento reciproco delle decisioni giudiziarie penali, confiance mutuelle e armonizzazione delle garanzie procedurali negli Stati membri dell'Unione europea. In: Parisi N, Fumagalli Meraviglia M, Rinoldi D, Santini A (eds) Scritti in onore di Ugo Draetta. Editoriale Scientifica, Napoli
Pasquero A (2007) Mutuo riconoscimento delle decisioni penali: prove di federalism. Giuffrè, Milano
Peers S (2004) Mutual recognition and criminal law in the EU: has the council got it wrong? Common Mark Law Rev 41:5 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden
Spencer JR (2010) EU fair trial rights – progress at last. New J Eur Crim Law, pp 445 ff
Suominen A (2011) The principle of mutual recognition in cooperation in criminal matters, a study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States. Intersentia, Cambridge
Van Ballegooij W, Bárd P (2016) Mutual recognition and individual rights: did the court get it right? New J Eur Crim Law, pp 439 ff
Vernimmen van Tiggelen G, Surano L, Weyembergh A (eds) (2009) The future of mutual recognition in criminal matters in the European Union. IEE, Bruxelles
Villani U (1992) Ravvicinamento delle legislazioni e mutuo riconoscimento nell'Atto Unico europeo. Jus, pp 181 ff

Chapter 8
Personal Freedom and Surrender

Marta Bargis

Contents

M. Bargis (✉)
University of Piemonte Orientale, Vercelli, Italy
e-mail: martabargis@hotmail.com

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_8

8.1 From Extradition to Surrender Procedures

8.1.1 Judicial Cooperation and Personal Freedom: Foreword

In the field of judicial cooperation, issues concerning limitations of personal freedom are, as it is easy to understand, of primary importance. Originally regulated by extradition, which will be also our starting point in the analysis, based on intergovernmental cooperation, they later became the object, with Framework Decision 2002/584/JHA, of the European Arrest Warrant (EAW), which represents the first and currently the most important instrument of mutual recognition for Member States of the European Union.

That Framework Decision will be examined in its significant points by highlighting both the role of the Court of Justice in the interpretation of certain dispositions and the difficulties that occurred in the implementation phase within Member States.

Other framework decisions were adopted between 2008 and 2009, and they resulted in directly influencing the use of the EAW either because they modified the scope of the original Framework Decision or because they have an accessory function compared to the latter: from this perspective, what comes into play are topics concerning the transfer of prisoners (2008/909/JHA), the decisions rendered *in absentia* (2009/299/JHA) and the recognition of decisions on supervision measures (2009/829/JHA). These framework decisions will be analysed (see Sect. 8.3.2) for the aspects that affect the rules on the EAW; however, a more specific analysis

will be carried out concerning the Framework Decision cited as last due to its broader purpose, i.e., to promote the use of supervision measures as an alternative to provisional detention.

The change under the EAW to surrender procedures (featuring the direct contact between judicial authorities of Member States, without any intermediation by political authorities) moved the spotlight on the rights that must be recognised to the person receiving the Euro warrant, which are not taken into account on the contrary in the conventions on extradition: even if they are provided in the Framework Decision on EAW, such rights must be further strengthened. The entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme, including the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (see Sect. 2.2.2), have finally accelerated the movement of the Union: the measures now adopted pursuant to the roadmap will be examined from the perspective of their influence on the surrender procedure (see Sects. 8.3.3.2 and 8.3.3.3), and future perspectives will be considered in outlining some final estimations (see Sect. 8.3.3.3).

8.1.2 Types of Intergovernmental Cooperation

In the context of judicial cooperation, extradition represents, as already mentioned, the oldest instrument aiming at governing the relationships between one State, which searches for a person with the purpose of enforcing against the latter a conviction and prison sentence or another measure restricting personal freedom, and the State (the so-called shelter) where the person is located. The mechanism is based on intergovernmental cooperation forms (between the requesting State and the requested State), which entail, other than a political filter, a lengthy proceeding given that the beginning and any requests for supplementing information are usually carried out through diplomatic channels.

8.1.2.1 The European Convention on Extradition and the Additional Protocols

This matter is regulated by an old convention of the Council of Europe, the European Convention on Extradition (E.C.Extr.) of 1957, completed by two additional protocols signed in Strasbourg in 1975 and 1978. On 10 November 2010, the Third Additional Protocol was opened for signatures in Strasbourg (in force from 1 May 2012) with the purpose of integrating the E.C.Extr. by simplifying and accelerating the procedure when the person to be extradited has granted his/her consent. On 20 September 2012, the Fourth Additional Protocol was opened for signatures in Wien (in force as of 1 June 2014), with the objective of modernising some provisions of the E.C.Extr. and integrating it from determined points of view, taking into account the evolution of international cooperation in criminal matters.

After the entry into force of the Framework Decision on EAW, other than regulating the relationships between Member States of the European Union and third States, the possibility of extradition remains even within the Union (see Sect. 8.1.3.2). It is therefore appropriate to outline its essential contours. We begin with its objective and subjective limits.

From the first perspective, what foremost comes into play is the principle of bilateral provision of the fact (Art. 2.1 E.C.Extr.) also called 'double incrimination' or 'double criminality'. Under this principle, the material fact that constitutes a criminal offence in the requesting State must also be deemed a criminal offence in the requested State, even if it is under a different regulatory qualification. Otherwise, it would not be reasonable for the latter to cooperate to the criminal repression, given the need to warranty equal sovereignty and reciprocity.

In addition, the fact must be subject to deprivation of liberty or a detention order under the law of both Parties, limiting freedom not lower, in its maximum, than 1 year, or to a more severe one; if the conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment must be at least 4 months. Moreover, the offence must not be statute-barred (Art. 10 E.C.Extr.), according to the 'law of either the requesting or of the requested Party', and the criminal offence must not be extinct due to amnesty in the requested State, if the latter State was competent to prosecute the offence under its own criminal laws (Art. 4 Second Protocol).

Another objective limit that results in situations of refusal is represented by the so-called *ne bis in idem* in extradition. Hence, for example, when the fact or the facts that are object of the extradition request are subject to ongoing criminal proceedings in the requested State, a facultative hypothesis of refusal is provided (Art. 8 E.C. Extr.); the refusal becomes mandatory when a final judgment was issued on these facts in that State (Art. 9 E.C.Extr.).

Political offence or 'an offence connected with a political offence' (Art. 3.1 E.C. Extr.) fall within the objective limits, leading to a refusal of extradition.

Due to changes in the actions of political offences, under the so-called Belgian or attempted assassination clause, the 'attempted taking of the life of a Head of State or a member of his family' (Art. 3.3 E.C.Extr.) is excluded from the list of political offences. The hypothesis of de-politicisation of certain offences is widened by the First Additional Protocol (Art. 1), the European Convention on the Repression of Terrorism of 1977 (Arts. 1 and 2) and the Council of Europe Convention on the Prevention of Terrorism of 2005 (Art. 20.1, except that the Party reserves the right to not apply this paragraph, *ex* Art. 20.2).

Somehow connected with the prohibition against extradition for a political offence is the so-called non-discrimination clause. This clause comes into play when the requested Party has a reason to think that the extradition request, even if concerning an ordinary criminal offence, was presented with the purpose of prosecuting or punishing a person on account of his or her 'race, religion, nationality or political opinion' or that the person's position 'may be prejudiced for any of these reasons' (Art. 3.2 E.C.Extr.; see also Art. 5 of the European Convention on the Repression of Terrorism and Art. 21 of the Council of Europe Convention on the

Prevention of Terrorism, which provides also for the risk of torture or inhuman or degrading treatment or punishment).

Again, concerning objective limits, it is necessary to refer to fiscal offences. It is important to highlight the change in perspective provided in the Second Additional Protocol which, in substituting Art. 5 E.C.Extr., included such offences in the scope of application of extradition. According to scholars, this change created a principle of special double incrimination. Under such principle, not only must the fact be considered an offence under the laws of the two countries, but the offence must also correspond, 'under the law of requested Party', to 'an offence of the same nature'.

Moving on to subjective limits, what is relevant is the status of the person whose extradition is sought as a national of a Member State. Connected to the sovereignty of the State over its nationals and the reciprocal obligations that arise from their relationship, the right to refuse their extradition is provided (Art. 6.1.a E.C.Extr.). However, in case of refusal, the requested State, upon request of the requesting Party, shall submit the request to its competent authorities in order that 'proceedings may be taken if they are considered appropriate' (Art. 6.2) by applying the principle *aut dedere aut iudicare*, less binding than the principle created by Ugo Grozio, *aut dedere aut punire*.

What remains to be considered are two aspects concerning the extradition rules: the hypothesis of a judgment rendered *in absentia* of the person whose enforceable extradition is sought and the area of application of the specialty rule.

The first issue, which was not regulated in the E.C.Extr., was faced in the Second Additional Protocol (Art. 3). This protocol tried to solve the practical inconveniences that arose, given that several States refused extradition when the wanted person had been judged *in absentia* by the requesting Party. In this situation, the requested Party can deny the extradition if, in its opinion, the trial proceedings did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence; however, extradition must be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person whose extradition is sought the right to a retrial that safeguards the rights of defence. In this case, the requesting Party might enforce the judgment if the convicted person does not make an opposition or, if he/she does, takes proceedings against the person extradited.

The specialty rule is a limit for the State that obtained the extradition and is provided for to protect both the extradited person and the requested State. The extradited person 'shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom' (Art. 14.1 E.C.Extr.). The principle has a wide scope because it inhibits not only restricting the personal freedom of the extradited person but also initiating prosecution for facts preceding the surrender that are different from the ones that are object of the extradition. However, the principle is subject to several exceptions. It is not effective in the case of consent by the Party that granted the extradition and in the two situations so-called purgation of extradition, i.e., the cases in which the extradited person, having had an opportunity to leave the territory of the Party to which he/she has been

surrendered, has not done so within 45 days of his/her final discharge or has returned to that territory after leaving it.

In the case of consent (Art. 14.1.a E.C.Extr.), we refer to the extension of extradition or supplementary extradition: the requesting State will have to present a new request, together with the necessary documents and 'a legal record', including the statements of the extradited person.

Even in the case of re-extradition (Art. 15 E.C.Extr.) to another Party or a third State, for offences committed before the surrender, the requesting Party, to whom the person has been surrendered, will have to request the consent of the Party that accepted the extradition request.

We must consider the already mentioned Third Additional Protocol to the E.C. Extr., which obviously took into account the steps forward that were meanwhile carried out at the European level (the latter will be analysed below: see Sect. 8.1.2.2). This protocol provides for a simplified procedure for the extradition of wanted persons under Art. 1 E.C.Extr. if they consent and the requested Party agrees.

In case of a request for provisional arrest (Art. 16 E.C.Extr), the simplified procedure does not require the subsequent submission of an extradition request with the regularly needed supporting documents (Art. 12 E.C.Extr.), but the requested Party grounds its decision on the information provided by the requesting Party in the request for provisional arrest, without prejudice to the possibility to request additional information. Concerning the course of the procedure (applicable, *mutatis mutandis*, even if the requested Party received a request for extradition drawn up under Art. 12 E.C.Extr.), it is inspired by simplification criteria while also safeguarding the choice of consent on the extraditing person's side.

Finally, concerning the innovations contained in the Fourth Additional Protocol to the E.C.Extr., in addition to rewriting Art. 10 E.C.Extr. on the lapse of time, it is important to point out that it substitutes Art. 12 E.C.Extr. on the request and the supporting documents: the request for extradition must be presented by the Ministry of Justice (or other competent authority) of the requesting Party to the analogous authority of the requested Party; concerning the documents, it is sufficient to attach a copy (neither the original nor a certified copy) of the enforceable conviction and sentence or detention order or of the arrest warrant or any other act having the same effect, issued in the forms prescribed by the law of the requesting Party.

Additional changes concern the rule of specialty (Art. 14 E.C.Extr.), the re-extradition to a third State (Art. 15 E.C.Extr.) and transit (Art. 21 E.C.Extr.). Under the first aspect, it is stated that in the case of consent requested from the Party that extradited the person, the decision must be taken within 90 days from receiving the request for consent; furthermore, the term for the extradited person, who may leave the territory of the Party to which he/she was surrendered, is reduced from 45 to 30 days from the final release.

Moreover, Art. 6 of the Fourth Protocol provides that communications can be forwarded electronically or by any other means affording evidence in writing to enable ascertaining their authenticity. In any case, the Party concerned shall be able at any time to submit the originals or authenticated copies of documents. Moreover, the use of Interpol or diplomatic channel is not excluded.

8.1.2.2 Other Agreements and Conventions

Finally, we must quickly consider other agreements and conventions concerning extradition following the Convention of 1957. A first attempt at sharpening the intergovernmental cooperation was made with the Agreement on the Simplification and Modernization of Methods of Transmitting Extradition Requests (signed in 1989 in San Sebastian by the Member States of the European Communities), which allowed the transmission of extradition requests and supporting documents via *telefax*. A higher importance, in completing the provision of the E.C.Extr., is contained in the provision concerning extradition (Arts. 59–66) of the Convention Implementing the Schengen Agreement of 1990 (CISA), especially concerning the alert in the Schengen Information System (SIS).

However, the drive to further simplify the extradition procedure is due mostly to the Treaty on European Union (signed in Maastricht on 7 February 1992 and in force since 1 November 1993), with the approval of two Conventions—which, however, never entered into force—one precisely on the simplified extradition procedure between Member States of the European Union (Brussels, 10 March 1995) and the other on extradition between Member States of the European Union (Dublin, 27 September 1996).

The first convention—which in fact inspired the Third Additional Protocol of E.C.Extr.—contains provisions concerning the case of consent and any express waiver to the rule of specialty provided by the wanted person and with the agreement by the requested State.

The second convention is more significant because of its general scope and the innovative and advanced character of some of its provisions, which was then picked up and broadened by the Framework Decision on the EAW. In fact, concerning the objective limits to extradition, it provides an exception to the principle of bilateral provision of a fact in the case of conspiracy or association to commit offences according to the law of the requesting State (Art. 3.1), and the notion of political offence disappears as a rule, even if other Member States have the right to limit such de-politicisation (Art. 5).

Concerning fiscal offences (Art. 6), Art. 2 of the Second Additional Protocol to E.C.Extr. is recognised; however, it is pointed out that each Member State can release a statement to limit extradition on fiscal offences only to offences concerning excise duties, value-added tax or customs (matching the ones listed under Art. 50.1 CISA).

Concerning subjective limits to extradition, the extradition of nationals is provided; however, each Member State has the option to state that it will not authorise the extradition of its own nationals or that it will do so only under certain specified conditions (Art. 7).

Concerning the rule of specialty, it loses its effectiveness in various explicitly listed situations (Art. 10.1.a–c); in addition, the extradited person is able, with adequate guarantees, to expressly waive such benefit for specific offences preceding his or her surrender without needing the consent of the requested Member State (Art. 10.1.d).

From a procedural perspective, it is necessary to highlight each Member State's choice of a central authority, with the duty—in general—to transfer and receive extradition requests, supporting documents and official communications (Art. 13); the possibility to use telefax (substantially mirroring the provisions of the already mentioned Agreement of San Sebastian); the possibility (if the Member State states it specifically) of direct relationships between the judicial authorities for requesting additional information in compliance with Art. 13 E.C.Extr. (Art. 14); and the simplification for the authentication of documents or copies thereof (Art. 15).

8.1.3 Reasons and Objectives of the Change from Extradition to Surrender Procedures

The modifications to the Treaty on European Union by the Treaty of Amsterdam (closed on 2 October 1997 and entered into force on 1 May 1999) did not influence the topic of extradition. In fact, Art. 31 of the 'old' TEU only stated that the common action on judicial cooperation in criminal matters would include, among others, 'facilitating extradition' between Member States (lett. *b*): in other words, it remained anchored to the traditional concept of intergovernmental cooperation. However, various factors encouraged following a different path.

First of all, it is necessary to recall that Protocol 2 to the Treaty of Amsterdam provided for incorporating the *acquis* of Schengen into the Treaty and, second, that the conventions concerning extradition, signed before the Treaty of Amsterdam, conditioned their own entry into force on the unanimous ratification by the Member States of the European Union after the adoption by the Council.

Concerning the first aspect, it is exactly the step-by-step abolition of checks on persons at the borders that made it easier for crime to circulate in Member States of the European Union; however, the legal provisions (except concerning SIS, which simplified disseminating requests for provisional arrest for extradition purposes) continued to be comprised in the E.C.Extr., which equated the relationships between States of the Union with the ones in any other State member of such Convention and therefore also with some States that, even if members—almost entirely—of the Council of Europe, did not always have a level of guarantees equal to that of Member States of the European Union.

Concerning the second aspect, the Treaty of Amsterdam tried to partially remedy it by suppressing the requisite of necessary ratification by all Member States: in fact, upon request of a Member State or the Commission, the Council could 'establish conventions' by unanimous decision recommending that the Member States adopt such conventions in compliance with their constitutional provisions, but, without prejudice to contrary disposition contained therein, once implemented by at least half of the Member States, the conventions entered into force for the latter (Art. 34.2.d TEU then in force).

To better face the now transnational dimension of criminal offences, an idea was delineating itself that consisted in substituting, within the European Union, the complex procedure of extradition with other mechanisms by leveraging on the substantial homogeneity of judicial systems of Member States; at the same time, the idea advanced to use an instrument different from conventions still subordinated to a ratification *quorum*. This is how a path began that, in a relatively short time, would result in the approval of the Framework Decision on the EAW.

8.1.3.1 The EAW as First Concretisation of the Principle of Mutual Recognition of Judicial Decisions in Criminal Matters

The Tampere European Council (15–16 October 1999) stated (conclusion 33) the principle of mutual recognition of judicial decisions as the 'cornerstone of judicial co-operation' (see Sect. 7.1.1), and it considered accordingly that (conclusion 35) 'the formal extradition procedure' had to be 'abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced and replaced by a simple transfer of such persons' and that, in other cases, it would have instead been necessary to take 'into consideration fast track extradition procedures, without prejudice to the principle of fair trial'. Oriented exactly in the same direction was the 'Global program' adopted by the JHA Council of 30 November 2000, by providing the establishment of a surrender regime, at least for the most serious criminal offences provided in Art. 29 TEU then in force, 'based on recognition and immediate enforcement of the arrest warrant issued by the requesting judicial authority', with a view to 'creating a single judicial area for extradition'.

On its side, the European Commission had begun to deal with drafting a proposal for a framework decision on the matter since the beginning of 2001, and the tragic attack on the 'Twin Towers' on 11 September 2001 suddenly accelerated this process, following which the Commission presented to the Extraordinary JHA Council of 20 September 2001 a proposal that, based on negotiations between the then 15 Member States of the Union, resulted in the Framework Decision on EAW, which worked, so to speak, as a 'frontrunner' for the following framework decisions, which were also grounded in the principle of mutual recognition. We will only consider the framework decisions on the matter of personal freedom or those that caused a direct impact on the efficiency of the EAW (see Sect. 8.3.2).

8.1.3.2 Underlying Differences Between Extradition and Surrender; Continuous Applicability of Extradition

Before analysing the Framework Decision on EAW in detail, it is better to clarify, on one hand, what the underlying differences are between the extradition mechanism and the mechanism based on the surrender and, on the other hand, that the above-mentioned Framework Decision implemented by the Member States of the

European Union, even if destined to substitute the precedent mechanism, in reality did not entirely cancel extradition from the scope of relationships between such States.

There is no doubt that the two instruments—extradition and surrender procedure—have the same purpose: in fact, both aim to allow the requesting Member State to enforce one of its provisional detention measures or a custodial sentence or detention order. However, their methods to achieve this purpose are radically different because the intergovernmental cooperation, with the connected political filter, was substituted by a direct relationship between judicial authorities, grounded in the mutual recognition of decisions, provisional or final, concerning personal freedom. In fact, the EAW 'is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order' (Art. 1.1 Framework Decision); it presumes the adoption, in the issuing Member State, of a coercive measure, whose existence is certified in the EAW (Art. 8.1.c) or, rather, in the form, common to all Member States, attached to this Framework Decision. In substance, therefore, each Member State shall execute the warrant subject to the conditions provided in the Framework Decision itself, 'on the basis of the principle of mutual recognition' (Art. 1.2 Framework Decision), although with the procedures better highlighted here (see Sects. 8.2.1 and 8.2.2), aiming at allowing the executing judicial authority to carry out the 'sufficient control' mentioned in recital 8 of the Framework Decision.

Another difference concerns the legal source that introduced the EAW into the European Union, i.e., a framework decision that regulates the procedure that Member States must follow in a broader way than the extradition conventions, paying attention to the rights of defence that was unknown to such conventions. Unlike the conventions that encompassed a clash with the necessary *quorum* for their adoption, the Framework Decision came into force once it was approved by the Council of the European Union, having regard to the European Parliament's opinion, and Member States had to adapt their internal legislation within a term provided in the Framework Decision itself; however, the consensual decision provided for the resolution of the Council often made the 'development' of a Framework Decision strenuous and the result of political compromises, which also occurred for the Framework Decision on EAW, even if, in this particular case, the severity of the contingent situation contributed to overcoming the conflicts.

Moreover, it should be recalled that the 5-year transitional regime had ceased (Art. 10 Protocol 36) for the Framework Decision on EAW (as for all the acts of the Union adopted before the Treaty of Lisbon's entry into force in the area of police and judicial cooperation in criminal matters). Therefore, as of 1 December 2014, the Commission and the Court of Justice can exercise their powers in full, even concerning the acts of the former Third Pillar; in particular, the Commission has the power to begin an infringement procedure (Art. 258 TFEU) against Member States that did not implement the law of the Union or implemented it in a wrong way.

Finally, concerning the continuing applicability of extradition, starting on 1 January 2004, the provisions of the Framework Decision on EAW replaced 'the corresponding provisions of the conventions' applicable in the field of extradition in

relations between the Member States (while there is no prejudice to their application in relationships between Member States and third States) (Art. 31.1). The result is that extradition requests received before 1 January 2004 'will continue to be governed by existing instruments relating to extradition', while the requests received after the above-mentioned date 'will be governed by the rules adopted by Member States pursuant to this Framework Decision' (Art. 32). However, in the face of this general rule, any Member State could make a statement at the time of the adoption of this Framework Decision by the Council, indicating that as an executing Member State, 'it will continue to deal with requests relating to acts committed before a date which it specifies in accordance with the extradition system applicable before 1 January 2004', a date that, in any case, cannot be later than 7 August 2002, the day when the Framework Decision entered into force (Art. 32).

Three Member States—Austria, France and Italy—drew up a statement on Art. 32 and notified the Council (such statements are published in the Official Journal, together with the text of the Framework Decision). While Austria and Italy stated that, as executing States, they will continue to apply the rules on extradition concerning requests related to criminal offences committed before the Framework Decision's entry into force (7 August 2002), France referred to criminal offences committed before 1 November 1993, the date on which the Treaty on European Union, signed in Maastricht on 7 February 1992, entered into force.

8.2 The Framework Decision on the European Arrest Warrant (EAW)

8.2.1 The Main Features of the Framework Decision on the EAW

8.2.1.1 General Purposes

On a general level, in the analysis of the Framework Decision on EAW, the 'recital' that constitutes its foreword will be specifically emphasised. Starting from the ascertainment (recitals 3 and 4) that 'all or some Member States' are parties to a number of conventions in the field of extradition (i.e., E.C.Extr. of 1957 and the European Convention on the Suppression of Terrorism of 1977) and that they have agreed upon themselves 'three Conventions dealing in whole or in part with extradition', comprised in the *acquis* of the Union (i.e., the Convention implementing the Schengen Agreement and the Conventions of Brussels and Dublin: see Sect. 8.1.2.2), the Framework Decision affirms that the objective set for the Union to 'become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities'. Furthermore, the introduction of a 'simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures' (recital 5). In other words, the

Framework Decision, even if it recalls point 35 of the conclusions of the Tampere Summit (see Sect. 8.1.3.1), goes beyond it as the surrender is applicable not only to execute a custodial sentence or detention order but also for the purpose of conducting a criminal prosecution.

Given that the EAW is an expression of the principle of mutual recognition (recital 6), the decisions concerning its execution are included in a strictly judicial procedure, and the role of central authorities must be limited 'to practical and administrative assistance' (recital 9). Concerning strengthening the rights and defence guarantees of the person to be surrendered, from one side the Framework Decision 'respects fundamental rights and observes the principles recognised' by Art. 6 of the TEU in force at the time and reflected in the Charter of Fundamental Rights of the European Union and does not prevent Member States from applying their 'constitutional rules relating to due process' (recital 12); on the other hand, it clarifies that 'no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment' (recital 13).

8.2.1.2 Scope of Application and Preconditions

Moving on to a deeper examination of the most relevant aspects of the Framework Decision, it is first of all necessary to clarify that the expression 'European Arrest Warrant' (Art. 1.1) does not mean a measure issued by a European Magistracy, which has not been yet created, but only means a measure to which a specific procedure of judicial cooperation is applicable, which overtakes the extradition procedure among Member States of the Union. The executing judicial authority (Art. 6.2) executes any EAW that comes from the issuing judicial authority (Art. 6.1: for two decisions of the Court of Justice on this concept, see Sect. 8.2.4.2) on the basis of the principle of mutual recognition, but every Member State can—similarly to Art. 13 of the Dublin Convention (see Sect. 8.1.2.2)—'designate a central authority or, when its legal system so provides, more than one central authority to assist the competent judicial authorities' (Art. 7.1).

Concerning the scope of application, the EAW may be issued for 'acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months' (Art. 2.1). A significant innovation is the differentiation introduced concerning the principle of double criminality. Indeed, under the EAW, the surrender must be executed without verification of the double criminality of the act for 32 (categories of) offences (the so-called list offences) 'if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State' (Art. 2.2). On the other hand, concerning offences other than those on the list, the surrender may be subject to the condition that the acts for which the EAW has been issued 'constitute an offence under the law of the executing Member State, whatever the constituent

elements or however it is described' (Art. 2.4); in these last situations, the punishment threshold is the general one.

8.2.1.3 Grounds for Mandatory Non-execution and for Optional Non-execution

The execution of the EAW can or must be refused on an exhaustive list of grounds.

The grounds for mandatory non-execution are listed in Art. 3 of the Framework Decision: they concern the amnesty granted in the Member State of execution, where it has jurisdiction to prosecute the offence under its own criminal law (no. 1); the lack of compliance with *ne bis in idem* if the executing judicial authority is informed that the requested person has been finally judged by a Member State with respect to the same acts, provided that, where there has been a sentence, 'the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State' (no. 2; see the Court of Justice orientation in Sect. 8.2.4.2); and the age of the requested person if he or she may not yet be held 'criminally responsible for the acts on which' the arrest warrant is based 'under the law of the executing State' (no. 3).

In addition, there are various situations provided in Art. 4 of the Framework Decision in which the executing Member State is allowed to refuse the execution of the EAW. First of all, if the State opted in for the double criminality for offences 'out of the list' (Art. 2.4), it is allowed to refuse the execution if the act on which the EAW is based does not constitute an offence under its domestic law (no. 1; for a decision of the Court of Justice, see Sect. 8.2.4.2). However, an exception applies to fiscal criminal offences ('in relation to taxes or duties, customs and exchange') because the refusal cannot be based on the ground that the domestic law does not impose the same kind of tax or duty or does not contain the same type of rules regarding taxes, duties and customs and exchange regulations as the law of the issuing Member State. This exception is connected to what is established in the Second Protocol to the E.C.Extr., where, on the other hand, it is also requested that the criminal offence is of the same nature, meaning a fiscal criminal offence (see Sect. 8.1.2.1).

A similar refusal is allowed if the person who is the subject of the warrant is being prosecuted in the executing Member State for the same act (no. 2), if the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings or where a final judgment has been passed upon the requested person in a Member State that prevents further proceedings (no. 3). Another ground for optional non-execution is where the criminal prosecution or punishment is statute-barred according to the law of the executing Member State, but only if the acts fall within the jurisdiction of that Member State under its own criminal law (no. 4).

Concerning the situation described in Art. 4 no. 3, there is an overlap with the hypothesis of mandatory non-execution provided under Art. 3 no. 2 (which also concerns any kind of decision): moreover, if the required conditions concerning a

final judgment by the above-mentioned disposition are not met (e.g., the penalty has not been applied or the execution of the punishment has been suspended), the ground for the mandatory non-execution should become optional.

When the situation provided in Art. 3 no. 2 as mandatory refusal concerns a final judgment issued by a third State (i.e., not member of the European Union), it only amounts to a ground for optional refusal, and, in the case of conviction, the same conditions must be met (Art. 4 no. 5).

Given that it concerns an executive EAW, the judicial authority may refuse to execute the warrant in the place where the requested person 'is staying in, or is a national or a resident of the executing Member State' if that State undertakes to execute the sentence or detention order in accordance with its domestic law (Art. 4 no. 6: for the Court of Justice's orientation on this point, see Sect. 8.2.4.2). Differently from extradition (see Sect. 8.1.2.1), in this case the Grotian principle of *aut dedere aut punire* applies to avoid that, within Europe, it is possible to provide immunities related to the status of a citizen of a Member State or related to his or her status as a person who is staying in or is a resident of a Member State: the execution of the sentence will be based on the recognition of the judgment, according to the rules provided in Framework Decision 2008/909/JHA (see Sect. 8.3.2.1).

The last ground for refusal (Art. 4 no. 7) concerns the situation where the EAW relates to offences that the law of the executing Member State 'regards as having been committed in whole or in part' in its territory 'or in a place treated as such' or that have been committed outside the territory of the issuing Member State where the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory. This provision is substantially similar to the one in Art. 7 E.C.Extr., which was provided mainly to regulate the hypothesis of offences committed on a ship or on an aircraft with the nationality of the requested Party or to take into account the principle of territoriality existing for certain States.

In addition, in certain particular cases (Art. 5), the execution of the EAW may be subject to certain conditions by the law of the executing Member State, i.e., decisions rendered *in absentia*, offences punishable 'by custodial life sentence or life-time detention order' and the case where a person who is the subject of the EAW for the purposes of prosecution 'is a national or resident of the executing Member State'.

Concerning the hypothesis where the EAW has been issued to execute a sentence or a detention order imposed by a decision rendered *in absentia*, the surrender—similarly to the conditions provided by the Second Protocol to the E.C.Extr. (see Sect. 8.1.2.1)—may be subject to the condition that the issuing judicial authority 'gives an assurance deemed adequate to guarantee the person' who is the subject of the EAW an opportunity to 'apply for a retrial of the case in the issuing Member State and to be present at the judgment': however, the guarantees at stake could only be requested if 'the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing that led to the decision rendered *in absentia*' (Art. 5 no. 1; for a decision of the Court of Justice on the correlation of no. 1 and no. 3 of Art. 5, see Sect. 8.2.4.2). We will see later on (see Sect. 8.3.2.2, also for some decisions of the Court of Justice on the innovation) that Framework Decision 2009/299/JHA abrogated Art. 5 no. 1 and at the same time added Art. 4a

with the aim of improving the mutual recognition of judicial decisions rendered *in absentia*.

If the offence on which the EAW has been issued is punishable by a custodial life sentence or lifetime detention order, the execution of said arrest warrant may be subject to the condition that the issuing Member State 'has provisions in its legal system for a review of the penalty or measure' imposed, on request or at the latest after 20 years, or for 'the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure' (Art. 5 no. 2).

The European Court (Grand Chamber) has held that when legislation does not provide for the review of a lifetime sentence, which is then considered a truly perpetual punishment, this violates Art. 3 ECHR (see ECtHR, 9 July 2013, *Vinter and Others v. United Kingdom* (see Sect. 3.3.1) and then reiterated by the ECtHR, 20 May 2014, *László Magyar v. Hungary*; ECtHR, 15 September 2015, *Kaytan v. Turkey*; and ECtHR, 15 December 2015, *Gurban v. Turkey*; see also ECtHR, 8 July 2014, *Harakchiev and Tolumov v. Bulgaria*; ECtHR, 4 November 2014, *Manolov v. Bulgaria*). For a different conclusion, see ECtHR, 17 January 2017, *Hutchinson v. United Kingdom*.

Finally, a solution is provided to overcome the 'classic' prohibition against extradition of citizens (Art. 5 no. 3): in fact, when a person who is the subject of the EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, 'after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed' against him in the issuing Member State. The execution of the sentence will be carried out on the basis of the recognition of the judgment, according to the rules provided in Framework Decision 2008/909/JHA (see Sect. 8.3.2.1).

Concerning the other 'classical' characteristic of extradition, i.e., the prohibition against extradition for political offences, which were already significantly overcome under Art. 5 of the Dublin Convention (see Sect. 8.1.2.2), it is not even mentioned in the Framework Decision; in any case, recital 12 clarifies that nothing in the Framework Decision may be interpreted 'as prohibiting refusal to surrender a person for whom' an EAW 'has been issued' when there are 'objective elements' to consider that the said arrest warrant has been issued 'for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons'.

The rule of specialty is maintained (Art. 27.2), but it can be overcome either because each Member State can waive it, by notifying the General Secretariat of the Council of the European Union with a statement (effective for the relationship with other Member States that sent the same notification) or because of some exceptions concerning the requested person, the offence and the proceedings (see Sect. 8.2.3).

8.2.2 Follows: Surrender Procedure

According to the form attached to the Framework Decision, the EAW must provide certain information (Art. 8.1); in addition to the identity and nationality of the requested person and elements that enable identifying the issuing judicial authority, it must contain 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect' coming within the scope of application of the arrest warrant; the indication of the 'nature and legal classification of the offence', taking into account the offences 'in the list' or 'out of the list'; a description of the circumstances in which the offence was committed, including the time, place and the requested person's degree of participation in the offence; the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State; and, if possible, other consequences of the offence.

Due to the principle of mutual recognition, the simple reference to the 'evidence' of *de libertate* measures, which are a prerequisite for issuing an arrest warrant and that are recognised if the issuing judicial authority certifies their existence, is sufficient (for two decisions of the Court of Justice on the expressions 'arrest warrant' and 'judicial decision' *ex* Art. 8.1.c, see Sect. 8.2.4.2). Note an important difference concerning the extradition procedure, where it is necessary to submit, in support of the request, 'the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of the arrest or other order having the same effects' (Art. 12.2.a E.C.Extr.; on the other hand, under the Fourth Additional Protocol, a simple copy is enough: see Sect. 8.1.2.1).

The EAW—without prejudice to different statements by each Member State that accepts the translation in one or more other official languages of the institutions of the Union—must be received translated into the official language or one of the official languages of the executing Member State (Art. 8.2).

The methods of transmission of the EAW are different based on whether or not the issuing judicial authority knows where the requested person is located. If it does know, it may transmit the EAW directly to the executing judicial authority but may also, in any event, decide to issue an alert for the requested person in the SIS (Art. 9), above all to face the risk that in the meantime the requested person changes domicile or residence; for these purposes, it is necessary to use the Interpol channel to disseminate the alert to Member States that are not part of the SIS. From 9 April 2013 (Art. 1 Decision 2013/157/EU of 7 March 2013), Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the Second Generation Schengen Information System (SIS II) (see Sect. 6.1.8) has been applicable to Member States participating in the SIS: the data related to persons wanted for arrest for surrender purposes are filled in on the request of the judicial authority of the issuing Member State (Art. 26.1), which, in addition, fills in a copy of the original EAW and eventually a copy of the translation, as complementary data (Art. 27.1–2) (somewhat similar provisions are dictated for extradition: see Arts. 29 and 31.2).

If the issuing judicial authority does not know the location of the requested person, it can carry out the necessary researches, especially through the European Judicial Network contact points (see Sect. 6.2.4), and if it is not possible to use the SIS II (because it is not a member thereof), it may request that the Interpol Services transmit the EAW (Art. 10). However, only the alert in the SIS II is equivalent to an EAW (Art. 9.3; see now Art. 31.1 Decision 2007/533/JHA), and, in practice, the majority of EAWs is issued and received through the SIS II.

Moving on to the methods of the surrender procedure, when the requested person is arrested, the competent judicial authority shall, 'in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority' (Art. 11.1); he or she shall have a right 'to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State' (Art. 11.2) (concerning the effects on the EAW execution procedure of the directives regarding the right to interpretation and translation in criminal proceedings, the right to information and the right of access to a lawyer; see Sect. 8.3.3.2).

Where the arrested person does not consent to his or her surrender as referred to in Art. 13, he or she will be entitled to a hearing in front of the executing judicial authority, in accordance with the domestic law of the latter (Art. 14). If such judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information (in particular, with respect to the ground of mandatory or optional non-execution of the warrant, the guarantees that the issuing State must provide in specific cases and the content and form of the arrest warrant itself) be furnished as a matter of urgency. The same judicial authority may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in for the final decision on surrender (Art. 15.2).

In fact, the timing for decision to execute the EAW is very short. In case of the requested person's consent, the final decision on the execution should be adopted within a period of 10 days after the consent has been given and, in other cases, within a period of 60 days after the arrest of the requested person, with the possibility of extension of such terms for 30 days in particular cases (Art. 17.2–4). If, in exceptional circumstances, a Member State is not able to comply with the mentioned terms, it shall inform Eurojust, providing the reasons for the delay (Art. 17.7; for a decision of the Court of Justice on the effects of lack of compliance with such terms, see Sect. 8.2.4.2).

Where the requested person enjoys a privilege or an immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Art. 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived (Art. 20). In case of 'competing international obligations' (Art. 21), i.e., when the requested person has been extradited to the executing Member State from a third State and is protected by provisions concerning specialty of the arrangement under which he or she was extradited, the executing Member State shall request forthwith the consent of the State from which the requested person was extradited so that he or she can be surrendered to the Member State that issued the EAW. In that

case, the time limits referred to in Art. 17 shall not start running until the day on which these specialty rules cease to apply, and pending the decision, the executing Member State will ensure that the material conditions necessary for effective surrender remain fulfilled.

In case of consent to surrender (Art. 13), that consent and, if appropriate, express renunciation of entitlement to the rule of specialty are gathered by the executing judicial authority and formally recorded in accordance with the procedure laid down by the domestic law, as established in such a way as to show that the person concerned, who to that end shall have the right to legal counsel, has expressed them 'voluntarily and in full awareness of the consequences'. In principle, consent may not be revoked without prejudice to a different choice by each Member State when the Framework Decision is adopted (see statements of Belgium, Denmark, Ireland, Finland and Sweden published in the Official Journal, together with the text of the Framework Decision).

As long as a final decision on the execution of the EAW has not been taken, the competent judicial authority 'shall ensure that the material conditions necessary for effective surrender of the person remain fulfilled' (Art. 17.5): in any case, when a person is arrested on the basis of an 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 Member State', and at any given moment 'the person may be released provisionally', provided that the same competent authority 'takes all the measures it deems necessary to prevent the person absconding' (Art. 12). In any case, the issuing Member State 'shall deduct all periods of detention arising from the execution' of an EAW 'from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed' (Art. 26.1; for a decision of the Court of Justice on the concept of 'detention' in the executing Member State, see Sect. 8.2.4.2) (a disposition not contained in the E.C.Extr. of 1957, where it was only provided that the requesting Party had to be informed of the length of time for which the person claimed was detained with a view to the surrender of said person); to that end, all information concerning the duration of the detention of the requested person must be transmitted by the executing judicial authority or the central authority to the issuing judicial authority at the time of the surrender (Art. 26.2).

Specific provisions regulate the hypothesis where the EAW has been issued for 'the purpose of conducting a criminal prosecution' (Art. 18; for the orientation of the Court of Justice, see Sect. 8.2.4.2); in fact, in that case, the executing judicial authority must either agree that the requested person should be heard according to Art. 19 or agree to the temporary transfer of the requested person, with conditions and duration of such temporary transfer that must be determined by mutual agreement between the issuing and executing judicial authorities. In the first case, the hearing is carried out by a judicial authority assisted by another person appointed by the requesting judicial authority in compliance with the law of the executing Member State and with conditions determined by mutual agreement between the issuing and executing judicial authorities. In the second case, the temporary

transferred person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

8.2.3 *Follows: Surrender and Its Effects. Handing Over of Property. Transit*

The executing judicial authority must immediately notify the issuing judicial authority of its decision concerning the EAW.

If two or more Member States have issued an EAW for the same person, the decision on which the arrest warrants will be executed shall be taken by the executing judicial authority with due consideration of the various elements provided (Art. 16.1), and, if necessary, it may seek the advice of Eurojust; even in the event of a conflict between an EAW and a request for extradition presented by a third State, the decision on precedence must be taken with due consideration of all the circumstances, in particular those referred to in Art. 16.1 and those mentioned in the applicable convention (Art. 16.3). The Court of Justice dealt with a different case (see Sect. 8.2.4.3), concerning the relationship between extradition toward a third State of a national of another Member State of the Union and the information to the latter, with the possible surrender of its national under the Framework Decision on the EAW.

If the decision on the surrender had a positive outcome, the requested person must be surrendered 'no later than ten days' after the final decision; if the surrender is prevented by *force majeure* causes for one of the Member States, the judicial authorities concerned 'shall immediately contact each other and agree on a new surrender date', which, in that event, shall take place within 10 days of the new date thus agreed; the surrender may exceptionally be temporarily postponed 'for serious humanitarian reasons', and as soon as these grounds have ceased to exist, the executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date, which in that event shall take place within 10 days of the new date thus agreed (Art. 23.2–4). It is important to highlight the provision under which upon expiry of the time limits just referred to, if the person is still being held in custody, he shall be released (Art. 23.5).

The surrender may be postponed or conditioned: in fact, the executing judicial authority may postpone the surrender of the requested person so that he or she may be prosecuted or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the EAW; alternatively, it may temporarily surrender the requested person, subject to conditions (binding for all judicial authorities of the issuing Member State) determined by mutual agreement between the executing and issuing judicial authorities (Art. 24).

Concerning the expenses, they will be borne by the issuing Member State, except the ones incurred in the territory of the executing Member State for the execution of the EAW.

Concerning the effects of the surrender, it is first necessary to take into account the discipline of the rule of specialty (Art. 27). The statement under which 'the person may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27.2) is limited by the safety clause contained at the beginning, which refers to the provided exceptions (for the orientation of the Court of Justice on certain profiles, see Sect. 8.2.4.2).

First of all, a presumed consent is contemplated (Art. 27.1) for the inoperability of the subject principle between Member States that notified the General Secretariat of the Council of the European Union of their will for that purpose (without prejudice to the possibility that in a specific case the executing judicial authority states otherwise in its decision concerning surrender).

Then various situations are listed (Art. 27.3) in which the rule of specialty does not apply (several date back to the Convention of Dublin: see Sect. 8.1.2.2). The first situation (substantially the same as the so-called purgation of extradition) is when the person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his or her final discharge or has returned to that territory after leaving it.

Another group of situations concerns the hypothesis when the offence is not punishable by a custodial sentence or detention order; the criminal proceedings do not give rise to applying a measure restricting personal freedom; the person could be liable to a penalty or a measure not involving the deprivation of freedom, including a financial penalty, even if the penalty or measure may give rise to restrictions. This last situation includes, other than the financial penalties, other measures such as community service, the prohibition to go to certain places, the duty not to leave the subject Member State.

An additional group concerns the hypothesis where the person has consented to his or her surrender and renounced, if applicable, the specialty rule (see Sect. 8.2.2) or, after having been surrendered, has expressly renounced benefitting from the specialty rule for certain offences prior to the surrender.

The last situation that is contemplated is when the judicial authority that surrendered the person grants its consent; in that case, a request for consent must be submitted to the executing judicial authority accompanied by the information mentioned in Art. 8.1 for the EAW and a translation. Consent will be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of Framework Decision on EAW. Of course, the grounds of mandatory or optional non-execution are applicable, and the issuing Member State must grant the prescribed guarantees for the situations mentioned in Art. 5. The decision must be taken no later than 30 days after receiving the request (Art. 27.4; for a decision by the Court of Justice concerning the remedies against such decision, see Sect. 8.2.4.2).

Art. 28 of the Framework Decision is partially structured following the lines of Art. 27, and it regulates the cases of surrender or subsequent extradition (for the Court of Justice orientation on some aspects, see Sect. 8.2.4.2).

This article provides (Art. 28.1) that the consent is presumed for the surrender of the person to a Member State other than the executing Member State pursuant to an

EAW issued for an offence committed prior to his or her surrender, but the person shall not be extradited to a third State without the consent of the competent authority of the Member State that surrendered the person (Art. 28.4). In cases different from presumed consent, the person may, without the consent of the executing Member State, be surrendered (Art. 28.2) in the situations that match the so-called purgation of extradition, in the hypothesis of consent of the requested person to be surrendered to a Member State other than the executing one or in the case of a requested person who does not benefit from the rule of specialty. Otherwise, the executing judicial authority will grant its consent to the surrender to another Member State with similar rules to the ones already seen for the consent for the non-applicability of the rule of specialty.

Concerning 'handing over of property' (Art. 29), the executing judicial authority shall, at the request of the issuing judicial authority or on its own initiative and in accordance with its national law, seize and hand over property, which may be required as evidence or has been acquired by the requested person as a result of the offence (even if the EAW cannot be executed in case of death or escape of the requested person himself). If it can be seized or confiscated in the territory of the executing Member State and if the property is needed in connection with pending criminal proceedings, the latter may temporarily retain it or hand it over to the issuing Member State on the condition that it is returned. Given that any rights that the executing Member State or third parties may have acquired must be preserved, where such rights exist, the issuing Member State shall return the property, without any charge, to the executing Member State as soon as the criminal proceedings have been terminated.

Even the dispositions concerning transit are indirectly related to surrender, and they also apply, *mutatis mutandis*, to the person that must be subject to extradition from a third State to a Member State (Art. 25).

In general, each Member State shall permit the transit of a requested person who is being surrendered through its territory provided that it has been given certain information (identity and nationality of the person subject to the EAW, existence of an EAW, nature and legal classification of the offence and a description of the circumstances of the offence, including the date and place). Specific provisions are provided where the EAW applies to a national or resident of the Member State of transit, if the transit is requested for the execution of a custodial sentence, detention order or prosecution purposes. Each Member State shall designate an authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence, and the Member State of transit shall notify such competent authority of its decision; the whole procedure must be carried out by means capable of being recorded in written form.

8.2.4 *The Framework Decision on the EAW in the Case Law of the Court of Justice*

As mentioned (see Sect. 1.2.4.3) with the *Pupino* decision (CJEU, 16 June 2005, C-105/03, *Pupino*), the consistent interpretation obligation for national judges has been extended to framework decisions of the former Third Pillar. As a result, the latter are immediately binding from an interpretative point of view (with regard to their provisions and underlying rationale), similarly to what occurs with directives. The obligation to provide an interpretation that is consistent with the Framework Decision also applies to the relevant national implementing law: the European source of law is a benchmark both when it specifically regulates the matter that raises the interpretative issue in the enacting law and when it traces guidelines that should help the national judge in interpreting the provision enacting the Framework Decision.

We thus understand the importance of examining the answers provided by the European Court of Justice on the requests for preliminary rulings submitted with reference to the Framework Decision on the EAW. To this end, the first decision of the Court, which confirmed the formal and substantial lawfulness of the said Framework Decision, must be separated from the subsequent decisions, which concern the interpretation of individual provisions.

8.2.4.1 The 'Founding' Decision

The first and most relevant decision on the EAW (CJEU, 3 May 2007, C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*) has addressed two crucial questions: (*a*) the formal lawfulness of the use of a framework decision (and not a convention) to regulate the EAW and (*b*) the alleged contrast of Art. 2.2 of the Framework Decision, which suppresses the verification of the double criminality for 32 categories of offences included in the so-called positive list, with the principle of legality in criminal matters and with the principle of equality and non-discrimination.

With reference to the first question, the Court of Justice has held that the use of framework decisions is perfectly lawful. Considering that the mutual recognition of EAWs issued by the Member States requires the harmonisation of the laws and regulations 'with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities', the CJEU has ruled out that the harmonisation by way of framework decisions only concerns the criminal provisions mentioned in Art. 31.1.e TEU (then in force) (i.e., those concerning the constituent elements of criminal offences and the penalties applicable in the fields indicated in this latter provision: organised crime, terrorism and illicit trafficking of drugs).

On the one hand, Art. 31.1.a–b TEU—on which the Framework Decision on the EAW is based—did not contain any indication as to the instruments to be used to

pursue the objective of a common action of Member States in the field of judicial cooperation in criminal matters; on the other hand, Art. 34.2 TEU did not make a 'distinction as to the type of measures' that could be adopted 'on the basis of the subject-matter to which the joint action in the field of criminal cooperation relates' and did not establish 'any order of priority between the different instruments listed'. Therefore, the possibility to choose among those instruments 'to regulate the same subject-matter, subject to the limits imposed by the nature of the instrument selected' could not be ruled out.

With reference to the second question raised, assuming that Art. 2.2 of the Framework Decision contains a list of 'very vaguely defined categories of undesirable conduct' without any guarantee of 'precision, clarity and predictability', the Court has ruled that this does not violate the legality principle as the definition of the offences and penalties applicable is the one that results from the national law of the issuing Member State, which, as stated in the Framework Decision (Art. 1.3), must respect fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty on European Union (at the time in force) and, consequently, the said principle of the legality.

With regard to the alleged violation of the equality and non-discrimination principle based on the fact that for offences other than those listed in Art. 2.2 the surrender may be subject to the existence of the double criminality, and that this distinction is objectively unjustified, the Court has specified that the choice of the 32 categories of offences has been justified—based on the principle of mutual recognition and considering the 'high degree of trust and solidarity between Member States'—according to the remark that, due to their nature and the penalty provided for (a maximum of at least 3 years), these offences 'feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of the double criminality'. As a result, according to the Court, assuming that the situation of persons suspected of having committed offences that fall within the list set out in Art. 2.2 (or convicted for having committed them) is comparable to that of persons suspected of having committed (or convicted for having committed) an offence that do not fall within that list, the distinction must be considered 'objectively justified'.

8.2.4.2 The Interpretation of Certain Provisions

The Court of Justice has also provided relevant specifications on various profiles of the Framework Decision.

First, starting from the grounds for refusal to execute the EAW, the Court has partly clarified its scope. As regards the grounds for mandatory non-execution, it dealt with (CJEU, 16 November 2010, C-261/09, *Mantello*) the notions of 'same acts' and of 'final judgment' (Art. 3 no. 2 Framework Decision: see Sect. 8.2.1.3).

With regard to the former, the Court has specified that it is 'an autonomous concept of European Union law', considering that to ensure 'uniform application' of such law, since that provision makes 'no reference to the law of Member States with regard to

that concept, the latter must be given an autonomous and uniform interpretation throughout the European Union'. Considering that the notion of 'same acts' is also contained in Art. 54 CISA and that, in this context, it has been interpreted by its case law as referring only to the 'nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected' (see Sect. 10.1.4.2), the Court concluded that, since the two provisions have a common objective, namely to ensure that 'a person is not prosecuted or tried more than once in respect of the same facts', the interpretation of the concept in question provided under the CISA should also apply to the Framework Decision on the EAW.

With regard to the second notion, the Court, after recalling by analogy its case law relating to Art. 54 CISA (see Sect. 10.1.4.3), specified that qualifying a judgment as final falls within the 'law of the Member State in which judgment was delivered'.

Moving on to the grounds for optional non-execution, the Court (CJEU, 25 September 2015, C-463/15 PPU, *A*.) stated that Arts. 2.4 and 4 no. 1 of the Framework Decision (see Sect. 8.2.1.3) must be interpreted as precluding a situation in which surrender is subject, in the executing Member State, not only to the condition that the act for which the EAW was issued constitutes an offence under the law of that Member State but also to the condition that it is, under the same law, also punishable by a custodial sentence of a maximum of at least 12 months. The Court based itself on the wording of the provision mentioned above, on the systematic structure of the Framework Decision and on the objectives pursued by the latter: in fact, Art. 2.1–2 of the Framework Decision refers to the level of applicable punishment in the issuing Member State, and it does not take into account the one applicable in the executing Member State so as to ensure free movement of judicial decision in criminal matters.

The Court has dealt on numerous occasions to interpret Art. 4 no. 6 of the Framework Decision (see Sect. 8.2.1.3). First of all (CJEU, 18 July 2008, C-66/08, *Kozlowsky*), it has defined the terms 'staying' and 'resident', considered to be 'autonomous concepts' of European Union law: it follows that the Member States, in their implementing rules, are not entitled to give those terms 'a broader meaning than that which derive from such a uniform interpretation' adopted by the Court.

In this regard, a requested person is a 'resident' in the executing Member State when 'he has established his actual place of residence there', while he is 'staying' there when, 'following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence'. In order to verify whether this person is 'staying' in that place, the executing judicial authority must conduct an 'overall assessment of various objective factors characterising the situation of that person', which include, in particular, 'the length, nature and conditions of his presence and the family and economic connections' that he has with the executing Member State.

The rationale of Art. 4 no. 6, according to the Court, is to increase 'the requested person's chances of reintegrating into society, when the sentence imposed on him expires'; Member States must also comply with Art. 12.1 TEC (now Art. 18 TFEU), which prohibits 'any discrimination on grounds of nationality'. It follows that is

compatible with these provisions a national law on the basis of which the competent judicial authorities, on the one hand, refuse to execute an EAW *in executivis* against one of its nationals and, on the other hand, subject the refusal, when it refers to a national of another Member State having a right of residence (Art. 18.1 TEC: now Art. 21 TFEU), to the condition that the latter has lawfully resided in the executing Member State for a continuous period of 5 years (CJEU, 6 October 2009, C-123/08, *Wolzemburg*): essentially, it is legitimate for the executing Member State to pursue social reintegration only in relation to persons who have demonstrated 'a certain degree' of integration.

On the contrary, Member States may not limit the said ground for non-execution with reference to their citizens by excluding 'automatically and absolutely' the nationals of other Member States who are staying or resident in its territory, regardless of the connection that they have with the latter, without infringing the principle of non-discrimination on grounds of nationality (CJEU, 9 May 2012, C-42/11, *Lopes Da Silva Jorge*). The Court also stated that Art. 4 no. 6 must be interpreted in the sense that it precludes a Member State from enacting a legislation that, in a situation where 'the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to execute a custodial sentence imposed on that national by a decision which has become final', does not authorise such a surrender and merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that 'they are willing to take over the enforcement of the judgment, where, on the date of the refusal to surrender, the execution has not in fact been take over and where, furthermore, in event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged' (CJEU, 29 June 2017, C-579/15, *Poplawski*).

To the Court has then been submitted the question of whether Art. 4 no. 6 and Art. 5 no. 3 of the Framework Decision (see Sect. 8.2.1.3) could be interpreted as meaning that the execution of an EAW regarding a conviction *in absentia* (Art. 5.1) may be subject 'to the condition that the person concerned, a national or resident of the executing member State, should be returned' to the latter 'in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State'. The Court (CJEU, 21 October 2010, C-306/09, *B.*) has adopted the above interpretation moving from the consideration that Art. 4 no. 6 and Art. 5 no. 3 (one concerning the EAW *in executivis*, the other the EAW for the purpose of conducting a criminal prosecution) both aim to increase 'requested person's chances of reintegrating into society' and there are no reasons to believe that 'the European Union legislator wished to exclude persons requested on the basis of a sentence imposed *in absentia* from that objective'.

On a more general level, the Court (CJEU, 29 January 2013, C-396/11, *Radu*) stated that the Framework Decision must be interpreted as meaning that the executing judicial authorities cannot refuse to execute an EAW issued for prosecution purposes on the ground that 'the requested person was not heard in the issuing Member State before that arrest warrant was issued'. On the one hand, the hearing obligation would 'inevitably' defeat the surrender system since the EAW, in particular to prevent the person concerned 'from taking flight', 'must have a certain

element of surprise'; on the other hand, the Framework Decision provides that the rights of the requested person, and in particular his hearing in the executing Member State, must be observed (see Sect. 8.2.2).

Second, the Court of Justice clarified the meaning to be attributed to the concept of 'issuing judicial authority' provided in Art. 6.1 of the Framework Decision (see Sect. 8.2.1.2): according to the Court, the reference of such a provision to the laws of a single Member State refers solely to the determination of the judicial authority that is competent to issue the EAW and does not concern the definition of the concept of 'judicial authority', which shall be considered as an autonomous concept of the European Union law, to be interpreted in a uniform way in its territory. From the wording of Art. 6.1, and from the context of the Framework Decision, it is clear that the same covers 'the Member State authorities that administer criminal justice, but not police services' (CJEU, 10 November 2016, C-452/16 PPU, *Poltorak*), given that the whole procedure of surrender, starting from the issuing of the EAW, shall be subject to judicial control. Based on the same conditions, the Court of Luxembourg (CJEU, 10 November 2016, C-477 PPU, *Kovalkovas*) excluded that the concept of 'issuing judicial authority' under Art. 6.1 can also cover 'an organ of the executive of a Member State, such as a ministry'. The Court specified that the latter can be designated as 'central authority', under Art. 7 of the Framework Decision, however with an intervention limited to the practical and administrative assistance to the competent judicial authorities, while the issue of an EAW would confer a decision-making power in the surrender procedure that the Framework Decision intended to repeal.

Third, concerning the EAW requirements (see Sect. 8.2.2), the Court (CJEU, 1 June 2016, C-241/15, *Bob-Dogi*) clarified that the term 'arrest warrant' in Art. 8.1.c of the Framework Decision refers to a national arrest warrant. Therefore, given that the EAW shall be grounded on a national arrest warrant, it is necessary that it contains the indication of the existence of the latter. When that indication is lacking and the executing judicial authority has not been otherwise updated on the fact that a national warrant has been issued, it shall not execute the EAW because it does not comply with the provided validity requirements. As highlighted by the Court, compliance with this requisite has particular relevance because it means that when the EAW was issued, the requested person could already benefit from procedural safeguards and fundamental rights granted by the issuing Member State in view of the issuance of a national arrest warrant. By focusing further on the meaning of the expression any other executive 'judicial decision', provided in the same Art. 8.1.c, the Court of Justice (CJEU, 10 November 2016, C-453/16, *Özçelik*) stated that it has to be referred to the concept of 'judicial authority' mentioned before, meaning that such 'judicial decision' will have to be issued by the 'authorities that administer criminal justice' but not by 'police services'. Given that the public prosecutor is among these authorities, his decision (in the case at stake, it concerned the confirmation of a national arrest warrant issued by police services) can very well qualify as 'judicial decision' under Art. 8.1.c.

Fourth, with respect to time limits for decisions on the execution of the EAW covered by Art. 17 of the Framework Decision (see Sect. 8.2.2), two questions have

been proposed to the Court of Justice, aimed at clarifying the effects of the failure to observe these time limits on both the executing judicial authority's decision and on the personal freedom of the person subject of the EAW, held in custody, pending a decision on surrender, for a period of time exceeding the aforementioned time limits. On the first question, the Court (CJEU, 16 July 2015, C-237/15 PPU, *Lanigan v. Minister for Justice and Equality*) has held that Art. 17, read in conjunction with Art. 15.1 of the Framework Decision (according to which the executing judicial authority decides the person's surrender within the time limits and under the conditions laid down by that Framework Decision), must be interpreted as meaning that the authority is required to adopt the decision on the execution even after the time limits have expired.

According to the Court, Art. 15.1 should be placed in the context of the Framework Decision on the EAW: the key importance of the obligation to execute the warrant (except for cases of refusal or execution subject to conditions) and the absence of an explicit indication about a temporal limitation of this obligation prevent to interpret the article in question in the sense that once the time limits referred to in Art. 17 have expired, the executing judicial authority can no longer adopt a decision or that the executing Member State is no longer required to continue the execution procedure of EAW. In support of its opinion, the Court relied on Art. 17, which governs situations in which a Member State is unable to meet these time limits but does not provide that the executing judicial authority can no longer decide after they expire. Moreover, a different interpretation of Arts. 15.1 and 17 could compromise the aim of accelerating and simplifying judicial cooperation (forcing the issuing Member State to issue a second EAW) and may encourage delaying practices aimed at obstructing the EAW execution.

As for the second question, the Court held that Art. 12 of the Framework Decision (which provides for the possibility of granting provisional release at any time in accordance with the domestic law of the executing Member State, provided that the competent authority of that State takes the necessary measures to prevent the requested person absconding), in conjunction with Art. 17, must be interpreted as meaning that it does not prevent, in principle, the executing judicial authority from holding the requested person in custody after the expiry of the time limits set by Art. 17, even where the total duration of the custody period exceeds those time limits. However, the Court stressed that Arts. 12 and 17 must be interpreted in light of Art. 6 of the Charter of Fundamental Rights, which protects every person's right to liberty and security. It follows that the executing judicial authority must ascertain whether the duration of the custody is excessive, taking into account the characteristics of the situation at issue (especially considering the possible lack of action of the judicial authorities of the Member States involved, the contribution of the requested person to the duration of the custody, as well as the potential sentence to which the requested person is exposed and the existence of a risk of that person absconding). Where the executing judicial authority decides to release the requested person, it must also order the necessary measures to prevent the latter from absconding and to ensure that the material conditions for its effective surrender remain fulfilled until the adoption of the final decision on the EAW has been made.

The timing of the decision on the execution of the EAW may also be affected by the real risk of inhuman or degrading treatments to which the person to be surrendered may be subjected because of the detention conditions in the issuing Member State. If there is objective, reliable, specific and properly updated evidence (for example, judgments of the Strasbourg Court, judgments of courts in the issuing Member State, decisions, reports and other documents of the Council of Europe bodies), which testify to the existence in the issuing Member State of deficiencies concerning the detention conditions (both structural and related to certain groups of people or certain detention centres), the Court of Justice (CJEU, 5 April 2016, C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*) held that the executing judicial authority must examine whether, in the particular case, there are serious and proven reasons for considering that the person to be delivered would face a real risk of inhuman or degrading treatment, in breach of Art. 4 of the Charter of Fundamental Rights. To this end, the authorities must request supplementary information to the issuing judicial authorities, which—availing itself of its central authority, where necessary—must provide such information within the required times. The executing judicial authority must postpone the decision on the surrender until it obtains such information. If the information does not exclude the risk of inhuman or degrading treatment within a reasonable time, the executing judicial authority shall decide whether it is necessary to end the surrender procedure. Even if these are requirements inferred from the same Framework Decision on EAW (see recital 13 and Art. 1.3), it is clear that compliance with them might make it way more complicated to achieve judicial cooperation.

Fifth, concerning Art. 23.3 of the Framework Decision (see Sect. 8.2.3), providing that when the surrender of the requested person within 10 days from the final decision to execute the EAW is prevented by a *force majeure* cause for one of the Member States a new surrender date is agreed, the Court of Justice (CJEU, 25 January 2017, C-640/15, *Vilkas*) pointed out that the executing judicial authority and the issuing judicial authority must agree on a further date when the second attempt of surrender is prevented by the requested person's resistance, provided that, for exceptional circumstances, the authorities could not foresee such resistance and it was not possible to avoid its consequences, notwithstanding the cautious measures that were adopted. However, in case of expiration of the terms provided in Art. 23 of the Framework Decision, the same authorities will continue to have an obligation to agree on a new surrender date.

Sixth, with regard to Art. 26.1 of the Framework Decision (deduction of the period of detention served in the executing Member State: see Sect. 8.2.2), the Court of Justice (CJEU, 28 July 2016, C-294/16 PPU, *JZ*) has held that the concept of 'detention'—an autonomous concept of Union law that must be interpreted uniformly in the whole European Union—refers not to a measure that restricts liberty but to one that deprives a person of it and covers 'not only imprisonment but also any measure or set of measures' that, on account of the type, duration, effects and means of execution, 'deprive the person concerned of his liberty, in a way that is comparable to imprisonment'. The judicial authority of the issuing Member State is required to consider whether the measure taken against the person concerned in

the executing Member State must be treated in the same way as deprivation of liberty and therefore constitute 'detention'. The Court of Luxembourg—confirming its own argumentation line with the case law of the Court of Strasbourg—decided that house arrest for nine hours during the night, together with the monitoring by means of an electronic tag; the obligation to report to a police station at fixed times daily or more than once a week; and the prohibition to request the issuance of documents valid for foreign travel do not entail, in principle, an actual deprivation of liberty, without prejudice on the part of the judicial authority of the issuing Member State to deduct, based solely on its own national law, in full or partially, the period in which the concerned person has been subject to measures limiting his/her liberty of movement in the executing Member State.

Seventh, the Court of Justice has also specified the scope of the rule of specialty (Art. 27.2 Framework Decision: see Sect. 8.2.3) and of some exceptions thereto (CJEU, 12 January 2008, C-388/08 PPU, *Leymann and Pustovarov*). As regards the specialty rule, the Court held that to determine whether the offence under examination is 'other' than that for which the person was surrendered, it is necessary to assess whether 'the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document'.

In order to establish the existence of 'sufficient correspondence', the Court has stressed that 'modifications concerning the time and place of the offence' are allowed, provided that they are derived 'from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Arts. 3 and 4 of the Framework Decision'. In the opinion of the Court, requesting the consent of the executing Member State 'for every modification of the description of the offence' would go beyond what is 'implied by the specialty rule and interfere with the objective' of speeding up and simplifying judicial cooperation between the Member States.

As regards the exceptions, the Court examined the relationship between the exception provided for under Art. 27.3.c of the Framework Decision ('the criminal proceedings do not give rise to the application of a measure restricting personal liberty') and the consent procedure by the executing Member State.

In the presence of an 'offence other', the consent must be requested (Art. 27.4) and obtained if a penalty or a measure depriving the person of his or her liberty needs to be executed, but the person surrendered can be prosecuted and sentenced for the 'offence other' before consent has been obtained, 'provided that no measure restricting liberty is applied during the prosecution or when judgment is given' on the same offence. However, the exception provided for in Art. 27.3.c does not preclude 'a measure restricting liberty from being imposed on the person surrendered before consent has been obtained', where that restriction 'is lawful on the basis of other charges' which appear in the EAW.

Still with regard to the consent procedure, from the executing Member State, for the extension of the EAW (Art. 27.4 Framework Decision) or the subsequent surrender to another Member State (Art. 28.3.c Framework Decision), it has been

proposed as a preliminary ruling whether such provisions should be interpreted as meaning that the decision (which occurs within 30 days of receiving the request) cannot be subject to appeal with suspensive effect. The Court of Justice (CJEU, 30 May 2013, C-168/13 PPU, *F.*) held that Member States may provide for such appeal, considering that if, in the case of a decision on the EAW, this possibility is 'implicitly but necessarily' permitted by the expression 'final decision' (Art. 17 Framework Decision), it cannot be excluded in the consent procedure for the extension of the EAW or for the subsequent surrender to another member State, especially if we consider that the extension or surrender can be requested for more serious offences than those that led to the execution of the warrant. However, the Court specified that if the appeal with suspensive effect is admitted, the final decision in this regard will have to be made within the time limits set by Art. 17 of the Framework Decision since providing longer time limits would be contrary to the logic and objectives of the Framework Decision.

Last but not the least, on the subject of subsequent surrender (Art. 28.2 Framework Decision: see Sect. 8.2.3), the Court was requested to clarify whether, in the case of more EAWs issued at different stages by several Member States in respect of the same person (the so-called EAW chain), the executing Member State shall be considered to be the State from which the person concerned was initially surrendered under the original EAW, or the second State—which in turn surrendered that person to a third Member State, which is then required to surrender the person to a fourth Member State—or whether the consent of both the first and the second State is required.

According to the Court (CJEU, 28 June 2012, C-192/12 PPU, *West*), Art. 28.2 must be interpreted as meaning that where a person has been subject to more than one surrender between Member States as a result of successive EAWs, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him 'is subject to the consent only of the Member State which carried out that last surrender'. The solution adopted, 'by limiting the situations in which the executing judicial authorities of the Member States involved in the successive surrenders of the same person may refuse to consent to the execution' of an EAW, 'only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition'.

8.2.4.3 Extradition Request Towards a Third State of a National of an EU Member State, the Information and the Surrender to the Latter State

The Court of Justice (CJEU, 6 September 2016, C-182/15, *Petruhhin*) decided on two preliminary rulings on Arts. 18 and 21 TFEU (which, respectively, prohibit any discrimination based on the nationality and provide the right to freedom of movement and of residence in the territory of Member States for Union citizens),

in connection with the legal concepts of extradition and surrender. According to the Court, these provisions shall be construed to mean that when a Member State of the Union where a national of another Member State has moved to is presented with an extradition request by a third State with whom the first Member State entered into an extradition agreement, it has a duty to inform the Member State that the person concerned is a national of and, if necessary, on request of this latter Member State, to surrender the national, according to the provisions of the Framework Decision on EAW, provided that such State is competent, based on its national law, to prosecute that person for acts committed outside the national territory.

According to the Court, 'in the absence of rules of EU law governing extradition between the Member States and a third State', it is necessary 'to apply all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law' in order to safeguard EU nationals from measures liable to deprive them of the rights of free movement and residence 'while combating impunity in respect of criminal offences'. The host Member State does not have a duty to recognise to nationals of another Member State who moved within its territory the same protection against extradition granted to its own nationals but, to cooperate with the Member State of which the person concerned is a national and to give priority to the potential EAW over the extradition request, it 'acts in a manner which is less prejudicial to the exercise of the right to freedom of movement while avoiding, as far as possible, the risk that the offence prosecuted will remain unpunished'.

In addition, in deciding another preliminary ruling, the Court stated that where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Art. 19.2 of the EU Charter of Fundamental Rights under which no one may be extradited 'to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment': on how to ascertain in concrete the violation of Art. 19.2 of the Charter, the Court refers to its decision in the joint cases *Aranyosi* and *Căldăraru* (see Sect. 8.2.4.2). Recently, the Court confirmed that Art. 19.2 of the EU Charter must be interpreted in the sense that a request for extradition 'originating from a third country concerning a Union citizen who, in exercising his freedom of movement, leaves his Member State of origin in order to reside on the territory of another Member State', must be rejected by the latter 'where that citizen runs a serious risk of being subjected to the death penalty in the event of extradition' (CJEU, 6 September 2017, C-473/15, *Schotthöfer & Steiner GbR v. Adelsmayr*).

8.3 The Implementation of the Framework Decision on the EAW in the National Legal Systems and Future Perspectives

8.3.1 Critical Issues Regarding the Implementation of the Framework Decision on the EAW in Member States and Positive Results

The main critical issues that have arisen in the implementation of the Framework Decision on the EAW were of a constitutional and procedural nature.

8.3.1.1 Constitutional Aspects

From the constitutional point of view, the greatest difficulties have arisen with regard to the surrender of the national and to the abolition of the verification of double criminality for 32 categories of offences listed in the so-called positive list.

As to the second aspect, the Belgian *Cour d'arbitrage*, called to adjudicate an appeal against the internal law implementing the EAW for alleged contrast with the Constitution, had appealed to the Court of Justice on matters involving two requests for a preliminary ruling relating to the Framework Decision: as mentioned (see Sect. 8.2.4.1), the CJEU has stated the full validity of the latter, in particular excluding any contrast of Art. 2.2 with the principle of legality in criminal matters and with the principle of equality and non-discrimination.

As to the first aspect, certain constitutional courts have held that the laws of their country enacting the Framework Decision were unconstitutional, in whole or in part. This, for example, occurred in Poland, where the Constitutional Court (27 April 2005) criticised the provision of the implementation law authorising the surrender of Polish citizens, considering it in contrast with Art. 55.1 of the Constitution, which, conversely, forbade extradition without exceptions. This resulted in the constitutional revision of the latter article and related changes to the Code of Criminal Procedure: Poland surrenders its citizens provided that the offence for which surrender is requested has been committed outside the territory of the State and is considered to be an offence under Polish law.

In Germany, the Constitutional Court (18 July 2005) annulled the entire law transposing the Framework Decision as it considered it to be contrary to Art. 16.2 of the Constitution, which provides that no German citizen may be extradited abroad (subject to possible derogations, to be established by law, concerning extradition to a Member State of the European Union or to an international court, provided that the fundamental principles of the rule of law are guaranteed), and, a judicial review not being possible against the decision of surrender, to Art. 19.4 of the Constitution. The new law implementing the Framework Decision provides more protection to German citizens, distinguishing between EAW for procedural or enforcement purposes.

8.3.1.2 Procedural Profiles

The first Reports of the European Commission on the implementation of the EAW (COM [2006] 8 final; COM [2007] 407 final) and the annexed working documents (SEC [2006] 79; SEC [2007], 979) also show many critical issues in the procedural field. The latest available Report (COM [2011] 175 final), accompanied by a full-bodied working document (SEC [2011] 430 final), in addition to describing the scenario more than 7 years after the entry into force of the relevant Framework Decision through an overview of the changes made by a number of Member States to the relevant implementing legislation and those still needed, focused on the issue of strengthening the procedural rights of the person involved in the proceeding triggered by EAW (as to the latest aspect, see Sects. 8.3.3.2 and 8.3.3.3).

The indications regarding the further modification measures passed in certain Member States (Austria, Czech Republic, Denmark, Finland, Hungary, Ireland, Luxembourg, Romania, Slovenia and Spain) and the implementation adopted by Croatia are available on the website of the European Judicial Network (www.ejn-crimjust.europa.eu), where they are constantly updated.

From the initial Reports, a critical issue can be inferred that regards the reintroduction of double criminality check in respect of the entire list of 32 categories of offences or of a single category. The first case under examination is that of Italy: the Italian transposing law, on the one hand, defined the categories of offences listed in the Framework Decision, often moving away from both the corresponding definitions of offences developed at European level and the national legislative provisions, thus creating independent offences, exclusively referred to in the surrender procedure; on the other hand, it imposed the obligation on the Italian judicial authority to ascertain 'what is the definition of criminal offences for which surrender is requested under the law of the issuing Member State, and if it corresponds to the offences' specifically described in the implementing provision. The second case under examination occurred in Belgium: Art. 5.4 of the Law of 19 December 2003 does not consider abortion and euthanasia to be included in the notion of murder present in the list. Conversely, the majority of States has rather reproduced verbatim the list of 32 categories or has made an indirect reference to it.

It should also be remembered, for example, that the Spanish criminal code did not provide for the offence of trafficking in human organs and tissues, which was then added in 2010 (with *Ley orgánica* 5/2010, of 22 June 2010, entered into force on 23 December of that year). Subsequently, with Law 23 of 20 November 2014 on the mutual recognition of judicial decisions in criminal matters in the European Union, Spain condensed into one piece of legislation the implementation of all framework decisions based on mutual recognition and the Directive on the European protection order (Art. 20 of that law regulates the absence of double criminality verification and its exceptions).

Another aspect relates to the introduction of grounds for refusal that differ from those established in the Framework Decision. From this point of view, it should be emphasised that while the three grounds for mandatory non-execution of the EAW

(Art. 3 Framework Decision) have been in substance implemented by all Member States, the choice with regard to the grounds for optional non-execution (Art. 4 Framework Decision) appears to be much more diversified. While some Member States have adopted them in part or have attributed to their judicial authorities 'a greater margin of discretion', others (this is the case, for example, of Italy) have considered all of them to be compulsory.

Among the grounds for optional non-execution, the Framework Decision provides for the possibility to refuse surrender aimed at enforcing a custodial sentence or detention order also where the requested person is a citizen of another Member State of the European Union, who is a resident or stays in the executing Member State's territory. The Italian law implementing the Framework Decision (Art. 18.1.r Law 69 of 22 April 2005) did not provide for such a ground for refusal, which was introduced by the Constitutional Court (judgment 227/2010), which also referred to the interpretation of the Framework Decision made by the Court of Justice in the rulings *Wolzemburg* and *Kozlowski* (see Sect. 8.2.4.2). Although each Member State is free to provide for this ground for refusal or otherwise, once the State has chosen to introduce it, it must respect the prohibition on discrimination on grounds of nationality. The Italian legislation, by contrast, had not provided for a limitation to equal treatment of citizens of another Member State than the Italian citizens (e.g., with regard to duration of the residence), but had radically excluded that the former may benefit from the refusal to surrender and the execution of the sentence or detention order in Italy, thereby producing a discrimination of the citizen of another country of the Union based on him or her being a foreigner.

As regards those grounds for refusal that are not provided for by the Framework Decision, the introduction of which is described as 'disturbing' by the Commission, the grounds for refusal that are contrary to the Framework Decision have been largely criticised. Such grounds include grounds that are based on 'political reasons, reasons of national security or ones involving examination of the merits of a case', such as 'its special circumstances or the personal or family situation of the individual in question'.

In Italy, one of the grounds for refusal not provided for by the Framework Decision was the subject of an interpretation by the Joint Sections of the Supreme Court (of 30 January 2007, *Ramoci*) aimed at ensuring compliance with the Framework Decision. The interpretation regards the ground for refusal established by the Italian enacting law concerning the case in which 'the issuing Member State legislation does not provide for the maximum period of provisional detention' (Art. 18.1.e Law 69/2005). The wording of the Italian provision actually left little room for a consistent interpretation according to the traditional standards (see Sect. 1.2.6.2), but the Joint Sections have adopted a 'teleological' approach and have come to a flexible interpretation of that rule, which meets the objectives of the Framework Decision. Accordingly, the Joint Sections reached the conclusion that those systems based on implicit time limits (i.e., where the maximum detention limit is not established directly, but indirectly, through the provision of a control to be carried out within a time period that is predetermined by law) comply with the Italian legislation transposing the Framework Decision, provided that there are provisions

according to which the failure to verify the need to maintain the *status custodiae* or the negative outcome thereof determines the automatic release of the accused person.

The implementation of the surrender subject to conditions (Art. 5 Framework Decision) appears not to be uniform because not all Member States have taken advantage of this possibility: some (such as Italy) have made all conditions mandatory, others only a few (it is the case, for example, of the Netherlands, Portugal and Spain).

Also, in relation to the content of the EAW, some Member States have imposed requirements or documents that are not provided for by Art. 8 of the Framework Decision and the warrant form enclosed thereto.

Italy, for example, provides for more complex documentation, requiring that a copy of the measure restricting personal freedom or of the sentence of imprisonment that gave rise to the request for surrender be enclosed with the warrant, as well as a report on the facts alleged against the person whose surrender is requested. However, the scope of the additional requirements established by the law implementing the Framework Decision has been reduced by the Italian Court of Cassation, which considered that the failure to enclose a report on the facts alleged against the person whose surrender is requested is not an obstacle to the surrender when the sources contained in the warrant or other equivalent instruments are sufficient for the judge to evaluate the existence of the 'serious elements of culpability', which are required to authorise the surrender for non-enforcement purposes.

Finally, the Reports have criticised the absence, in the legislation of several Member States, of a maximum time limit for higher courts' decisions, in relation to Art. 17 of the Framework Decision, as well as the provision of an overall maximum time limit that exceeds the 60-day rule indicated in the provision in question or the maximum period of 90 days in the event of an appeal before the Court of Cassation. The Reports observe that 'a domestic appeal is not in itself an exceptional circumstance' under Art. 17.7 of the Framework Decision, which requires information to be submitted to Eurojust. With regard to the role of Eurojust in such a case, the Commission has also pointed out that not all Member States provide the information in the event of delay, while it would be appropriate to follow the required practice set to allow the European body to take action.

In addition to the elements that emerge from the Commission Reports, it is worth recalling those resulting from the fourth round of mutual evaluations on the practical application of the EAW and the corresponding surrender procedures between Member States, which was carried out from 2006 to 2009 and resulted in reports, with recommendations to individual countries. However, as common issues were identified, in June 2009, the Council approved the final Report (8302/4/2009 REV 4 CRIMORG 55), which contains a number of recommendations related to the basic principles of cooperation (role of judicial authorities and direct contacts), with the aim of updating relevant information (for example, practical and linguistic training, Atlas database of the European Judicial Network), of facilitating cooperation (for example, acceptance of a copy of the EAW instead of the original, flexibility in the language of translation) or of influencing the execution of the EAW (grounds for refusal, resignation from the rule of specialty, use of the SIS,

now SIS II), as well as recommendations related to information requested and provided on the EAW.

The final Report stated that the Member States should have submitted to the Council by mid-2011 the information relating to the actions and measures already taken or planned in response to the recommendations addressed to them. Nevertheless, as documented by the Presidency Report of 28 October 2011 on the general follow-up, only 18 States (Belgium, Bulgaria, Czech Republic, Germany, Denmark, Estonia, Spain, France, Latvia, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Slovenia, Finland and Sweden) have responded and only seven of them (Austria, Germany, Denmark, France, Poland, Slovenia and Finland) have specified what were the actions taken by them.

The Report on the general follow-up has a purely descriptive character but focuses particularly on issues arising from the answers provided by the seven States mentioned above: the most important, as they can widely influence the practical application of the EAW, are those concerning the grounds for refusal and the rule of specialty.

Firstly, the recommendations concerning the grounds for refusal were asking Member States to amend those parts of their legislation, which established additional grounds for refusal or turned optional grounds listed in the Framework Decision on the EAW into mandatory so as to align these grounds to those foreseen in the Framework Decision. To explain the reasons that inspired the law implementing the Framework Decision, Member States mostly referred to the wording and purpose of the latter with regard to both the observance of fundamental rights and the difference between the refusal to surrender their own citizens and the refusal to surrender persons residing or staying in the Member State and also pointed out that the additional grounds for refusal are applied very rarely, or even not applied (Netherlands).

As recalled by the 2011 Commission Report, certain countries (Austria, Czech Republic, Belgium, Cyprus, Denmark, Finland, France, Ireland, Italy, Lithuania, Latvia, Malta and Slovenia) have also included in their implementing law, among the grounds for refusal, the failure to comply with their constitutional principles on fair trial. Certain States have also included the risk that the surrendered person be exposed to danger of death penalty, torture or other inhuman or degrading treatment (as provided by recitals 12 and 13 of the Framework Decision, respectively: see Sect. 8.2.1.1). In this regard, the Report on the general follow-up confirms the position already expressed by the Commission in the 2006 Report, which was then maintained in that of 2011, according to which the execution of an EAW can always be refused when the proceedings have been vitiated by infringement of Art. 6 TEU, even though these situations should be considered exceptional.

Secondly, from a different perspective, the recommendation encouraged Member States to identify the means to solve practical problems related to the specialty rule, also referring to the need, on which a discussion at European Union and national levels was recommended, to remove it gradually, especially by resorting to the declaration under Art. 27.1 of the Framework Decision on the EAW. The answers provided on this point by the seven Member States confirmed the divisions that

emerged during the fourth round of mutual evaluations: while Denmark does not apply the principle, France considers its application troublesome, and other States are reluctant to abandon it, underlining its importance with regard to the procedural guarantees.

Some concrete problems relating to the EAW executing procedure have also been highlighted in the annual reports of the Eurojust, a body that, according to the Framework Decision on the EAW (see Sects. 8.2.2 and 8.2.3), must be informed when, for exceptional circumstances, a Member State is unable to meet the deadlines set for the decision (Art. 17.7) or may be required to provide its advice in the event of EAWs issued by two or more Member States for the same person (Art. 16.2). With reference to the last Reports, while the 2013 Report provides, with regard to the execution of warrants, only one table of the Member States issuing/receiving the request, the 2012 Report shows that, in the course of that year, Eurojust registered 259 cases involving the execution of an EAW, i.e., 16.8% of all registered cases: most of the time (252 cases), the request was aimed to facilitate the execution of the EAW; there were six requests for advice, and in all of these cases the opinion issued by Eurojust was accepted (Eurojust drew up the Guidelines on Deciding on Competing EAWS in order to assist the practitioners in complex cases). As regards the violations of the time limits, 94 violations were recorded in 2012: the delays are due to the duration of the appeal proceedings, the request for additional information, the requested person or the person released on bail absconding and to the high number of EAWs. The 2014 Report shows that, in that year, Eurojust registered 266 cases concerning the improvement in the execution of EAW, equal to 14.5% of the total of cases; four requests for advice were submitted, and 123 violations of the time limits set to decide on the execution of EAW were reported. With regard to the 2015 Report, Eurojust registered 292 cases of the improvement of the execution of EAWs, amounting to 13% of all cases; five requests for advice were opened, and 82 breaches of time limits were registered. The 2016 Report refers to 315 cases concerning the improvement of the executions of the EAWs, amounting to 14% of all cases; eight cases for advice were opened, and only 25 breaches of time limits were registered, perhaps because ‘some Member States did not comply with their notification duty’.

8.3.1.3 Positive Results of the EAW

The finding of critical profiles illustrated above, however, has not prevented the Commission from giving a positive opinion on the impact of the EAW with regard to ‘the judicial control, effectiveness and speed’. The first Reports show that the use of the instrument in question is on an upward trend and is allowing to achieve the surrender of requested persons in less time than the traditional extradition procedure: the average duration of execution of a request has gone from about a year (with extradition) to 43 days, or even 11 in the quite frequent cases in which the person gives consent (the simplification of the procedure benefits the person to be surrendered, who consents in more than half the cases). The last Report (accompanied by an annex that lists the available statistics data—but not all Member States have

regularly provided data—collected between 2005 and 2009, with 54,689 issued warrants and 11,630 executed warrants) confirms that the percentage of requested persons who has consented to the surrender remained between 51% and 62%, on average after a period ranging from 14 to 17 days, while the average surrender time of those who have not given their consent is calculated in 48 days. Additional statistical data provided by the Commission show that the situation is basically unchanged in recent years (9800 issued warrants in 2011, with 5230 surrendered persons; 10,450 issued warrants in 2012, with 4480 surrendered persons; 13,100 issued warrants in 2013, with 3460 surrendered persons; 14,700 issued warrants in 2014, with 5480 surrendered persons): in most Member States, the surrender, in the case of consent, takes place within 14/16 days (about 50% of the requested persons' consents); otherwise, the surrender time is less than 2 months.

8.3.2 The Modifications of the Framework Decision on the EAW Operated by Subsequent Framework Decisions

This section will address the changes made to the Framework Decision on the EAW by three subsequent framework decisions. The first two (see Sects. 8.3.2.1 and 8.3.2.2) modify the rules of the EAW (although only the second directly amends the original text of the Framework Decision), while the third (see Sect. 8.3.2.3) plays a complementary role with regard to the EAW.

8.3.2.1 Framework Decision 2008/909/JHA on the Transfer of Prisoners

Framework Decision 2008/909/JHA (with the provisions of which Member States had to comply by 5 December 2011) concerns the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (for an amendment affecting the judgments rendered *in absentia*, see Sect. 8.3.2.2). The pursued purpose is to establish 'the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence' (Art. 3.1). This Framework Decision shall apply 'where the sentenced person is in the issuing State or in the executing State' (Art. 3.2), irrespective of whether such person is in custody. Where the sentenced person is in the executing State, the executing State may, at the request of the issuing State, before the arrival of the judgment and the certificate or before the decision to recognise the judgment and enforce the sentence, arrest the sentenced person or take any other measure to ensure that the sentenced person remains in its territory, pending a decision to recognise the judgment and enforce the sentence (Art. 14).

Limiting ourselves to illustrate the impact of this measure on the EAW functioning, Art. 25 and recital 12 establish that the provisions laid down therein shall apply—to the extent that they are compatible with those contained in the Framework Decision on the EAW—to the enforcement of sentences (a) where a Member State undertakes to enforce the sentence in cases covered by Art. 4 no. 6 of the Framework Decision on the EAW; (b) if, based on Art. 5 no. 3 thereof, it has imposed the condition that the person be returned to serve the sentence in the Member State concerned 'so as to avoid impunity of the person concerned'. Furthermore, Art. 29.4 provides for a procedural mechanism for situations in which a Member State has experienced repeated difficulties, which have not been solved through bilateral consultations.

The Framework Decision has filled a vacuum of the Framework Decision on the EAW because the latter, while providing (Arts. 4 no. 6 and 5 no. 3) that the sentence could be served in the country of citizenship, residence or stay of the convicted person, failed to provide specific rules to that effect: therefore, it was unclear whether the application rules could be found in the Council of Europe Convention on the transfer of sentenced persons, signed in Strasbourg on 21 March 1983. It is now clear that the enforcement of the sentence, in the above cases, is based on the recognition of the judgment issued in another Member State of the European Union (after all, in accordance with Art. 26.1, as of 5 December 2011, Framework Decision 2008/909/JHA replaced the corresponding provisions of the said Convention in relations between Member States).

8.3.2.2 Framework Decision 2009/299/JHA on the Decisions Rendered in Absentia

As from 28 March 2011 or, at the latest, with effect from 1 January 2014, Framework Decision 2009/299/JHA, which applies to the recognition and enforcement of decisions rendered in the absence of the concerned person at the trial, introduces amendments to various instruments of the former Third Pillar, all based on the principle of mutual recognition, with the aim of enhancing the procedural rights of the persons subject to criminal proceedings, of facilitating judicial cooperation in criminal matters and, in particular, of improving mutual recognition of judicial decisions rendered *in absentia* (Art. 1.1). The objective is to lay down conditions, alternatively from the one to the other, on the basis of which the recognition and execution of a decision rendered following a trial where the person did not appear in person should not be refused (recital 6). The instruments that were modified include, to the extent relevant here, Framework Decision 2002/584/JHA on the EAW and Framework Decision 2008/909/JHA on the transfer of prisoners, which we have just addressed.

Firstly, with regard to the Framework Decision on the EAW, the innovations consist of the introduction of an Art. 4a ('Decisions rendered following a trial at which the person did not appear in person') and in the corresponding removal of no.1 of Art. 5 (the States, after implementing Framework Decision 2009/299/JHA, are to

use the 'consolidated' EAW form, available on the website of the European Judicial Network: see Sect. 8.3.3). Art. 4a.1 allows the executing judicial authority to refuse to execute an EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, with four exceptions exhaustively set out as alternatives.

The first exception (lett. a) provides that the person concerned has been summoned in person or was officially informed by other means of the scheduled date and place of the trial (thus unequivocally establishing that he or she was aware of the scheduled trial) and informed that a decision may be handed down in case of failure to appear in court. The second exception (lett. b) concerns the situation where the person, being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial and was indeed defended by that counsellor at the trial. The third exception (lett. c) concerns the case in which the person concerned, after being served with the decision and being expressly informed about the right to a retrial or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined and which may lead to the original decision being reversed, has either expressly stated that he or she does not contest the decision or has not requested a retrial or appeal within the applicable time frame. The fourth exception (lett. d) relates to the case where the person concerned was not personally served with the decision (the authorities have been unable to contact him or her particularly because he or she tried to evade justice: see recital 12) but will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial or an appeal and will be informed of the time frame within which he or she has to request such retrial or appeal.

In the last case being examined, once made aware of the content of the EAW, the person concerned, who was not officially informed of the existence of the criminal proceedings against him or her, may ask that a copy of the judgment be sent to him before proceeding with the surrender; this copy has information purposes only (on the translation of the judgment or of its essential parts, see recital 13). Therefore, the transmission of the copy does not amount to formal service of the judgment, and the time limits for requesting a retrial or for filing an appeal do not start running (Art. 4a.2).

In conclusion, when one of the four exceptions considered in Art. 4a.1 applies, the requested Member State cannot refuse to execute the EAW: as the conditions for executing the EAW in the event of conviction *in absentia* have been harmonised, the provision in question must be interpreted—in the opinion of the Court of Justice—as precluding the executing judicial authority, in these cases, from making the execution of an EAW 'issued for the purpose of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State' (CJEU, 26 February 2013, C-399/11, *Melloni*).

In this particular case was at stake the exemption under Art. 4a.1.b. Furthermore, the Court decided that Art. 4a.1 complies with what is required under Arts. 47 (right to an effective remedy and to a fair trial) and 48.2 (right of defence) of the EU Charter of fundamental rights, construed in compliance with the reach that the Court of Strasbourg recognises to the rights under Arts. 6.1 and 3 ECHR (on the interpretation of Art. 53 of the Charter in the same *Melloni* case, see Sect. 2.1.6).

Recently, with reference to the first exception above-mentioned, the Court of Justice (CJEU, 24 March 2016, C-108/16 PPU, *Dworzecki*) ruled that provisions under Art. 4a.1.a 'constitute autonomous concept of EU law and must be interpreted uniformly' in the whole European Union; consequently, the Court has held that Art. 4a.1.a must be interpreted in the sense that a summons 'which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the EAW whether and, if so, when that adult did actually passed that summons on to the person concerned, does not in itself satisfy the condition set out in that provision'. Therefore, it will be up to the issuing judicial authority to provide, in the EAW, the elements based on which it deemed that the person concerned received as a matter of fact information relating to the date and place of his or her trial. In addition, the Court pointed out that as the cases at stake are intended as exceptions to an optional ground to refuse the execution of the EAW, the executing judicial authority can, after having found that 'they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence': for the purposes of such an assessment, it may thus have regard, for example, to the conduct of the person concerned, notably where it emerges that he or she sought to avoid service of the information addressed to him or her, as well as the fact that the national law of the issuing Member State in any event affords the person concerned the right to request a retrial, where service of the summons was not handed over personally. The Court clarified that the concept of 'trial resulting in the decision', according to Art. 4a.1, must be considered 'as an autonomous concept of EU law'. Where the issuing Member State has provided for a criminal procedure 'involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down *in absentia*', the concept above-mentioned must be interpreted 'as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merit of the case' (CJEU, 10 August 2017, C-270/17 PPU, *Tupikas*). Furthermore, the Court has pointed out that the said concept must be interpreted as referring also 'to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence', at the end of which 'the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion at this regard' (CJEU, 8 August 2017, C-271/17 PPU, *Zdziaszek*).

Secondly, with regard to the Framework Decision on the transfer of prisoners, the amendment refers to the optional ground for refusal of recognition for the case of a judgment rendered *in absentia* (Art. 9.i). In the event of an optional refusal based on the certificate showing that the person did not appear in person at the trial, the new version provided for three (alternative) exceptions, which are identical to the first three situations described above with regard to the amendment of the Framework Decision on the EAW.

8.3.2.3 Framework Decision 2009/829/JHA on Supervision Measures as an Alternative to Provisional Detention

A more extensive analysis must be devoted to Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (its provisions were to be implemented by 1 December 2012). In addition to being of undoubted general significance for the protection of individual freedom, this decision also plays a complementary role with regard to the legal instrument of the EAW (see also Sect. 8.3.3.1).

The purpose of the Framework Decision is to establish the rules under which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures (Art. 1). The Framework Decision has multiple objectives (Art. 2): to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial; to promote, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place; to improve the protection of victims and of the general public.

In summary, the issuing authority may submit, directly to that of the executing State, the decision on supervision measures (listed in Art. 8) or a certified copy, accompanied by the relevant certificate, the form of which is contained in Annex I of the Framework Decision (Art. 10): the Member State to which the decision in question can be transmitted is the one where the person concerned is lawfully and ordinarily residing (if he agrees to return to it), or, at the request of the same, another Member State, with the consent of the competent authority of the latter (Art. 9.1–2).

In this way, the person suspected of having committed an offence in a Member State where he is not a resident may be subject to a non-custodial supervision measure in the State of residence as long as the process does not take place in the State in which the offence was committed, if the competent authority of the executing State recognises the decision on supervision measures: the authority is to ensure the recognition as soon as possible and within 20 working days of receipt of the decision on supervision measures and the certificate (in case of an appeal of decision, the time limit for the recognition is extended by another 20 working days) (Art. 12.1–2). The decisions on supervision measures are recognised without verifying the double criminality of the act for 32 categories of offences (listed in Art. 14.1 and identical to those provided in Art. 2.2 of the Framework Decision on the EAW), unless, upon adopting the Framework Decision, a Member State has declared that, for constitutional reasons, it will not apply this provision for some or all of the offences listed therein (see the statements of Germany, Poland and Lithuania); optional grounds for non-recognition are also provided for (Art. 15).

If recognition occurs, the executing State's competent authority shall take all necessary measures to monitor the supervision measures (Arts. 12.1 and 16), without

prejudice to the possibility for adaptation to the types of supervision measures that apply to equivalent offences under the national law (Art. 13). The issuing State's authorities have jurisdiction over all subsequent decisions relating to the original decision on supervision measures (Art. 18), which, notably, include the renewal, review and withdrawal of the decision, modification of the supervision measures, issuing an arrest warrant or any other enforceable judicial decision having the same effect (Art. 18.1). The law of the issuing State applies to these decisions (Art. 18.2); if such law provides for a prior hearing of the person concerned, teleconferencing or videoconferencing may be used (Art. 19.4).

These rules interact with the legal instrument of the EAW (see also Sect. 8.3.3.2) because the issuing State may not issue the warrant, relying on the fact that the executing State will not only monitor the provisional measures but will also ensure the return of the person to the issuing State, to appear at the trial. Only in the event that such person does not voluntarily return to the issuing State will an EAW be issued, and the person will be surrendered in accordance with the Framework Decision on the EAW (recital 12). In this context, to refuse to surrender the person concerned, the competent authorities of the executing State may not invoke Art. 2.1 of the Framework Decision on the EAW (which sets the maximum period of detention for EAW issuance purposes), unless, when implementing the Framework Decision or at a later stage, a Member State has notified that it will also apply this provision (Art. 21.2–3 Framework Decision 2009/829/JHA).

8.3.3 The Future Perspectives of the EAW: Operational Issues and Protection of Fundamental Rights

Irrespective of the impact on the Framework Decision on the EAW caused by the subsequent framework decisions, which have just been addressed, further future prospects can be outlined that concern, on the one hand, operational practice and, on the other hand, a redesigned protection of the fundamental rights of the person involved in the EAW procedure.

8.3.3.1 The Good Practices, the Correct Use of the European Handbook on How to Issue an Arrest Warrant Form and the Enhancement of the Principle of Proportionality

The main objective to be pursued at the operational level is to improve the uniform application of EAW, overcoming the concrete difficulties encountered so far. In June 2010, in the Conclusions on the recommendations contained in the final Report on the fourth round of mutual evaluations on the practical application of the European Arrest Warrant, the Council, *inter alia*, called on the Member States to use the forms contained in the European handbook on how to issue a European Arrest Warrant

form, to communicate the progress of the procedure and the final decision, and pointed out the need for a uniform approach in relation to the seizure and handing over of property. Particularly interesting is the aspect concerning the need for proportionality in issuing the warrant (which led to modify the aforementioned European handbook accordingly) so as to make it an effective tool to fight first of all the serious forms of crime.

In essence, given the serious consequences that arise from the execution of an EAW in terms of restrictions on physical freedom and of free movement of the requested person, before deciding whether to issue a warrant, the competent authorities should have regard to the proportionality principle by assessing a number of factors, including the seriousness of the offence, the possibility of the suspected person being detained and penalty that would be likely to apply if the requested person was found guilty; they should also consider the need to ensure the effective protection of the public and the interests of victims of the offence. Thus, for example, the EAW should not be issued if the coercive measure that seems proportionate, adequate and applicable to the case in question is not preventive detention. Then alternatives to issuing of the warrant could be considered, which include the use, where possible, of mutual judicial assistance instruments; the use of videoconferencing for suspects; the use of means of a summons; the use of SIS (now SIS II) to determine the place of residence of a suspect.

The European handbook on how to issue a European Arrest Warrant form was drafted in 2008, with the assistance of several European experts on the issue, the European Judicial Network, Eurojust, the General Secretariat of the Council of the European Union and the Commission, and was revised in December 2010 based on some of the conclusions of the Council described above: the handbook's stated purpose is to provide 'guidelines for the adoption of best practices in the light of experience acquired' and to provide detailed information to the competent authorities 'on how EAW forms should ideally be filled in'. The handbook was revised again in September 2017, with the purpose to update it and 'make it more comprehensive and more user-friendly' (in this latest revision it is entitled 'Handbook on how to issue and execute a European arrest warrant').

The compilation of the form (available in all official EU languages on the website of the European Judicial Network, including in its consolidated version, which takes into account the changes made by Framework Decision 2009/299/JHA on decisions rendered *in absentia*), if conducted with special care, should avoid requests for additional information; Annex III to the handbook provides detailed criteria on how to fill in the form, and each 'box' of the form comes with relevant comments, suggestions and examples. The handbook also addresses the translation of the EAW; its mode of transmission, depending on whether the requested person has been located or not; and problems linked to the SIS (now SIS II). However, two instruments are available on the website of the European Judicial Network: the Compendium—whose new version finalised in the month of July 2016 now extends also to other European acts based on mutual recognition—and the Atlas. They both assist the requesting judicial authority in filling in the EAW form and in pinpointing the identification data of the executing judicial authority. Finally, the

Fiches Belges, which have been revised and updated, and the Judicial Library contain all necessary practical information (it is also available the above-mentioned handbook).

The European Parliament Resolution of 27 February 2014, containing recommendations to the Commission on the review of the EAW, also insists on strengthening the principle of proportionality in the issue of EAWs, pointing out that there is a disproportionate use of the instrument 'for minor offences or in circumstances where less intrusive alternatives might be used', which leads to unjustified arrests and 'unjustified and excessive time spent in pre-trial detention' and therefore to a disproportionate impact on the fundamental rights of suspected and accused persons. Another way to implement the principle of proportionality, thus avoiding the issue of EAWs, consists precisely in the use of other less invasive mutual recognition instruments. The pieces of European legislation that can perform an alternate function with this respect, are as follows: (a) Framework Decision 2009/829/JHA on the European supervision order (see Sect. 8.3.2.3 for an analysis of its interaction with the legal instrument of the EAW), the provisions of which were to be implemented by 1 December 2012 but have been only enacted by some Member States, as shown in the Commission's Report of 5 February 2014 (COM [2014] 57 final), which listed 12 countries (now risen to 27); the Report also pointed out with regret that some Member States (Hungary, Lithuania and Poland) have precisely failed to implement Art. 21, which concerns the possible emission of the EAW (see Sect. 8.3.2.3), thus emptying the usefulness of the European supervision order; (b) Directive 2014/41/EU of 3 April 2014 concerning the European Investigation Order (EIO) (see Sect. 9.1.7). Recitals 25 and 26 of the Directive revealed a possible additional function of this mutual recognition instrument that is complementary to the European Arrest Warrant: given that the Directive sets rules on how to carry out investigative measures, in order to gather evidence, where necessary with the participation of the person concerned and, therefore, considering that an EIO 'may be issued for the temporary transfer of that person to the issuing State or for the carrying out of a hearing by videoconference ', recital 25 notes that where the person 'is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial', an EAW should be issued. Moreover, in the light of the principle of proportionality, to be understood as 'proportionate use' of the EAW, recital 26 clarifies that the issuing authority, placed in front of two choices, should check whether an EIO 'would be an effective and proportionate means of pursuing criminal proceedings', considering in particular whether 'issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative' to the issue of an EAW.

8.3.3.2 The Protection of Fundamental Rights

The protection of the fundamental rights of the requested person is closely connected to the EAW. When the relevant Framework Decision entered into force, many

scholars had highlighted a sort of reversal of perspective: the harmonisation of the European citizens' freedom and rights should have acted as a prerequisite of the mutual recognition of decisions (which, conversely, is inspired by obvious repressive needs) and should not have been seen as a subsequent counterweight.

It is true that, when compared to the extradition, the EAW would emerge victorious in terms of fundamental rights: in addition to better clarifying the scope of the *ne bis in idem* principle, the Framework Decision implemented the right to assistance of a legal counsel and an interpreter and, as to the restriction of personal liberty, provided for the right to check on the conditions for the continued detention and the right to have the period of detention arising from the execution of the EAW deducted from the total length of detention to be served in the issuing Member State as a result of a custodial sentence or detention order.

However, considering the concrete uneven protection due to the references made by the Framework Decision to the 'national law' of the individual executing State, it became urgent to establish minimum standards on procedural safeguards for suspected and accused persons in the Union, leaving the individual Member States free to implement the highest level of safeguards that they considered appropriate.

It is no coincidence that the 2011 Commission Report (see Sect. 8.3.1.2) devotes ample space to the interconnections between the EAW and the strengthening of procedural rights of suspected or accused persons. On the one hand, the Report sets out the main problems related to the practical application of the warrant, consisting of the lack of access to assistance by a legal counsel in the issuing Member State during the surrender proceedings in the executing Member State (this point has now been addressed by Directive 2013/48/EU on the right to access to a lawyer, which will be discussed shortly); the detention conditions in some Member States, sometimes combined with a prolonged pre-trial detention for the surrendered persons; the uneven application of the proportionality check (see Sect. 8.3.3.1) by the issuing States, resulting in requests for surrender for relatively minor offences, which, in the absence of such control, must be executed. On the other hand, the Report refers to the potential of the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. If adopted and implemented, the measures contained in the roadmap should increase mutual trust, which is essential for the practical application of the instruments based on mutual recognition.

The measures now adopted pursuant to the roadmap involve important effects on the rules governing the EAW (see also Sect. 8.3.3.3).

An example is Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (see Sect. 3.2.7; Member States had to comply by 20 October 2010): the rights contained therein should apply, 'as necessary accompanying measures', to the execution of an EAW (recital 15). In addition, persons concerned 'should have the right to challenge the finding that there is no need for interpretation' (with no obligation for Member States 'to provide for a separate mechanism or complaint procedure in which such finding may be challenged'), but this right 'should not prejudice the time limits applicable to the execution' of an EAW (recital 25).

The executing Member State must ensure that its competent authorities provide the assistance of an interpreter to those persons who do not speak or understand the language of the proceedings (Art. 2.7): given that under such provision the authorities shall act 'according to' the same Art. 2, the interpretation should be ensured by the recipient of the EAW even for the communication with his or her lawyer (Art. 2.2); it is also necessary to provide a written translation of the EAW to those persons who do not understand the language in which the EAW is drawn up or has been translated by the issuing Member State (Art. 3.6); however, as an exception to the general rule, an oral translation or oral summary may be provided on the condition that such oral translation or oral summary does not prejudice the fairness of the proceedings (Art.3.7) and is noted on the record (Art. 7).

As far as relevant here, the Green Paper on the application of EU criminal justice legislation in the field of detention (COM/2011/327 final of 14 June 2011) deals both with the EAW and with alternative measures to provisional detention provided for by Framework Decision 2009/829/JHA (see Sect. 8.3.2.3).

From the first point of view, the Green Paper highlights that the rules governing the EAW appear significant, with reference to detention, both at the pre-trial and post-trial stages: on the one hand, if the pre-trial detention period is too long, the executing Member State may 'object to the use of an instrument designed for the rapid surrender of persons to face trial', if such persons risk 'spending months awaiting trial in a foreign prison when they could have remained in their home environment until the authorities in the issuing State were ready for trial'; on the other hand, the executing Member State can refuse surrender because the detention conditions in the issuing Member State are unacceptable and constitute an infringement of Art. 3 ECHR. In this latter regard, some 'pilot' judgments of the Strasbourg Court have identified structural prison overcrowding problems, to be resolved through preventive and compensatory internal measures: this is the case of Italy (ECtHR, 8 January 2013, *Torreggiani et al. v. Italy*) and, more recently, Belgium (ECtHR, 25 November 2014, *Vasilescu v. Belgium*), Bulgaria (ECtHR, 7 January 2015, *Neshkov et al. v. Bulgaria*) and Hungary (ECtHR, 10 March 2015, *Varga et al. v. Hungary*). For a ruling from the Court of Justice on the subject, see Sect. 8.2.4.2.

With regard to Italy, after the position taken by the Strasbourg Court, the execution of an EAW issued by Italy could have reasonably been refused, given the serious risk that the surrendered person be subjected to inhuman or degrading treatment (in fact, actual cases have occurred in the relations with the United Kingdom). At present, however, following a series of legislative and structural interventions that have executed the above-referenced *Torreggiani* 'pilot' judgment, the European Court has shown its appreciation for the results obtained by the Italian State (ECtHR, 16 September 2014, *Stella et al. v. Italy*; ECtHR, 16 September 2014, *Rexhepi et al. v. Italy*). This should result in positive EAW-related consequences.

From the second point of view, the Green Paper points out that, based on the order requesting a non-custodial supervision measure, the suspected person can be subjected to such a measure in the Member State of origin until the process will take place in the issuing Member State and that, therefore, the provisional detention of non-residents should be reduced in the future. As mentioned (see Sect. 8.3.2.3),

the European supervision order may interact with the EAW. However, the Green Paper highlights that the use of such an order is discretionary for the issuing Member State. As a result, it is difficult to predict how national courts will use this tool and how such instrument will specifically interact with the EAW. In essence, there is a risk of non-uniform use at European level, limited to those States among which mutual trust actually exists.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (see Sect. 3.2.4; with which the Member States were required to comply by 2 June 2014) states (recital 39) that the right to written information about rights on arrest should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of an EAW.

In this context, Member States must ensure that these persons are provided promptly with appropriate communication (letter of rights) containing information on their rights in accordance with the law of the executing Member State implementing the Framework Decision on the EAW (Art. 5). The letter of rights must be drafted in simple and accessible language, in accordance with the form contained in Annex II to the Directive: it is a purely indicative model, which the Member States are not obliged to use, being able to modify it to adapt it to national rules and to add other useful information. In the form, five essential rights are taken into account: the right to be informed of the content of the EAW on which the arrest is based, the right to assistance of a lawyer (with the information that, in some cases, the assistance may be free of charge), the right to have the free assistance of an interpreter and to translation of the EAW (which may also be an oral translation or a summary), the right to consent to the surrender (with the additional information that the consent will speed up the proceedings but that it might be difficult, if not impossible, to change this decision at a later stage); the right, in case of failure to consent to surrender, to be heard by a judicial authority.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (see Sects. 2.2.2 and 3.2.5.2; with which the Member States must comply by 27 November 2016) devotes Art. 10 (to be read in connection with recitals 42–47) to the right of access to a lawyer in European Arrest Warrant proceedings. First, it refers to the right to access to a lawyer in the executing Member State when arrested, and, with regard to the contents of such right, the Directive specifies that requested persons for surrender purposes have the right to access to a lawyer in such time and in such manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty (see also recital 45); it also includes the right to meet and communicate with the lawyer representing them.

According to recital 43, Member States may make practical arrangements concerning the duration and frequency of such meetings (depending of the case) to ensure safety and security, in particular of the lawyer and of the requested person, in the place where the meeting among themselves is conducted, while, in accordance

with recital 44, the right to communicate with counsel should be ensured at every stage of the proceedings, including before any exercise of the right to meet with the lawyer, and Member States may make practical arrangements concerning the duration, frequency and means of communication, including videoconferencing and other communication technology.

The Directive also provides for the right to the presence and participation of the lawyer in the hearing of the person subject to the EAW by the executing judicial authority, in accordance with national procedures (which shall also apply to note such participation in the record): recital 42 states that the lawyer may, *inter alia*, ask questions, request clarification and make statements.

The provisions concerning confidentiality in the communications with the lawyer apply *mutatis mutandis* to the EAW proceedings, as well as the right to notify a third person of the deprivation of liberty and to communicate with such person, the right to communicate with consular authorities, the rules regulating the waiver of one of the rights mentioned in Art. 10 (without prejudice to national law requiring the mandatory presence or assistance of a lawyer), a decision that can be withdrawn anyway.

Finally, it is worth pointing out—and therein lies perhaps the most significant aspect of the Directive—that, innovating with respect to the Framework Decision on the EAW, the Directive established that the executing judicial authority shall inform the arrested person, without undue delay, of his or her right to appoint a lawyer in the issuing Member State to assist the lawyer who operates in the executing Member State by providing information and advice with a view to the effective exercise of rights of the person to be surrendered. If the latter wishes to exercise this right and has not already appointed a lawyer in the issuing Member State, the competent executing authority shall promptly inform the corresponding authority of the issuing State, which shall, without undue delay, provide information that will facilitate the lawyer's appointment (see recital 46). The exercise of the right in question, however, should not prejudice the time limits set by the Framework Decision on the EAW or the obligation for the executing judicial authority to decide, within those time limits and the conditions set out in that Framework Decision, whether the person must be surrendered (see also recital 47). However, if these rights are infringed, the person whose surrender is requested must be granted an effective remedy under the national law (Art. 12.1).

The right to 'dual defence' led to a significant widening of the protection to any person who is subject to an EAW; nevertheless, it constitutes an economic burden that not everyone will be able to support: therefore, the Directive on free legal aid (see Sect. 8.3.3.3) will be particularly relevant to that end. However, the effectiveness of this safeguard will actually depend on the quality of information transmitted by the lawyer appointed in the issuing Member State (information that will have to be communicated—we believe, in a systematic way—to the arrested person and/or to its lawyer in the executing Member State in a language they understand). In October 2017, the ECBA (European Criminal Bar Association) has published the handbook on the EAW for Defence Lawyers: in particular, the point H explains the role of the lawyer in the issuing State.

8.3.3.3 Final Considerations on the Practical Application of the EAW

More than 15 years after the entry into force of the Framework Decision (7 August 2002), it can be held that the shadows that had been cast over the respect of fundamental rights in the execution of the EAW are finally being dispelled: combining the efficiency of the surrender procedure and the protection of rights is the categorical imperative in order to enhance the principle of mutual recognition. In the above lapse of time, the national courts of the Member States have used the principle of consistent interpretation in interpreting the respective laws enacting the Framework Decision, while the Court of Justice has clarified a number of interpretative doubts concerning the Framework Decision, pursuing uniform application in the European Union, and, in certain decisions taken in the 2-year period 2015–2016, paid particular attention to the safeguard of fundamental rights (see Sects. 8.2.4.2 and 8.3.2.2). The combined action on the European level and on the internal level should lead to further improve the EAW in the near future.

From this point of view, as far as the European level is concerned—compared to the 'package' of measures presented by the Commission on 27 November 2013—Directive 2016/1919/EU of 26 October 2016 on the legal aid for suspects and accused persons (with which Member States will have to conform by 25 May 2019) (see Sect. 3.2.5.2) applies (Art. 2.2), upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU. Under Art. 5.1, the executing Member State shall ensure that requested persons have such a right upon arrest until they are surrendered or until the decision not to surrender them becomes final. On its side, the issuing Member State ensures that requested persons who appointed a local lawyer to assist the lawyer in the executing Member State, in the scope of the EAW executing proceedings, have the right to legal aid in its territory in so far as legal aid is 'necessary to ensure effective access to justice' (Art. 5.2) – a condition that according to recital 21 would be met when the lawyer in the executing Member State 'cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State', a criterion (matching the one in Art. 47.3. of the Charter of Fundamental Rights) that in any case subordinates the enforcement of this right to a discretionary judgment of the competent authority of the issuing Member State. In addition, the Directive does not clarify the term of the right in the issuing Member State, even if an analogy should be made to the term recognised to that right in the executing Member State: in any case, the right to a 'dual defence' shall not prejudice compliance with the time limits set out for the decision on the surrender (Art. 10.6 Directive 2013/48/EU: see Sect. 8.3.3.2). Furthermore, it is necessary to point out that the Directive does not provide anymore the provisionary admission with legal aid (which was provided for in the proposal for a directive for requested persons deprived of liberty in the executing Member State): it will be necessary to remedy with faster proceedings.

Certainly, in both Member States, the right to legal aid may be subject to a means test: therefore, it will be necessary to apply, *mutatis mutandis* (Art. 5.3), the criteria set out in Art. 4.3. of the Directive, which refer to 'relevant and objective factors, such as the income, capital and family situation, as well as the costs of the assistance of a lawyer'. In addition, Member States will have to ensure that requested persons will be informed in writing in case their request for legal aid is refused in full or in part (Art. 6.2); that staff involved in the decision-making has adequate training (Art. 7.2 and recital 26); that requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced 'where specific circumstances so justify' (Art. 7.4); and that requested persons shall be allowed an effective remedy under national law in case of a breach of their rights under the Directive (Art. 8 and recital 27). Finally, a catch-all provision requires Member States to ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of the Directive (Art. 9).

The proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings (COM [2013] 822 final), accompanied by a recommendation on procedural safeguards for vulnerable suspects or accused persons in criminal proceedings (2013/C 378/02) also dealt with the EAW proceedings. In the final draft of the Directive (2016/800/EU of 11 May 2016), the child subject to an EAW is entitled to certain rights provided for in the latter, which apply, *mutatis mutandis*, from the moment in which he was arrested pursuant to EAW proceedings in the executing Member State (Art. 17): the right to be informed (firstly, according to Directive 2012/13/EU: see Sect. 8.3.3.2) and to have the holder of parental responsibility informed or, in certain cases, another appropriate adult, appointed by the child and approved by the competent authority or a person designated by that authority, in the best interests of the child; the right to be accompanied by one of these persons during the proceedings; the right to be assisted by a lawyer and, if necessary, the right to legal aid (firstly, according to Directive 2013/48/EU: see Sect. 8.3.3.2); the right to a medical examination; various rights regarding personal liberty (concerning the limits to the deprivation of liberty; the use, wherever possible, of alternative measures to detention; the right to a specific treatment, compared to adults, in the event of deprivation of liberty); the right to be guaranteed a timely and diligent treatment of cases; the right to protection of privacy.

Mention must then be given to the European Parliament Resolution of 27 February 2014, containing recommendations to the Commission on the review of EAW (see Sect. 8.3.3.1), in which the Parliament paid particular attention to the protection of fundamental rights, targeting both the Commission, in order to request legislative proposals taking into account the detailed recommendations enclosed with the Resolution itself, and the Member States, in order to ask them 'clear and consistent application of Union law regarding procedural rights in criminal proceedings linked to the use' of the EAW. Looking ahead, on the other hand, the smooth functioning of the mutual recognition instruments such as the EAW is not only essential for the investigation of national prosecutors, in order to combat serious transnational crimes, but it can play a key role in the investigative action of the

European Public Prosecutor's Office. Those recommendations, which refer to the mutual recognition instruments in general, and therefore also to the EAW, concern the provision of a possible validation procedure in the issuing State, in order to overcome the different interpretations of the expression 'judicial authority' (for two decisions of the Court of Justice on the concept of 'issuing judicial authority' in the Framework Decision on the EAW, see Sect. 8.2.4.2); the proportionality check; a standardised consultation procedure between the competent authorities of the issuing State and the executing State; the introduction of a ground for refusal on fundamental rights; the provisions on effective legal remedies. With specific reference to the Framework Decision on the EAW, recital F of the Resolution expresses further concern, in particular, and most significantly, with regard to the absence of a periodic review of the SIS II and Interpol alerts and the lack of an automatic link between the withdrawal of an EAW and the removal of such alerts and with regard to the uncertainty about the effects of the refusal to execute an EAW on the validity of the warrant and of the related alerts; the absence of time limits for the transmission of the translated warrants, which leads to varying practices, harbingers of uncertainty; the lack of an adequate definition of the serious crimes to which the verification of double criminality no longer applies. Until now, the Commission has not answered the solicitations of the European Parliament, and the highlighted profiles are not falling in its work programme for 2017, as is clear from the Communication to the European Parliament, to the Council, to the European Economic and Social Committee and to the Committee of the Regions (COM[2016] 710 final of 25 October 2016—*Commission Work Programme 2017 Delivering a Europe That Protects, Empowers and Defends*), which, within ten priorities, lists at number seven 'An Area of Justice and Fundamental Rights Based on Mutual Trust', focused on the security of the borders and on various forms of fight against terrorism and its financing, highlighting that the right to safety can never prejudice the respect of other fundamental rights, including the right to personal data protection (the Commission has reiterated similar considerations in its work programme for 2018: COM[2017] 650 final of 24 October 2017). In the meantime—as already indicated—the Commission engaged in the process leading to the approval of the measures provided in the 'package' dating back to November 2013: the implementation by Member States of the new directives should result in a higher harmonisation of national legislation, increasing in this way the mutual trust and reducing the cases of refusal to execute the warrant.

Practical suggestions for improving the operation of the EAW also emerge from the conclusions of the strategic seminar (entitled 'The European Arrest Warrant: Which Way Forward?') organised by Eurojust in conjunction with the seventh meeting of the Consultative Forum (The Hague, 10–11 June 2014): for example, enhancing European training for national judicial staff; improving the European handbook on how to issue an EAW (the handbook was revised in September 2017: see Sect. 3.2.2.2); creating a European database containing the most significant national case law on the EAW; increasing the role of Eurojust.

Finally, the guidelines set out in the Conclusions of the European Council of Ypres (26–27 June 2014), which approved 'the strategic agenda of key priorities' for

the 5 years from 2015 to 2020, provide that the Council will 'continue efforts to strengthen the rights of accused and suspect persons in criminal proceedings' (and, as we know, by now this category includes the persons subject to an EAW) and to enhance the mutual recognition of decisions and judgments in criminal matters.

As far as the internal legislation of Member States is concerned, it is essential to implement the framework decisions that have not been implemented yet, and the directives adopted after Lisbon, because to be able to effectively operate in the Union, the principle of mutual recognition also requires the mutual transposition of the European legal instruments. In order for this scenario to be achieved, it is necessary that the European Commission carry out its task of monitoring the situation of the Member States and activate, if appropriate, an infringement procedure, now also applicable to the 'old' framework decisions, as the 5-year transitional period has expired (Art. 10 Protocol 36: see Sect. 8.1.3.2).

Further Reading

Alegre S, Leaf M (2004) Mutual recognition in European judicial cooperation: a step too far too soon? Case study – the European arrest warrant. Eur Law J 10(2):200 ff

Amalfitano C (2013) Mandato d'arresto europeo: reciproco riconoscimento vs diritti fondamentali? Note a margine delle sentenze Radu e Melloni della Corte di Giustizia. www.penalecontemporaneo.it. 4 July 2013

Bachmaier L (2015) Mutual recognition instruments and the role of the CJEU: the grounds for non-execution. New J Eur Crim Law 6(4):505 ff

Bachmaier Winter L (2015) The EU directive on the right to access to a lawyer: a critical assessment. In: Ruggeri S (ed) Human rights in European criminal law. Springer, Heidelberg, pp 111 ff

Bachmaier Winter L (2016) Quo vadis – El TJUE y su papel en materia de cooperación penal al hilo de la reciente jurisprudencia sobre la orden de detención y entrega. Revista General de Derecho Europeo, no. 38

Bargis M (2007) Studi di diritto processuale penale. II. Questioni europee e "ricadute" italiane. Giappichelli, Torino

Bargis M (2015) Il mandato di arresto europeo dalla decisione quadro del 2002 alle odierne prospettive. Dir pen cont 4:61 ff

Bargis M (2017) Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi" della Corte di giustizia tra compromessi e nodi irrisolti. Dir pen cont 2:177 ff

Bargis M, Selvaggi E (eds) (2005) Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna. Giappichelli, Torino

Benoit L (2003) Le mandat d'arrêt européen. Revue du Marché Commun et de l'Union européenne 465:106 ff

Blekxtoon R, van Ballegooij W (eds) (2004) Handbook on the European arrest warrant. T.M.C. Press, The Hague

Böse M (2015) Human rights violations and mutual trust: recent case law on the European arrest warrant. In: Ruggeri S (ed) Human rights in European criminal law. Springer, Heidelberg, pp 135 ff

Brodowski D (2017) Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick. Zeitschrift für Internationale Strafrechtsdogmatik, pp 11 ff

Cartier ME (dir) (2005) Le mandat d'arrêt européen. Bruylant, Bruxelles

Chelo A (2010) Il mandato di arresto europeo. Cedam, Padova

Chiavario M (2013) Manuale dell'estradizione e del mandato d'arresto europeo. Utet, Torino
Combeaud S (2006) Premier bilan du mandat d'arrêt européen. Revue du Marché Commun et de l'Union européenne 495:114 ff
Coventry T (2017) Pretrial detention. Assessing European Union competence under Article 82 (2) TFEU. New J Eur Crim Law 8(1):43 ff
Da Fonseca A (2014) Le Tribunal constitutionnel espagnol et la Cour de justice: un dialogue d'apparat autour de l'affaire Melloni? www.gdr-elsj.eu. 30 Mars 2014
De Amicis G, Iuzzolino G (2008) Guida al mandato d'arresto europeo. Giuffrè, Milano
Delgado L (2013) Droits fondamentaux et reconnaissance mutuelle: une jurisprudence troublante ou simplement prudente? www.gdr-elsj.eu. 2 Fevrier 2013
Di Chiara G (2013) The protection of the right of freedom on the European Union level: the European arrest warrant and non-custodial pre trial measures. The guideline of the principle of proportionality: an interpretative perspective. In: Ruggeri S (ed) Transnational inquires and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg, pp 241 ff
Fichera M (2009) The European arrest warrant and the sovereign state: a marriage of convenience? Eur Law J 15:70 ff
Fichera M (2011) The implementation of the European arrest warrant in the European Union: law, policy and practice. Intersentia, Cambridge
Flore D (2002) Le mandat d'arrêt européen: première mise en oeuvre d'un noveau paradigme de la justice pénal européenne. Journal des Tribunaux, pp 273 ff
Fontaine M (2016) Une directive relative à l'aide juridictionelle dans l'Union, alfin? www.gdr-elsj.eu. 22 Octobre 2016
Gáspár-Szilágyi S (2016) Joined cases Aranyosi and Căldăraru: converging human rights standards, mutual trust and a new ground for postponing a European arrest warrant. Eur J Crime Crim Law Crim Justice 24(2–3):197 ff
Gómez-Jara Díez C (2006) European arrest warrant and the principle of mutual recognition. Eucrim, pp 23 ff
Grasso C (2013) The European arrest warrant under the scrutiny of the Italian constitutional Court. New J Eur Crim Law 4(1):120 ff
Guiresse M (2016) Confiance mutuelle et mandat d'arrêt européen: evolution ou inflexion de la Cour de justice? www.gdr-elsj.eu. 12 Avril 2016
Heard C, Mansell D (2011) The European arrest warrant: the role of judges when human rights are at risk. New J Eur Crim Law 2(2):133 ff
Herlin-Karnell E (2007) In the wake of Pupino: Advocaten voor de Wereld and Dell'Orto. Germ Law J 8(12):1147 ff
Jimeno-Bulnes M (2007) The enforcement of the European arrest warrant: a comparison between Spain and UK. Eur J Crime Crim Law Crim Justice 15(3–4):263 ff
Jimeno-Bulnes M (2008) European arrest warrant and surrender procedures: essential guarantees. In: de Hoyos Sancho M (ed) Criminal proceedings in the European Union: essential safeguards. Lex Nova, Valladolid, pp 101 ff
Jimeno-Bulnes M (2010) The application of the European arrest warrant in the European Union: a general assessment. In: Fijnaut C, Ouwerkerk J (eds) The future of police and judicial cooperation in the European Union. Martinus Nijhoff, Leiden, pp 285 ff
João Costa M (2017) The emerging EU extradition law. Petruhhin and beyond. New J Eur Crim Law 8(2):192 ff
Kalb L (ed) (2005) Mandato di arresto europeo e procedure di consegna. Giuffrè, Milano
Keijzer N, Sliedregt E (eds) (2009) The European arrest warrant in practice. T.M.C. Press, The Hague
Klimek L (2012) New law on the European arrest warrant in the Slovak Republic: does it fulfil standards at the level of the EU? Eur J Crime Crim Law Crim Justice 20(2):181 ff
Klimek L (2015) European arrest warrant. Springer, Heidelberg
Klip A (2017) Europeans first!: *Petruhhin*, an unexpected revolution in extradition law. Eur J Crime Crim Law Crim Justice 25(3):195 ff

Kromrey H, Morgenstern C (2017) Die Menschenwürde und das Auslieferungsverfahren. Zeitschrift für Internationale Strafrechtsdogmatik, pp 106 ff
Labayle H (2013) Mandat d'arrêt européen et degré de protection des droits fondamentaux, quand la confiance se fait aveugle. www.gdr-elsj.eu. 3 Mars 2013
Labayle H (2013) Fin de questions, début des difficultés? La réponse de la Cour de justice au Conseil constitutionnel à propos du mandat d'arrêt européen dans l'affaire Jérémy Forrest. www.gdr-elsj.eu. 1 Juin 2013
Labayle H (2013) Suite e bientôt fin: la saga du mandat d'arrêt européen devant le Conseil constitutionnel. www.gdr-elsj.eu. 16 Juin 2013
Labayle H, Medhi R (2013) Le droit au juge et le mandat d'arrêt européen: lectures convergentes de la Cour de justice de l'Union européenne et du Conseil constitutionnel. Revue française de droit administratif, pp 691 ff
Mansell D (2012) The European arrest warrant and defence rights. Eur Crim Law Rev, pp 36 ff
Marchetti MR (2008) Mandato d'arresto europeo. Enc. dir., Annali II, vol I. Giuffrè, Milano, pp 539 ff
Marin L (2011) 'A spectre is haunting Europe': European citizenship in the area of freedom, security, and justice. Some reflections on the principles of non-discrimination (on the basis of nationality), mutual recognition, and mutual trust originating from the European arrest warrant. Eur Public Law 17:705 ff
Marin L (2014) Effective and legitimate? Learning from the lessons of 10 years of practice with the European arrest warrant. New J Eur Crim Law 5(3):327 ff
Medhi R (2013) Retour sur l'arrêt Melloni: quelques réflexions sur des usages contradictories du principe de primauté. www.gdr-elsj.eu. 29 Mars 2013
Meyer F (2016) 'From Solange II to Forever I' The German federal constitutional Court and the European arrest warrant (and how the CJEU responded). New J Eur Crim Law 7(3):277 ff
Meysman M (2014) Quo vadis with vulnerable defendants in the EU? Eur Crim Law Rev, pp 179 ff
Miettinen S (2013) Onward transfer under the European arrest warrant: is the EU moving towards the free movement of prisoners? New J Eur Crim Law 4(1):99 ff
Millet FX (2014) How much lenience for how much cooperation? On the first preliminary reference of the French constitutional Council to the Court of justice. Common Mark Law Rev, pp 195 ff
Mitsilegas V (2015) The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice. New J Eur Crim Law 6(4):457 ff
Niblock R (2016) Mutual recognition, mutual trust? Detention conditions and deferring an EAW. New J Eur Crim Law 7(2):250 ff
Niblock R, Oehmichen A (2017) Local law repercussions on EU extradition law. Perspectives from continental Europe and England and Wales. New J Eur Crim Law 8(2):116 ff
O'Reilly P (2007) The exit of the elephant from the European arrest warrant parlour. J Eur Crim Law 2:23 ff
Ormazábal Sánchez G (2006) La formación del espacio judicial europeo en materia penal y el principio de reconocimiento mutuo. Especial referencia a la extradición y al mutuo reconocimento de pruebas. In: Armenta Deu T, Gascón Inchausti F, Cedeño Hernán M (eds) El derecho procesal penal en la Unión Europea. Colex, Madrid, pp 37 ff
Ostropolski T (2014) The principle of proportionality under the European arrest warrant – with an excursus on Poland. New J Eur Crim Law 5(2):167 ff
Oubiña Barbolla S (2012) The European arrest warrant in law and practice. In: Ruggeri S (ed) Liberty and security in Europe. V&R Unipress, Göttingen, pp 47 ff
Pettigrew M, Vinter A (2017) Retreat in Europe. Returning to the issue of whole life sentences in Strasbourg. New J Eur Crim Law 8(2):128 ff
Platcha M (2003) European arrest warrant: revolution in extradition? Eur J Crime Crim Law Crim Justice 11(2):178 ff
Rafaraci T (2012) The application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. In: Ruggeri S (ed) Liberty and security in Europe. V&R Unipress, Göttingen, pp 67 ff

Rozo Acuña E (ed) (2004) Il mandato di arresto europeo e l'estradizione. Cedam, Padova
Ruggeri S (2015) Procedimento penale, diritto di difesa e garanzie partecipative nel diritto dell'Unione europea. Dir pen cont 4:130 ff
Schallmoser NM (2014) The European arrest warrant and fundamental rights. Risks of violations of fundamental rights through the EU framework decision in light of the ECHR. Eur J Crime Crim Law Crim Justice 22(2):135 ff
Selvaggi E (2008) Aporie nel m.a.e.: quale la base giuridica per il trasferimento dell'esecuzione della pena nel caso del cittadino? Cass. pen., pp 4407 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Siracusano F (2010) Reciproco riconoscimento delle decisioni giudiziarie, procedure di consegna e processo in absentia. Riv it dir proc pen, pp 115 ff
Sokol T (2015) Implementation of European arrest warrant in Croatia: a risk for the functioning of judicial cooperation in criminal matters in the EU? Eur J Crime Crim Law Crim Justice 23 (3):258 ff
Taupiac-Nouvel G (2015) Le principe de proportionnalité en coopération judiciaire pénale: principe janusien de l'espace pénal européen. www.gdr-elsj.eu. 16 Juin 2015
Taupiac-Nouvel G (2016) L'arrêt Bob-Dogi de la Cour de justice, deux occasions manquées pour le droit de la coopération judiciarie pénale. www.gdr-elsj.eu. 8 Juin 2016
Tinsley A (2012) Note on the reference in case C-399/11 Melloni. New J Eur Crim Law 3(1):19 ff
Tinsley A (2012) The reference in case C-396/11 Radu: when does the protection of fundamental rights require non-execution of a European arrest warrant? Eur Crim Law Rev, pp 338 ff
van Ballegooij W, Bárd P (2016) Mutual recognition and individual rights: did the Court get it right? New J Eur Crim Law 7(4):439 ff
van der Hulst J (2014) Extradition and the European arrest warrant in the Netherlands. Eucrim, pp 64 ff
Vassalli G (2002) Mandato d'arresto e principio di uguaglianza. Il giusto processo 3:129 ff
Vervaele JAE (2013) The European arrest warrant and applicable standards of fundamental rights in the EU. Rev Eur Adm Law, pp 37 ff
Viganò F (2014) Obblighi di adeguamento al diritto UE e 'controlimiti': la Corte costituzionale spagnola si adegua, bon gré, mal gré, alla sentenza dei giudici di Lussemburgo nel caso Melloni. www.penalecontemporaneo.it. 9 March 2014
Vogel J (2013) Reaction to Radu. Judgment of the Oberlandesgericht of Munich of 15 May 2013. New J Eur Crim Law 4(3):310 ff
Wahl T (2015) Der Rahmenbeschluss zu Abwesenheitsentscheidungen Brüsseler EU-Justizkooperation als Fall für Straßburg? Eucrim, pp 70 ff
Weis K (2011) The European arrest warrant – a victim of its own success? New J Eur Crim Law 2(2):124 ff
Weyembergh A (2006) Les juridictions belges et le mandat d'arrêt européen. Eucrim, pp 26 ff
Weyembergh A, Armada I, Brière C (2014) Sur l'opportunité de réviser le mandat d'arrêt européen. Observateur de Bruxelles, Dossier spécial – Le droit pénal européen
Wischmeyer T (2016) Generating trust trough law? Judicial cooperation in the European Union and the "principle of mutual trust". Germ Law J 17(3):339 ff
Xanthopoulou E (2015) The quest of proportionality for the European arrest warrant: fundamental rights protection in a mutual recognition environment. New J Eur Crim Law 6(1):32 ff
Zanetti E (2009) Il mandato di arresto europeo e la giurisprudenza italiana. Giuffrè, Milano (8)2

Chapter 9
Evidence Gathering

Marcello Daniele and Ersilia Calvanese

Contents

M. Daniele (✉)
School of Law, University of Padua, Padua, Italy
e-mail: marcello.daniele@unipd.it

E. Calvanese
Italian Court of Cassation, Rome, Italy
e-mail: ersilia.calvanese@giustizia.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_9

9.1 General Aspects

Marcello Daniele

9.1.1 Foreword

Evidence gathering in the European context is still a fundamental tool of judicial cooperation. In this section, we will elaborate upon it in a general perspective. The following sections will be dedicated to the examination of specific activities.

It is important to point out immediately that, at the European level, there is no clear distinction between the evidence gathered in the investigation phase and the evidence collected during the public trial. Such distinction is not adopted by European law because it is relevant only in systems, such as the Italian and English systems, that are based on a separation between the investigation phase and the public trial, concentrating the collection of evidence in the latter. Several other systems have kept the 'mixed-inquisitorial' paradigm based on the collection of evidence in the pre-trial phase. Therefore, in the European context, it is better to use the general expression 'evidence gathering', which has the advantage of applying to all forms of evidence collection.

9.1.2 Theoretical Models

In theory, the activities at stake can be regulated on the basis of two different models.

9.1.2.1 The Model of Unified Rules of Evidence

One hypothetical model envisages a unification of the rules of evidence by providing common rules able to regulate the collection of evidence found in a State that must be used in proceedings concerning criminal offences affecting the interests of more than one State. According to a federal logic, such rules would be placed side by side with the national evidentiary rules, which would remain in force for proceedings against criminal offences with mere domestic relevance. In this way, creating proper European criminal trial would be possible.

The model of unified rules of evidence is advantageous because it ensures the maximum consistency and uniformity: all evidence that is relevant for European purposes would be gathered according to the same rules, wherever it is physically located.

However, this model is not easy to realise even after the Lisbon Treaty went into effect, when the legislative procedures of the European Union became more elastic, thanks to the mechanism of the so-called enhanced cooperation (see Sect. 1.2.3.3). It is hard to adopt due to the differences that still exist between the national evidentiary rules in force in the various European States. These rules are the result not only of the different historical, political and cultural backgrounds of each system but also of the deep nationalist nature of criminal law and criminal procedure, which explains the demand for a regulatory monopoly that States continue to claim in this area. In addition, there is the widespread fear that common regulations would be strongly unbalanced in favour of the needs of criminal offence repression at the expense of the need to protect the fundamental rights of the accused.

That explains why, in general, the existing regulations in force do not provide unified evidentiary rules. For the time being, the Union has provided the necessary legal basis for an approximation of national regulations, an essential step to creating

a future European criminal process. We refer to the already mentioned Art. 82.2.a and c TFEU, which stipulates the possibility to establish minimum rules concerning mutual admissibility of evidence between Member States, as well as Art. 86 TFEU, which institutes a European Public Prosecutor's Office (EPPO) competent to gather evidence and prosecute in the national courts of the Member States.

However, it is necessary to point out that the Regulation of 12 October 2017 on the establishment of the EPPO does not provide a unitary regulation of evidence gathering in Europe, which would have been beneficial from the point of view of clarity and simplification (see Sect. 5.2.6).

9.1.2.2 The Model of Transnational Evidence Gathering

The other model is the one of transnational evidence gathering, meaning gathering evidence physically located in a State, which must be acquired within the scope of criminal proceedings held in another State, through cooperation between the respective national authorities.

The regulations in force at European level mainly refer to this kind of activities. This also explains why evaluation of evidence, which logically follows evidence gathering, is not relevant for our purposes. Even if acquired abroad, each piece of evidence will have to be evaluated on the basis of specific national rules within the single proceedings where it is intended to produce its cognitive contribution.

Concerning this last feature, it is only possible to recall that the legislation of the main European States are based on the 'free conviction' principle: the cognitive value of the evidence is not determined in advance by the legislator, as was the case in Continental Europe during Middle Ages, but must be determined by the judge for the specific case applying inductive logic, which allows reconstructing past events using criteria that are the result of logic, common experience and, where possible, scientific knowledge.

In any case, it is important to recall that under Art. 6.2 of the European Convention on Human Rights (ECHR) and Art. 48.1 of the Charter of Fundamental Rights of the European Union (CFREU), the presumption of innocence imposes the *in dubio pro reo* rule.

The latter is explicitly covered by Art. 6.2 Directive 2016/343/EU of 9 March 2016 on the presumption of innocence, which provides that States must ensure that any doubt as to the question of guilt is to benefit the accused person. Article 6.1 adds that the burden of proof of guilt is on the prosecutor, without prejudice to the right of the defence to submit evidence and to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence in accordance with the applicable national law (the reference is to the national systems that still contemplate the role of the 'investigating judge', such as the French system).

9.1.3 Transnational Evidence Gathering Under the Principles of Mutual Assistance and Mutual Recognition

Transnational evidence gathering can be carried out based on various founding principles.

9.1.3.1 Mutual Assistance Principle

Mutual assistance is a dated principle that supposes a low level of integration of the interested States' procedural systems and, correspondingly, the maximum compliance with the evidentiary rules of the State where evidence is available. It also implies that evidence gathering is based on intergovernmental cooperation between the States concerned instead of direct relationships between individual judicial authorities.

The principle of mutual assistance entails the adoption of the already mentioned request model (see Sect. 7.1.2): the State interested in the acquisition of a piece of evidence sends a request to the State where the evidence is located; such a request does not automatically have to be carried out, but it is subject to a preliminary assessment by governmental and judicial bodies of the executing State on the basis of several political and juridical parameters; if it is admissible, the request is executed under the evidentiary rules in force in the State where the evidence is located (*lex loci*).

The principle of mutual assistance has always been favoured by national systems, because it ensures the maximum respect of the sovereignty of each State. In addition, it helps authorities of the State where the evidence can be found because it allows them to apply their own national rules.

However, in the contemporary world, this principle no longer appears to satisfy the needs of judicial cooperation in view of an effective repression of supranational criminality: it demands that the requests of evidence go through too many filters.

In particular, the opportunity for governmental controls is controversial. Such controls slow down the investigation and lead to the exercise of a power that has blurry limits and that is hard to challenge; often, authorities' decisions on this point cannot even be motivated to avoid spreading information whose dissemination would be harmful to the State's security.

The principle of mutual assistance also has the disadvantage of not granting the usefulness of the investigation activities: the application of the *lex loci* might cause the inadmissibility of the evidence collected if the national system of the requesting State has evidentiary rules conflicting with the ones of the executing State.

This is the reason why, as will be clearer later on, European regulations that are influenced by the principle of mutual assistance give effect to it with some

limitations, with the purpose of raising the effectiveness of the evidence-gathering operations.

9.1.3.2 Mutual Recognition Principle

A more modern principle that could inspire transnational evidence gathering is the principle of mutual recognition, the general features of which have already been analysed (see Chap. 7). Such principle presumes a higher level of integration of State procedural systems and leads to direct cooperation between judicial authorities. It is based on the idea that each State trusts the validity of evidentiary rules of other States, in order to achieve the free circulation of judicial decisions relating to evidence gathering.

Interpreted in the active sense of the term, the principle of mutual recognition means, as already pointed out before, implies the adoption of the order model: the interested judicial authority issues an order to collect the evidence to the competent judicial authority of the State where such evidence is located; the order is not subject to any filter by political organs, cannot be refused and must be executed in application of the evidentiary rules in force in the issuing State (*lex fori*).

The principle of mutual recognition offers the advantage of favouring fast evidence gathering, thanks to the lack of political checks and to the impossibility to refuse to execute the order. However, the differences between the evidentiary rules that still exist in the various national systems make it difficult to fully realise it. States are not willing to apply all the evidentiary rules of the other systems, in particular when these rules might prejudice the protection of the defence rights or the reliability of the evidence to be gathered.

In particular, States such as Italy and England that have a procedural system based on the fact that, as a rule, evidence is collected in the public trial might not easily accept the logic of systems that grant evidentiary value to pre-trial investigations.

More generally, the mutual recognition principle can be challenged because it aspires to apply the economic idea of freedom of movement of goods and services to criminal law and criminal proceedings, while in this particular sector what must be privileged are the reasons of individuals. As a consequence, a too strict realisation of such principle would require diminishing the protection of fundamental rights in favour of the State's repressive needs.

That explains why, as we will see below, notwithstanding some explicit declarations of intent, the European legislative acts in force concerning evidence gathering do not transpose the principle of mutual recognition in full but mitigate it with a series of limitations aimed at preserving the most relevant evidentiary rules of the State where such evidence is located.

9.1.3.3 Harmonisation of National Regulations

Mutual recognition would be less problematic with harmonisation of the law of evidence. Such an activity, which consists in the maximum possible homogenisation of the various national legislation, is expressly regulated in the already mentioned Art. 82.2.a–c TFEU. The latter provides that the Union, by means of directives adopted in accordance with the ordinary legislative procedure, may establish minimum rules concerning mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure and the rights of victims of crime.

This legal basis is leading to the approval of a series of directives in this field. It is possible to mention, in particular, Directive 2012/29/EU on the protection of victims of crime, which comprises some dispositions concerning the hearing in criminal proceedings of victims of crimes and of vulnerable witnesses (see Sect. 9.5.4).

An additional thrust for the approximation of national legislation concerning criminal evidence comes from the decisions of the European Court of Human Rights and the Court of Justice of the European Union, which have full jurisdiction over the interpretation and application, respectively, of the ECHR and the CFREU. However, it is important to point out that these two courts' jurisprudence, considered by itself, is often tailored to the particular circumstances of the individual cases and, moreover, is capable of expressing only a minimum level of protection of fundamental rights. Therefore, it is not enough to grant a sufficient level of harmonisation.

In addition, if harmonisation can favour mutual recognition, the inverse is not necessarily true. Fully applied, the mutual recognition logic would allow the individual national rules to survive and to maintain their individual characteristics. This would prevent any further development of harmonisation, hindering the creation of a unified European criminal process in the long run.

9.1.4 Current Regulations on Evidence Gathering

Currently, evidence gathering within Europe is regulated by a large number of legal sources: multilateral conventions, bilateral conventions and legislative acts of the European Council and of the European Union, which are specified and integrated by the case law of the European Court of Human Rights and of the Court of Justice of the European Union. The common characteristic of these sources is that they have asymmetric operative contexts: they are not in force between the same States, and they do not regulate the gathering of the same kinds of evidence. Their applicability depends on whether or not they have been transposed in the internal legislation of States involved in the activity of evidence collecting. Their interweaving and overlapping make analysing them problematic and result in many practical drawbacks: it is not always easy to find the most legally correct tool for gathering certain evidence.

In addition, in actual practice, many evidence-gathering operations are carried out based on spontaneous judicial cooperation. This happens when evidence is gathered based on informal, case-by-case agreements between the judicial authorities of the individual States. It is a practice that defers the evidence-gathering operations to the good will of the investigative bodies concerned, leading to one-time solutions that do not reflect the need of uniformity that should apply in this sector.

However, for our purposes, it is better to focus our attention on legislative acts in force among the largest number of States, from which it is possible to clarify certain basic rules. What can be inferred by examining these acts is that the fundamental instrument to be used to acquire evidence at the European level is the newborn European Investigation Order (EIO). The traditional letter rogatory is still in force, but now, as we will see, it has a much more reducted operational scope.

In 2008, moreover, the letter rogatory was joined by the European Evidence Warrant (EEW), which was more limited in scope and had been expunged in 2016.

9.1.5 Letter Rogatory

The letter rogatory is based on the above-mentioned principle of mutual assistance. It consists in a request for evidence collection from one State to another, which is subject to a whole series of controls.

The related dispositions can be found in various bilateral and multilateral mutual assistance conventions and in the internal rules of States that refer to such conventions. After the entry into force of the EIO Directive, the letter rogatory can be used when evidence gathering interests States that do not belong to the European Union: for example, Iceland and Norway. Also, it can be used when evidence gathering involves EU States that have not signed the EIO Directive (in particular, Denmark and Ireland).

The most important are the Convention of the Council of Europe on Mutual Assistance in Criminal Matters (signed in Strasbourg on 20 April 1959 and entered into force on 12 June 1962), its first Protocol of 1978 and its second Protocol of 2001; the Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic (drawn up on 19 June 1990 and entered into force on 26 March 1995); the Convention on Mutual Assistance in Criminal Matters of the European Union (drawn up on 29 May 2000 and entered into force on 23 August 2005), which completes and modernises the dispositions of the 1959 Convention, as well as its Protocol of 2001; the United Nations Convention Against Transnational Organized Crime (signed during the Palermo conference of 15 December 2000).

These conventions provide the possibility to use letters rogatory to acquire any kind of evidence. They also preserve the possibility of applying more favourable dispositions contained in agreements in force between two or more States (Art. 26 Convention of 1959 and Art. 1.2 Convention of 2000).

Their dispositions provide three fundamental articulations of the investigation activities: the request, the refusal and the execution of the letter rogatory. The admissibility of the evidence collected, instead, is regulated by national law.

9.1.5.1 The Request

In general, a letter rogatory can be requested whenever a judicial authority considers it necessary to acquire evidence that is located abroad and that seems to be relevant for internal criminal proceedings.

The principle of mutual assistance implies that the request for a letter rogatory must be subject to governmental controls on the activity of evidence gathering in order to protect the national interests of the States concerned.

The original text of Art. 15 Convention of 1959 provided that, except in emergency situations, such controls had to be carried out through a preliminary examination of the admissibility of letters rogatory by the ministries of justice of the requesting State and of the requested State. The resulting lengthy and muddled procedure led to the introduction of the direct transmission of the letters rogatory between the competent judicial authorities (see Art. 53 Convention Implementing the Schengen Agreement and Art. 6 Convention of 2000).

9.1.5.2 The Refusal

The State where the evidence is available is not necessarily obliged to accept the request for a letter rogatory. It can reject such request on the basis of predetermined grounds for refusal.

First of all, such grounds concern the criminal relevance of the facts object of the proceedings. We refer to the rule of double incrimination (Art. 5.1 Convention of 1959), which provides that the execution of the letter rogatory can be refused if the proceedings do not concern a fact that is also considered a crime under the law of the State where the evidence is located. The double incrimination rule works, in particular, when the letter rogatory is for a search or seizure (Art. 51 Convention Implementing the Schengen Agreement), taking into consideration how such searches might impinge on fundamental rights.

The purpose of the double incrimination rule, as mentioned before concerning the discipline of the European Arrest Warrant (see Sect. 8.1.2.1), is to avoid prosecution based on ideological reasons while also saving resources.

Article 5.1.b Convention of 1959 adds a complementary rule to the one of double incrimination: the requested State can deny the execution of a letter rogatory when the criminal offence cannot lead to extradition according to its domestic legislation. Article 2.a provides the same when a political crime comes into play.

A second kind of ground for refusal is focused on the needs of national security: it is possible to reject the letter rogatory when gathering evidence is likely to prejudice

the sovereignty, security, public order or other essential interests of the requested State (Art. 2.b Convention of 1959; see also Arts. 18.13 and 21.b Convention on Transnational Organized Crime).

Finally, the letter rogatory must be rejected when it would lead to a violation of the fundamental principles of the requested States' domestic law (Art. 5.1.c Convention of 1959, Art. 51.b Convention Implementing the Schengen Agreement, Art. 18.21.d Convention on Transnational Organized Crime and Art. 4.1 Convention of 2000), in application of the already mentioned criterion of the *lex loci*. In these cases, reasons must be given for the refusal to execute the letter rogatory (Art. 19 Convention of 1959 and Art. 18.23 Convention on Organized Crime).

However, we cannot avoid noticing the haziness of the concept of 'fundamental principle', which leaves a wide discretion as to who has to determine what it consists of. In general, national rules that protect the general principles established in the Charter of Fundamental Rights of the European Union and of ECHR, both referred to in Art. 6 TEU, can be considered an expression of fundamental principles.

Beyond these minimum standards, national procedural rules can assume a different structure in the various European legal systems. Consequentially, the range of this ground for refusal changes according to the features of the legal system of the State where the letter rogatory is sent, creating the risk of unequal treatment and insufficient protection of fundamental rights. In particular, there might be differences concerning the need to include in the fundamental principles the exclusionary rules of evidence provided in national systems (see Sect. 7.1.3).

9.1.5.3 The Execution

Normally, the letter rogatory should be executed by the competent authorities of the requested State. However, it is possible that the judicial authorities of the requesting State are not excluded from participating. This form of execution, which can be called 'joint execution', is provided by Art. 4 Convention of 1959 and is allowed with the consent of the requested State.

Concerning the rules of evidence to be observed, Art. 3.1 Convention of 1959, applying the principle of mutual assistance, opts for the pre-eminence of the *lex loci*: the requested State shall execute the letter rogatory 'in the manner provided for by its law' (see also Art. 18.17 Convention on Organized Crime).

From that point of view, Art. 4.1 Convention of 2000 appears to be more innovative, as it provides that the requested State shall observe the formalities and procedures expressly indicated by the requesting State, unless these are conflicting with its domestic fundamental principles of law. In this way, it introduces a hybrid solution between the applicability of the *lex loci* and the use of the criterion—imposed by the logic of mutual recognition—of the *lex fori*. However, taking into account the margins of discretion that, as mentioned above, characterise the identification of such principles, it is unavoidable that, in several cases, the *lex loci* maintains residual operative spaces.

9.1.5.4 Admissibility of the Evidence Collected

Once the letter rogatory has been executed, an issue arises as to the admissibility of the evidence collected in the proceedings pending in front of the requesting State—an issue all the more problematic as much as the *lex loci* is different from the *lex fori*.

The existing supranational rules leave the duty to deal with this aspect to the individual domestic legislation. The latter solves it by establishing adjustment mechanisms of each legal system to the foreign one involved from time to time. This solution seeks to grant the respect for others' sovereignty while also ensuring that investigation activities carried out abroad can be effectively used in the domestic territory.

The result is that, in the case of evidence collected in other States, some exceptions to the ordinary rules of evidence are created at the legislative or case law level, which allows the use of investigation methods that, even if not provided by the *lex fori*, are adopted by foreign authorities for the collection of evidence.

The range of such exceptions varies with the legal system concerned. In general, it is not allowed to derogate to rules of evidence that express fundamental principles or values, especially if provided by the ECHR, by the Charter of Fundamental Rights of the European Union or by national constitutions: e.g., in particular, the rules of inadmissibility of evidence collected in violation of the physical integrity or moral freedom of individuals.

An additional adjustment mechanism adopted by some legal systems consists in the possibility for the judge to grant a lower cognitive weight to evidence collected abroad using methods inconsistent with the *lex loci*.

9.1.6 European Evidence Warrant (EEW) and Its Failure

The European Evidence Warrant (EEW) was a more modern instrument, introduced by Framework Decision 2008/978/JHA of the Council of the European Union of 18 December 2008, entered into force on 19 January 2009.

As originally intended, the EEW would have allowed transnational collection of evidence on the basis of the principle of mutual recognition, which is expressly recalled in Art. 1.2 Framework Decision. However, we have already pointed out that the application of this principle in the scope of evidence collection continues to face a number of obstacles. This explains why the Framework Decision on EEW, beyond its policy statements, provided considerable exceptions to the logic of mutual recognition, adopting quite a few compromises and outlining an instrument that, in several aspects, was not different from the letter rogatory in its modernised version contained in the Convention on Mutual Assistance of 2000.

But the EEW revealed itself to be an ineffective tool due to its reduced operative scope, far narrower than the letter rogatory. Normally, it could be used only to acquire objects, documents or data available in other States (Art. 4.1). At most, it

could be used to collect statements of people present at the time of its execution (Arts. 4.5 and 6). However, it could not be used to acquire statements from witnesses; to carry out bodily data as DNA samples or fingerprints; to conduct analysis of existing objects, documents or data; to intercept communications; or to obtain telephone or digital traffic data (Art. 4.2). That led to the coexistence of EEW and the letter rogatory (Art. 21.1), which resulted in a fragmentation and an excessive complication of the regulation. It is not surprising that the Framework Decision on the EEW has been repealed by Regulation 2016/95 of the European Parliament and of the Council of 20 January 2016.

9.1.7 European Investigation Order (EIO): The New Face of Evidence Gathering Within the EU

The legislative framework based on the letter rogatory and on the EEW has received many criticisms, as it was considered incoherent and unsatisfying and could excessively hinder judicial cooperation. The most controversial aspect concerned the coexistence of miscellaneous judicial instruments, which resulted in interpretative uncertainties regarding the identification of the most correct investigation means to be used in each case.

Moving from this premise, the possibility to introduce a single European instrument for transnational collection of evidence that could be used in any kind of investigation activity was already suggested in the 'Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility' (Bruxelles, 11 November 2009, COM(2009)624).

Point 3.1.1 of the Stockholm Programme moved in the same direction. It hoped for the adoption of a new approach that, even if inspired by the principle of mutual recognition, would have taken into account the flexibility of the traditional system of mutual legal assistance.

Distinguished by a difficult gestation, Directive 2014/41/EU on the European Investigation Order (EIO) has finally put these intentions into effect. The EIO—in force starting on 22 May 2017—can be used to collect any kind of evidence, with the exception of investigation activities carried out by joint investigation teams (Art. 3 Directive).

However, the Directive gave up a full realisation of the principle of mutual recognition. The result is a regulation that is partially similar to the letter regulatory (recital 6), partially recalls the EEW and partially introduces significant innovations. In particular, the Directive provides four essential articulations of the investigation activities: the issuance, the refusal, the execution and the appeal of the order. The admissibility of the evidence collected, for its part, is regulated by national law.

9.1.8 Follows: Framework of the Investigation Activities

9.1.8.1 The Issuance

The EIO can be issued not only by a judge or by a prosecutor but also by any other authority that is competent to carry out investigations according to national law. This does not exclude the police; however, in this case, the EIO should be validated by a judicial body (Art. 2.c), so that the execution of activities that might affect fundamental freedoms would not be entirely left in the hands of the public security authorities.

With the intent to foster the right of defence, Art. 1.3 adds that the issuance of an EIO can be requested by the accused or by his/her lawyer in the Framework of the defensive powers recognised by national law.

Normally, the EIO must be transmitted directly by the issuing judicial authority to the executing authority. However, the possibility to provide governmental controls is retained: each State can designate a central authority to assist the competent judicial authority for the issuance (Arts. 7.3 and 16.1).

Article 6.1 adds that the EIO can be issued only when the requested investigation acts are admissible under the same conditions in a similar domestic case, in order to prevent the search of evidence abroad from turning into an opportunity to avoid the corresponding domestic rules. In addition, it is provided that the issuance of an EIO must be necessary and proportionate for the purpose of the proceedings. In this way, the Directive welcomed the suggestion, which had been proposed by many scholars, to include a proportionality test: the latter, which, as we will see, also concerns the executing authority, is needed to prevent performing transnational evidence collection through an EIO based on an unreasonable balancing of the values at stake.

9.1.8.2 The Refusal

As for the letter rogatory, the executing authority can abstain from executing the EIO in the presence of a predetermined set of grounds for refusal. The number and scope of the latter show the will of the Directive to introduce substantial derogations to the principle of mutual recognition.

A first category concerns the criminal relevance of the facts object of the proceedings and operates when the investigation acts are coercive (Art. 11.2): in particular, when they interfere with the right to privacy, such as personal searches and seizures in private places and interception of communications (recital 16).

It is the classic requirement of double incrimination (Art. 11.1.g), with the addition of the possibility of refusing execution when the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences that does not include the offence covered by the EIO (Art. 11.1.h); let us refer to the interception of communications, often limited by national legislation to proceedings concerning significantly serious criminal offences.

However, relating to some criminal offences set out specifically in a list (Art. 11.1.g and attachment d), the Directive adds a waiver of double incrimination. The list comprises offences punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least 3 years, which are considered serious enough to justify the collection of evidence through the EIO even if they do not constitute an offence under the law of the executing State.

A second category of grounds for refusal concerns situations where the issuing State does not appear legitimated to carry out its own punitive power: either because the criminal offences at play have already been subject to proceedings ending with a final decision in the executing State, and therefore the principle of *ne bis in idem* applies (Art. 11.1.d; see 10.1), or because such proceedings refer to acts presumed to have been committed outside the territory of the issuing State and, wholly or partially, in the territory of the executing State while at the same time not constituting a criminal offence in the executing State (Art. 11.1.e).

A third category of grounds for refusal refers to situations of objective impossibility. This happens when the law of the executing State provides immunities or privileges (Art. 11.1.a) or when the requested investigation act does not exist in the executing State or is not available in a similar domestic case (Art. 10.5), and there are no alternative measure that can have the same results (Art. 10.1).

We must add that the Directive identifies a series of investigation measures that must always be available under the law of the executing State: the acquisition of evidence already possessed by the executing authority; the acquisition of information contained in the databases of investigative bodies; the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State; the non-coercive investigation measures; the identification of people holding telephonic and informatics lines (Art. 10.2). The result is an embryonic form of harmonisation of national regulations, even if we cannot ignore that they all are investigative measures that are generally provided in national legal systems.

A fourth category is linked to the protection of national security: the EIO can be refused when its execution could harm essential national security interests, jeopardise the sources of information or involve the use of classified information (Art. 11.1.b).

The last and most important category concerns respecting fundamental rights. In fact, the execution of the EIO can be refused when there are substantial grounds to believe that it would be incompatible with the obligations imposed by Art. 6 TEU, which prescribes compliance with the Charter of Fundamental Rights of the European Union, of ECHR and of the common constitutional traditions of Member States (Art. 11.1.f, as well as Art. 1.4). Article 10.3 Directive specifies that the executing authority may also have recourse to an investigative measure other than that indicated in the EIO where the investigative measure selected by the executing authority would achieve the same result by less intrusive means.

What follows is the need for a proportionality test, as provided more in general in Art. 52.1 of the Charter of Fundamental Rights of the European Union: as already mentioned, as the issuing authority, the executing authority must ascertain that in

each concrete situation, the investigation acts indicated in the EIO are prejudicial to fundamental rights only in the measure that is strictly necessary to carry them out and that they do not impair the essential core of such rights. The introduction of this control was received favourably by scholars, taking into account the negative experiences accrued with the operative practice of the Framework Decision on the European Arrest Warrant (which, on the contrary, does not provide an explicit proportionality test: see Sect. 8.3.3.1).

9.1.8.3 The Execution

When it is not possible to invoke any grounds for refusal, the EIO must be executed without any further formality being required, as if it was a national investigation act (Art. 9.1). It must be executed with the same speed as for a similar domestic case and, in any case, within 30 days of receiving the order, unless the issuing authority advances particular urgency reasons (Art. 12). It can also be postponed if it might prejudice an ongoing criminal investigation or prosecution or if the evidence requested is already being used in other proceedings (Art. 15).

Concerning the rules of evidence gathering, it is stipulated—as was already provided in the Convention on Mutual Assistance of 2000 concerning letters rogatory and in the EEW Framework Decision—that the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, unless they are contrary to the fundamental principles of law of the executing State (Art. 9.2).

Moreover, an innovative feature of the Directive is to widen the operative scope of joint evidence gathering: the executing authority can refuse the latter only when the participation of the issuing authority would conflict with the fundamental principles of its domestic law or would harm national security interests (Art. 9.4).

9.1.8.4 The Appeal

In this regard, the Directive conforms itself to the Framework Decision on EEW, and it establishes the option to appeal the EIO (Art. 14).

The opportunity to provide for the power to appeal evidence-gathering acts carried out at the European level is controversial. Some point out that the appeal would hinder the speed and efficiency of evidence collection. Others reply that it is nonetheless essential to protect the rights of the accused and of third parties that are involved in the investigation operations.

The Directive joined this last approach, diversifying the legal remedies against the EIO. In general, States involved in evidence collection must ensure means of appeal equal to the means available in similar domestic cases (Art. 14.1). That would consent to appeal the EIO, for example, when the executing authority has not

followed the formalities and procedures indicated by the issuing authority that are not against the fundamental principles of its domestic law.

For its part, the substantive grounds on which the EIO is issued can be challenged only in front of the competent authority of the issuing State, without prejudice to the guarantees of fundamental rights in the executing State (Art. 14.2).

The Directive also specifies that the appeal does not suspend the execution of the investigation measures, unless the effect of suspension is provided in similar cases by domestic law (Art. 14.6).

9.1.9 Follows: Admissibility of the Evidence Collected

Similarly to the letter rogatory regulation, the EIO Directive does not provide a specific regime of admissibility in domestic proceedings of evidence collected abroad (except a specific exclusionary rule that concerns interceptions, which we will discuss below; see Sect. 9.3.4). This is due to the already mentioned difficulties faced by States to agree on the provision of unified evidentiary rules and even to merely harmonise their internal regulations.

The fact that Art. 9.2 Directive requires that the use of investigation measures indicated by the issuing authority should not conflict with the fundamental principles of the domestic law of the executing State does not guarantee the full respect of *lex fori*. As already mentioned concerning the similar disposition provided in the Convention on Mutual Assistance of 2000 concerning letters rogatory, such provision leaves wide margins for the executing authority to substitute the *lex fori* with the *lex loci*.

Several scholars point out how the lack of common admissibility rules for the acquired evidence risks frustrating the cooperation: evidence collected might be lost due to the differences between the *lex loci* and the *lex fori*.

As already mentioned, in the context of letters rogatory such problem is solved thanks to a process of mutual adjustment of the legal systems: the States that request the investigation measures introduce exceptions to their evidence rules so that evidence collected under the *lex loci* is admissible. However, in several cases, this expediency leads to lowering the national standards, pushing the systems to apply evidentiary rules that do not provide sufficient guarantees for the fundamental rights or are not able to satisfy the cognitive needs of criminal proceedings.

Within the scope of the EIO Directive, as above mentioned, Art. 6.1 provides that the EIO can be issued only when the investigative measure could have been ordered under the same conditions in a similar domestic case. This means that the evidence collected should be subjected to the rules of admissibility provided by the *lex fori*.

On the contrary, the exclusionary rules that depend on the techniques of evidence gathering are defined by the outcome of the proportionality test of the fundamental rights restriction. It should not be disregarded that the result is the establishment of rules of judicial creation. Thanks to the proportionality test, judicial authorities involved in the evidence gathering have the possibility to balance the repressive needs underlying the investigation acts with the fundamental rights on the basis of

the particularities of each actual case. The content of the exclusionary rules, which will be perfected and more articulated with the development of the case law and the inputs by the Court of Justice, will derive from such balances.

In any case, these exclusion rules should be inspired by a reasonable reconciliation of all values at play, also taking into account the need to ensure the same level of protection of fundamental rights established by national constitutions and by the ECHR (Art. 52.3–4 and Art. 53 of the Charter of Fundamental Rights of the European Union; on this point, see Sect. 2.1.4).

We must add that the investigation methods used in practice are likely to affect also the evaluation of evidence. Article 14.7 Directive specifies that, without prejudice to national procedural rules, States shall ensure that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. This provision might lead to a form of mitigation of the cognitive weight of evidence collected with rules different from the ones provided in the *lex fori*, as already happens concerning letters rogatory.

9.2 Searches and Seizures

Ersilia Calvanese

9.2.1 The Application of Mutual Recognition in Judicial Cooperation on Searches and Seizures

The judicial cooperation between Member States of the European Union for the execution of search and seizure measures for evidentiary purposes has been characterised by a long and tortuous path that should have led to the adoption of a nimble and simplified instrument based on the principle of mutual recognition.

However, the results overall achieved are quite unsatisfactory, especially if compared with the ones that characterised the European Arrest Warrant.

Indeed, notwithstanding the remarkable efforts, Member States showed in this field a higher resistance to abandon the traditional rules of intergovernmental cooperation, characterised by the model of the classic letter rogatory, where the request of assistance must be necessarily examined through an *exequatur* procedure before its execution and where the decision requires long and uncertain times.

The current legal framework is, therefore, characterised by a partial and uncertain application of the principle of mutual recognition, which has lead, since 2014, the European bodies to review the traditional approach, consisting in the adoption of a specific instrument regulating this matter.

9.2.2 The Seizure and Freezing of Property in Framework Decision 2003/577/JHA

In a historical perspective, the first instrument, through which the European Union regulated the search of evidence according to the mutual recognition principle, was Framework Decision 2003/577/JHA of 22 July 2003.

Such Framework Decision created a simplified cooperation mechanism limited to the preliminary phase of 'freezing', leaving unchanged the rules concerning the subsequent treatment of the frozen property located abroad.

The word 'freezing' was referred to all the measures, however named in the Member States, adopted by a judicial authority to provisionally prevent any act aiming at destroying, transforming, moving, transferring or selling assets that could be used as evidence.

Similarly to all the mutual recognition procedures, the Framework Decision provided for the transmission of a standard form (the 'certificate') containing the information essential for the cooperation; in addition, the double criminality rule was not applied with regard to a list of specific criminal offences, relating to which it was sufficient for the issuing State to certify that the seizure to be executed was referred to one of the listed crimes.

Finally, the issuing authorities had to specify whether the gathered evidence had to be directly transferred to the issuing State or provisionally conserved by the executing one while waiting for the transmission.

In order to ensure celerity, the recognition procedure was limited to a control on the completeness and regularity of the documents sent and provided a list of mandatory and limited hypothesis of non-recognition or non-execution of the requested measure.

Once the property had been seized, the issuing State had to transmit a specific request of judicial intergovernmental assistance, following the traditional rules, in order to obtain the transfer of the property, which, in the meantime, remained frozen.

Therefore, the freezing mechanism, due to the fact that it was limited only to the precautionary phase concerning evidence gathering, resulted in a two-headed procedure, which proved ineffective in the practice.

9.2.3 From the EEW to the EIO

The deficiencies of the aforementioned procedure should have been settled by Framework Decision 2008/978/JHA of 18 December 2008 on the EEW, which concerned all the judicial seizure measures and established the application of the mutual recognition principle to the whole procedure, including both the seizure and the subsequent treatment of the seized property.

Even if the 2008 Framework Decision overlapped with the 2003 Framework Decision, it did not repeal the latter, as it can be inferred from Art. 9, which expressly mentioned it.

However, for its part, the 2008 Framework Decision on EEW was deeply criticised, in particular due to the fact that it was limited to certain kinds of evidence (in particular, the pre-existing ones) and to the fact that it provided for a large list of ground of refusal. This led the European Union to adopt a different model for cross-border evidence gathering, keeping up with the new challenges posed by criminality.

In this perspective, according to the Stockholm Programme, adopted by the European Council of 10–11 December 2009, which aimed to create a global system of evidence gathering in cross-border cases, Directive 2014/41/EU on the EIO, avoiding any fragmented regulation in this matter, is applicable also to searches and seizures for evidentiary purposes (see Sect. 9.1.7).

9.3 Interceptions and Digital Investigations

Marcello Daniele

9.3.1 General Aspects

Let us now focus our attention on two means of collecting evidence based on the use of technology that are widely detrimental to the fundamental right to privacy, which is protected by national constitutions and is the object of the already mentioned provisions of Art. 7 of the Charter of Fundamental Rights of the European Union and of Art. 8 ECHR (see Sect. 3.3.2).

We refer to interceptions of conversations or communications and also to investigations that lead to the acquisition of digital evidence that can be found in informatics systems and networks, as well as of telephone and network data traffic kept by service providers.

The latter are useful for tracing and identifying the source or destination of a communication, determining the relevant date, time and length, and establishing the position of the used devices.

There is a clear conflict with the privacy of individuals resulting from the use of such investigation means. The cognitive value of interceptions is based on the circumstance that communicating individuals do not know that their voices are being intercepted, and, as a consequence, investigative bodies inevitably discover confidential information. Furthermore, digital evidence is often mingled with private data that are irrelevant for the criminal proceedings. Potentially, the analysis of informatics systems and networks can reveal the content of entire lives: habits, political opinions, preferences of any kind.

Interceptions and digital investigations rise to a transnational dimension essentially in two situations: when they cannot be implemented by a State without the assistance of another State or when their object is evidence sources or pieces of evidence located outside the national territory.

Concerning their legal discipline, transnational interceptions and digital investigations are mainly regulated by Conventions on letters rogatory (in particular, the Convention on Mutual Assistance in Criminal Matters of the European Union of 2000) in relation to the States that do not belong to the European Union and by Directive 2014/41/EU on the European Investigation Order (EIO) in relation to EU countries. Digital investigations find also a specific discipline in the Convention of the Council of Europe on Cybercrime drawn up in Budapest in 2001.

The Budapest Convention includes some minimum provisions concerning digital investigations that should be implemented by the individual national legislation, with the purpose of harmonising their legal systems.

9.3.2 Essential Guarantees

The regulation on transnational interceptions and digital investigations that can be found in the above-mentioned sources of law was criticised because it appears to be patchy and incomplete, particularly concerning the regime of admissibility of the evidence collected.

However, we should not forget that such rules must be integrated with the guarantees deriving from Art. 8 ECHR and Art. 7 of the Charter of Fundamental Human Rights of the European Union, as interpreted by the European Court of Human Rights (among others, see ECtHR, 4 December 2015, *Roman Zakharov v. Russia*, concerning interceptions, and ECtHR, 3 July 2012, *Robathin v. Austria*, concerning digital investigations), as well as by the Court of Justice of the European Union.

The result is that interceptions and digital investigations must be regulated by legal provisions being sufficiently clear and accurate and subject to independent supervision: evidence collection must be authorised or at least subject to an *a posteriori* control by a judge.

Moreover, evidence collection must not result in abuses and must not be done arbitrarily. Hence, there is a need for it to be expressly justified: for example, referring to reasons to believe that a crime has been committed and to the fact that the interceptions are strictly necessary or to the reasonable suspicion of the existence, in a computer system or in a network, of digital data relevant for the proceedings.

Finally, it is necessary to grant to the defence a power of control on investigation activities, as is also provided in Art. 48 of the Charter of Fundamental Human Rights of the European Union. Such control must consist in the active participation by the lawyer or, where this is not possible, in the possibility to carry out appropriate appeals. This means that at least the control at stake should be carried out after the collection of evidence, which should be fully documented.

The need to comply with those guarantees is likely to guide the interpretation of European and national regulations on letters rogatory. In addition, when an EIO is issued, such need will justify the non-application of national rules that do not provide those guarantees, also taking into account the proportionality test imposed by Directive 2014/41/EU (see Sect. 9.1.8.1) and, more generally, by Art. 52.1 of the Charter of Fundamental Rights of the European Union and the 'necessary in a democratic society' clause under Art. 8.2 ECHR.

9.3.3 Interceptions with Technical Assistance of a Foreign State

Now we can turn our attention to the dispositions on transnational interceptions that can be found in the Convention on Mutual Assistance of 2000 and in the EIO Directive. It is possible to derive various kinds of interceptions, distinguished on the basis of the level of involvement of foreign States in conducting the operations.

One kind—regulated under Art. 18 Convention of 2000 and Art. 30 EIO Directive—comes into play whenever a State that does not have the necessary technology needs the technical assistance of another State to carry out an interception, regardless of where the person being intercepted is located.

In this case, the interested State must send a request of letter rogatory or send an EIO to the competent judicial authority of the State that should carry out the interception.

It is necessary to add to the letter rogatory or to the EIO a request of transmitting telecommunications immediately to the issuing State, or of intercepting, recording and subsequently transmitting the outcome of interception of telecommunications to the issuing State (Art. 18.1 Convention of 2000 and Art. 30.6 Directive).

The request of a letter rogatory must meet the requisites of domestic law of the State that formulates it (Art. 18.1 Convention of 2000). Article 30.4 EIO Directive adds that the issuing authority must state the reasons for which it considers the interception useful for the criminal proceedings—a requisite that, in light of the principle of proportionality, must be intended so that the interception must be not merely relevant but also necessary to carry out the investigation.

In addition, the interception must be admissible in a similar case in the legal system of the State whose assistance is needed (Art. 18.4–6 Conventions of 2000 and Art. 30.5 Directive). Nor must it be forgotten that, in case of the use of an EIO, the grounds for refusal for coercive investigation measures apply (see Sect. 9.1.8.2).

On the other hand, the EIO Directive does not impose the issuing authority or the executing authority to necessarily be judges. On this point, it is in tension with Art. 7 of the Charter of Fundamental Human Rights of the European Union and Art. 8 ECHR. Therefore, it would be beneficial for the Court of Justice to provide a restrictive interpretation so as to ensure the guarantee of a judicial review.

9.3.4 *Interceptions Without Technical Assistance of a Foreign State*

The Convention on Mutual Assistance of 2000 and the EIO Directive both provide the possibility to carry out an interception without the technical assistance of another State.

In this case, the Convention of 2000 makes a distinction between whether the State concerned with the necessary technology has or does not have a connection between its territory and the satellite systems on which the communications pass through.

If the State concerned does not have its own input station to satellite systems, Art. 19 Convention provides the option to relay on a provider of telecommunications services able to use an input station located in another State.

In the latter case, the interception is allowed if the person to be intercepted is located within the territory of the State concerned and if it is admissible on the basis of the applicable domestic law (Art. 19.2 Convention of 2000). Such method of interception can also be used to carry out an interception requested by another State under Art. 18 Convention of 2000.

On the other hand, Art. 20 Convention of 2000 and Art. 31 Directive on the EIO regulate the hypothesis where the State concerned has its own input station and the interception relates to a person resident abroad. They provide that the State can directly carry out the interception, under the condition that the latter is authorised by the competent national authority and that the State where the service to be intercepted is located is informed so that it can provide its consent. The informed State can ask not to carry out or to suspend the interception when it considers it to be against its domestic law. In case of use of an EIO, also the grounds for refusal provided for coercive investigation measures apply (see Sect. 9.1.8.2).

When the informed State dissents, Art. 31.3.b of the EIO Directive establishes a proper exclusionary rule: the State can order the inadmissibility of any result of the interception that has already been obtained or that the results of the interception may only be used under certain conditions, by communicating the reason for such limitations to the authority that requested the interception.

Finally, it is appropriate to add that the rules prescribed in the EIO Directive disqualify the practice of routing of communications with foreign services in communication nodes located in a State and their uptake without informing the foreign State concerned. Such practice, which is often tolerated by national States, would lead to the circumvention of the Directive and should be banned by the Court of Justice.

9.3.5 *Digital Investigations: Foreword*

Digital evidence is capable of bringing relevant information for the ascertainment of any criminal offences; therefore, it has a potentially unlimited operational scope.

That explains why Art. 14.2 of the Budapest Convention on cybercrime provides procedural rules applicable not only for the repression of computer crimes, but also for the research of electronic evidence of other crimes.

9.3.6 The Harmonisation of Internal Rules on Collection of Digital Evidence

Having the purpose of providing instructions for the harmonisation of evidentiary rules, Art. 15.1 of the Budapest Convention states that digital investigations are in general subject to the conditions and guarantees provided under the domestic law of each State, which will ensure the proper protection of human rights and freedoms, as well as compliance with the principle of proportionality.

Article 15.2 of the Budapest Convention states the need to observe minimum guarantees derived from Art. 8 ECHR and Art. 7 of the Charter of Fundamental Human Rights of the European Union: national legislators must provide judicial or other independent supervision, grounds justifying application and limitation of the scope and the duration of such power or procedure. At the same time, they have to consider the impact of digital investigations upon the rights, responsibilities and legitimate interests of third parties.

Article 18 and onwards in the Budapest Convention identify certain specific means of digital evidence collection. These are, in particular, the production order, which the judicial authority can address to entities and service providers resident within its territory who are in possession of evidence relevant to the purposes of a criminal trial and contained in a system or in a computer data-storage medium; the search and seizure of computer systems and computer data-storage media, with the possibility to create and keep a copy of the data, which have to be kept intact; the interception of digital data related to the content of communications in its territory transmitted by means of a computer system, which will be allowed for a list of serious criminal offences that must be indicated in the domestic law and only if the latter allows this kind of investigation measure; and the real-time collection of traffic data, subject to the condition that it is not against domestic law.

Traffic data had to be retained through the methods and security measures stipulated by Art. 4 of Directive 2006/24/EC, which provided the access to such data by competent national authorities in cases specifically indicated in the domestic law and on the basis of procedures that had to comply with the guarantees of the ECHR and with EU regulations. However, in the decision of 8 April 2014, C-293/12 and C-594/12, *Digital Rights Ireland*, the Court of Justice held that this Directive was invalid due to a violation of the rights for the respect of private life, protection of personal data and freedom of speech (Arts. 7, 8 and 11 Charter of Fundamental Human Rights of the European Union). The Court observed that, in the absence of rules that would oblige the ascertainment that the data retention was truly essential to

the fight against criminality, the Directive allowed such retention of an unlimited amount of data concerning the private lives of people for an unreasonable period of time.

More recently, in the decision of 21 December 2016, C203/15 and C698/15, *Tele2 Sverige AB*, the Court of Justice added that also Art. 15 of Directive 2002/58/EC on the processing of personal data, which allows the national States to adopt legislative measures to restrict the scope of fundamental rights involved in order to prevent, investigate, detect and prosecute criminal offences, must be read in the light of the Digital Rights Ireland decision. This means that such article must be interpreted as precluding national legislation that, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. The Court stated that it is also necessary that the access to the data is subject to prior review by a court or an independent administrative authority.

9.3.7 Transnational Collection of Digital Evidence

One last group of dispositions in the Budapest Convention concerns the forms of mutual assistance that a State must ensure when the search of evidence arises to a supranational dimension.

The juridical instruments that can be used for that purpose are the letter rogatory or the EIO, which the judicial authority of a State can issue when it needs to acquire digital evidence that is located in the territory of another State.

In particular, the EIO can be used to collect evidence elements in real time (for example, the monitoring of banking transactions or the online search of informatics systems). In these cases, the acquisition can take place only for a given time, and the issuing authority must state the reasons why the requested information should be considered useful for the criminal proceedings concerned: a requisite that, in application of the principle of proportionality, must be identified with the necessity rather than the mere relevance of such information. Finally, the refusal to execute the order must be based not only on the already analysed general rules related to coercive investigation acts but also on the fact that it would not have been permitted for a similar domestic case (Art. 28 EIO Directive).

The Budapest Convention also provides additional dispositions aiming to satisfy the needs of expediency that often characterise digital investigations. We refer to the possibility to send the letter rogatory through instantaneous means of communication such as fax and e-mail (Art. 25.3 Budapest Convention). We must add that the request for search and seizure concerning data stored by means of a computer system issued by one State to another must be responded to on an expedited basis where there are grounds to believe that relevant data are particularly vulnerable to loss or modification (Art. 31 Budapest Convention). Furthermore, each State must

designate a continually available point of contact between judicial authorities (24/7 network) in order to guarantee immediate assistance (Art. 35 Budapest Convention).

Finally, Art. 27 of the Budapest Convention regulates the case when no treaties or agreements of mutual assistance are in force between the requesting State and the requested State.

In this scenario, each State must designate a central authority that is responsible for sending and answering requests for mutual assistance. Such requests must be executed in compliance with the rules specified by the judicial authority of the requesting State, unless they are conflicting with the legislation of the requested State. There are also grounds for refusal of the request that are connected with the political nature of the offence and with a possible prejudice for the sovereignty, safety or public order of the requested State.

In any case, digital investigations through mutual assistance between States will be outdated when, due to the use of cloud computing, digital evidence will not be available in single physical storage systems but will be found in informatics networks accessible from anywhere.

9.4 Collection and Transmission of DNA Profiles

Marcello Daniele

9.4.1 General Aspects

The use of DNA profiles for the purposes of criminal investigations is one of the most significant contributions of science to trials. The examination of DNA—the molecule contained in every living being that contains the genetic information that distinguishes it from all other organisms—often has a decisive role in identifying the perpetrator of criminal offences. This evidence is extremely delicate, and its cognitive contributions cannot be separated from the use of strict scientific methods.

The operations that lead to the acquisition and transmission of DNA profiles between States can have repercussions on various fundamental rights: not only the right to dignity, health and liberty of the people subjected to the collection (Art. 5 ECHR and Art. 6 Charter of Fundamental Human Rights of the European Union) but also the right to privacy (Art. 8 ECHR and Art. 7 Charter of Fundamental Human Rights of the European Union: see Sect. 3.3.2), considering that such activities allow knowing information that is otherwise considered sensitive data.

The supranational regulations on this topic have their most important source in the Prüm Convention on cross-border cooperation of 2005, whose content was implemented by the Union legislation with Decision 2008/615/JHA (the so-called Prüm Decision). We have already analysed its dispositions concerning the activity of

police cooperation and the actors of judicial cooperation (see Sect. 6.1.7). Now it is worth highlighting the investigational powers provided under these dispositions, which are intended to favour the circulation of genetic profiles of people suspected of criminal offences between the various States, completing the general rules concerning letters rogatory in this respect. The result is a unified system of collection and transmission of DNA profiles, which has the purpose of providing remedy for the deficiencies of the more traditional methods of exchanging DNA profiles between the single States—methods that often would not offer the police or judicial authorities the necessary information to identify the States where relevant profiles could be reached and that would burden the requested authorities with the duty to carry out all the necessary activities to identify and compare such profiles.

Other dispositions can be found in Decision 2002/187/JHA, modified by Decision 2009/426/JHA, which allows Eurojust to retain and use the DNA profiles of suspects (see Sect. 5.2.4). It is also important to recall Directive 2016/680/EU on personal data of 27 April 2016, which, starting on 6 May 2018, has replaced the Framework Decision of the European Union 2008/977/JHA on the protection of personal data.

In addition, in relation to EU States, it is now necessary to carry out the transnational collection of DNA profiles through the European Investigation Order as provided in Directive 2014/41/EU.

In any case, the legislation regulating the activities at stake must be analysed by distinguishing between the transmission of DNA profiles from one State to another and, if such profiles are not already available, their collection from people's bodies.

9.4.2 Transmission of DNA Profiles Between States

The transmission of DNA profiles comes into play when the judicial authority of a State needs a certain person's DNA profile that is in the possession of another State for domestic criminal proceedings, with the aim of identifying possible suspects.

The procedure at stake must be carried out in the perimeter of the guarantees fixed by the ECHR and by the Charter of Fundamental Human Rights of the European Union, as interpreted by the European Court of Human Rights and by the Court of Justice of the European Union. Hence, there is a need to apply the principle of proportionality, which has the function to mitigate the primary need that characterises DNA investigations within the supranational scope: the realisation of the principle of availability, according to which the investigation bodies of a State have the right to obtain the relevant cognitive data in possession of the authorities of other States (see Sect. 6.1.7).

9.4.2.1 Data Retention

First of all, the result of the principle of proportionality is that each State must process DNA profiles that it could transmit to other States by employing methods that safeguard at least the essential core of the right to privacy under Art. 8 ECHR and Art. 7 of the Charter of Fundamental Human Rights of the European Union.

On this point, it is important to mention the opinion of the European Court of Human Rights (Grand Chamber, 4 December 2008, *S. and Marper v. United Kingdom*), which states that the retention must be provided by sufficiently clear and detailed legal rules in order to prevent the risk of abuse or arbitrary choices. In particular, such rules must regulate the scope and methods for the application of measures, as well as the minimum guarantees to be observed concerning the duration of retention, the use of the processed data, access by third parties, the procedures intended to protect the integrity and the confidentiality of data and the procedure for their destruction. The legislator must be able to ensure not only that the data are useful but also that they are processed in a way that allows the identification of their owner only for the period of time that is strictly necessary for the pursued purposes. Finally, when the proceedings end with the dismissal or the discharge of the accused, the data must be destroyed within a certain period of time.

Directive 2016/680/EU on personal data follows the line traced by the European Court. Article 3 and following provide that personal data—meaning any information relating to an identified or identifiable natural person—may be collected only for specific, explicit and legitimate purposes (including the prevention and punishment of criminal offences), while the processing of such data must be adequate, relevant and not excessive in relation to the purposes for which they are collected. Referring to the processing standards, Framework Decision 2009/905/JHA provides that the scientific labs competent for data processing must be authorised.

9.4.2.2 Data Transmission

Additionally, the principle of proportionality requires the transmission of DNA profiles from one State to another to be strictly necessary for criminal investigations.

For this purpose, Art. 2 and following of the Prüm Convention and Decision provide that the transmission must follow different steps. Single States must create and manage analysis files of DNA examinations and choose a national contact point, meaning an authority that is competent for the transmission of data contained in the files. To grant the full availability of these files, each State must authorise the national contact points of other States to access its files with online connections and to compare the DNA profiles when this is necessary for a criminal investigation.

However, each DNA profile must be arranged so that it does not allow directly identifying the person to whom it belongs. Only when there is a match with a DNA profile already in the possession of the investigating bodies should the contact point of the interested State be able to request the transmission of personal information

concerning the accessed data, which will be carried out in the manner prescribed by the law of the requested State (several national laws consent to the transmission only if the proceedings are concerned with a sufficiently serious criminal offence). The transmission of DNA profiles that cannot be attributed to any person can occur only when it is permitted by the law of the requesting State.

9.4.3 Transnational Collection of DNA Profiles

Article 7 of the Prüm Convention and Decision is also concerned with granting mutual assistance between States in relation to the collection of biological material from people's bodies.

It provides that the judicial authority of a State that wants to acquire the DNA profile of a person who is in another State for the purposes of criminal proceedings has to send a specific request. The judicial authority of the requested State must collect the biological material from that individual, analyse it and transmit the DNA profile, subject to the condition that the requesting State supplies a specific warrant issued by the competent authority in compliance with its domestic law, where it is stated that the collection and the analysis of the data would be admissible in a similar domestic case. The collection, the analysis and the transmission of the data must be carried out on the basis of the methods established by the law of the requested State.

However, given that national rules for the conduct of such activities are not all homogeneous, the requesting State might consider the methods adopted by the requested State insufficient to grant the fundamental rights or the cognitive reliability of the transmitted genetic data. On this point, neither the Prüm Convention and Decision nor the EIO Directive provides any harmonisation of national regulations. What remains is the minimum requirement that the collection of genetic data occurs in compliance with the guarantees fixed by the ECHR and the Charter of Fundamental Human Rights of the European Union, as interpreted by the European Court and by the Court of Justice; this means that, even in this case, it is necessary to apply the principle of proportionality.

In particular, the European Court considers the collection of biological material compliant with the *nemo tenetur se detegere* guarantee. If it is carried out against the will of the accused, it should be executed with methods that are not detrimental to the dignity of the individual or to his/her right to health. Otherwise, the defence should at least have the opportunity to challenge the use of the so-collected evidence, which, in any case, should not be deemed decisive to proclaim a conviction (ECtHR, Grand Chamber, 11 July 2006, *Jalloh v. Germany*).

9.5 Testimonial Evidence Gathering

Marcello Daniele

9.5.1 General Aspects

Finally, it is necessary to draw attention to the regulation of collection of testimonial evidence. With the latter expression, we mean the cognitive elements that consist of statements, i.e. assertions concerning the existence of facts that are relevant for criminal proceedings, which can be assessed in terms of truth or falsity.

As we have already seen (see Sect. 3.2.6), statements that are able to become evidence can be made during proceedings by persons who attended the commission of the facts (witnesses in the strict sense of the term) We can also mention the statements made by the victims of criminal offences, the expert witnesses called by the judge or by one of the parties when it is necessary to deal with questions that require particular technical or scientific knowledge, as well as the accused himself or herself. The collection of testimonial evidence rises to a transnational dimension when it is necessary to acquire statements from a person resident in a State, which appear to be relevant within the scope of proceedings in another State.

In relation to the States that do not belong to European Union, the activity at stake continues to fall within the scope of the principle of mutual assistance, and its legal instrument is the letter rogatory.

Dispositions that are specifically established to regulate this topic can be found, in particular, in the Convention of the Council of Europe on Mutual Assistance in Criminal Matters of 1959 and in the Convention of the European Union on Mutual Assistance in Criminal Matters of 2000.

In relation to EU countries, it is now necessary to assume witness evidence through the European Investigation Order (EIO) according to the dispositions of Directive 2014/41/EU.

The picture is completed with the rules provided for the collection of the statements of victims of criminal offences, provided in a series of sectorial directives of the European Union (Directive 2012/29/EU on the protection of victims, Directive 2011/92/EU on sexual abuse and sexual exploitation of children and Directive 2011/36/EU on human trafficking), as well as in the Convention of the Council of Europe of 2007 on the protection of children against sexual exploitation and abuses (the so-called Lanzarote Convention), which, instead, aim at the harmonisation of national legislation.

9.5.2 *Essential Guarantees: Prohibition of Torture, Right to Silence and Right to Confrontation*

Witness evidence is not pre-existing, but must be collected on the basis of specific procedural rules. From that point of view, each European legal system has an autonomous legislation, varied according to its characteristics and the underlying ideologies.

Some systems, such as those of Italy and England, are grounded on a clearer separation between the pre-trial phase and the phase where witness statements are acquired, which mostly occurs during the public trial based on the method of cross-examination: statements are simultaneously collected through a succession of examinations carried out by the party that called the witness to testify and by the counterparties, while the judge has the power to ask questions only in exceptional cases. In other legal systems, this split is less marked because witness evidence is acquired also before the public trial; take for example the French, German or Spanish systems, based on the 'mixed system' logic that has Napoleonic origins.

The minimum limits that no national legislation should fall short of are compliance with the prohibition of torture (Art. 4 Charter of Fundamental Human Rights of the European Union and Art. 3 ECHR), the right to silence (which can be deemed comprised in the presumption of innocence under Art. 6.2 ECHR and Art. 48.1 of the Charter) and the right to confrontation (Art. 6.3.d ECHR) (see Sect. 3.2.6).

The prohibition against torturing witnesses represents an achievement of civilisation already consolidated in European legal systems. The same applies to the right to silence, which is now provided by Directive 2016/343/EU of 9 March 2016 on the presumption of innocence.

The latter specifies that the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate themselves shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned (Art. 7.5). The Directive also adds that, without prejudice to national rules on the admissibility of evidence, States must ensure that, in the assessment of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected (Art. 10.2).

Instead, there are still several differences between the various systems concerning the configuration of the right to confrontation. The European Court of Human Rights specified the content of such right by fixing a double condition, which is constantly repeated in relation to the statements of 'absent' witnesses (either because they cannot be found or because they plead their right to remain silent); of 'weak' witnesses, such as victims of criminal offences; and of 'anonymous' witnesses (among others, ECtHR, Grand Chamber, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom*). The first condition provides that the accused has an 'adequate and proper opportunity to challenge the depositions either when made or at a later stage' (see Sect. 3.2.4). The second condition provides that a conviction cannot be based 'solely or to a decisive extent' on the statements made by a person

who the accused could not question either during the preliminary investigations or during the public trial or on the statements made by anonymous witnesses, except where there are appropriate procedural guarantees that are able to compensate the violation of the right to confrontation (see Sect. 3.2.6). Such rule, though criticised by some scholars for its excessive vagueness, has now entered most legal systems of the European States either at the legislative level or in practice.

9.5.3 Hierarchy of the Procedures for the Hearing of Witnesses: From Traditional Methods of Examinations to Videoconference

Beyond these minimal standards, there are still many differences between national legislation, and therefore there is a need for European rules to identify the discipline to be applied with regard to the collection of statements.

On this point, as already mentioned before, the traditional solution of the *lex loci* provided in Art. 3.1 Convention on Mutual Assistance of 1959 has been overtaken by the more modern criterion established in Art. 4.1 Convention of 2000 and in Art. 9.2 EIO Directive, in light of which the authority to whom the letter rogatory or the EIO is sent must comply with the formalities and procedures expressly provided by the issuing authority, except when the latter are in conflict with the fundamental principles of its domestic legal system.

The need to comply with such principles, together with the necessity that any restriction of fundamental rights at play must comply with the principle of proportionality, determines a proper hierarchy of the witness hearing procedures.

In particular, the use of procedures more detrimental to the right to confrontation should be justified by the reasoned ascertainment, based on the actual circumstances, of one of the following alternative eventualities: the objective impossibility of using less harmful procedures; the fact that the adoption of less harmful procedures would excessively extend the time required to collect statements and could jeopardise the investigations, also taking into account the severity of the criminal offence and the importance of the statements for the purpose of the ascertainment; or the fact that adopting less harmful procedures for the right to confrontation would jeopardise other fundamental rights.

9.5.3.1 The Examination in the State Where Criminal Proceedings Are Carried Out

The golden rule is the physical examination of the witness to be conducted on the basis of the *lex fori* of the State where the criminal proceedings are carried out.

On this point, Art. 10.1 Convention of 1959 provides that if the requesting judicial authority considers the personal appearance of a witness or expert especially necessary, it shall so mention in its request. In this case, the requested judicial authority must invite the witness to appear and then communicate whether the invitation was successful to the requesting authority.

In this eventuality, Art. 12 Convention of 1959 provides immunity for the declarant summoned as witness concerning facts committed before he/she moved out from the requested State.

We must add that Art. 22 of the EIO Directive provides that the deposition at stake can be facilitated by the temporary transfer to the issuing State of persons held in custody, which can be refused if the imprisoned person denies his/her consent or if the transfer could extend the detention period.

9.5.3.2 Joint Examination

The second procedure of examination that can be used is the joint examination in the executing State, which has already taken into consideration (Art. 4 Convention 1959 and Arts. 9.4 and 5 EIO Directive). In this case, in addition to the judicial authority of the State where the criminal proceedings are carried out, the attorney of the person subject to investigations should also take part in the collection of statements: such possibility, even if not expressly provided in the European legislation, is not excluded and seems imposed by the need to realise the maximum protection of the right to confrontation.

9.5.3.3 Remote Witness Examination

The third procedure consists in the remote examination by using audiovisual and sound connections so as to allow the collection of statement by the judicial authority of the interested State avoiding the physical movement of the witness. This form of examination is less compliant with the right to confrontation—in particular when carried out with a mere sound connection—given that the lack of a physical interaction between the witness and the people who conduct the examination could lead to a distortion of the truthfulness indexes of the testimony.

Article 10 Convention on Mutual Assistance of 2000 and Art. 24 EIO Directive provide for deposition through videoconference, which is allowed to collect the declarations of witnesses or expert witnesses, and can be also extended to the examination of the accused, when the latter consents.

The implementation of this procedure presumes that it is not desirable or possible for the person to be heard to appear in the territory of the requesting State (Art. 10.1 Convention of 2000). As clarified in the explanatory report of the Convention, 'Not desirable' 'could for example apply in cases where the witness is very young, very old, or in bad health'; 'not possible' 'could for instance cover cases where the witness would be exposed to serious danger by appearing in the requesting Member State'.

The State where the witness is located authorises the examination via videoconference if it is not against its fundamental principles and, in addition, if the necessary technology to carry out the remote connection is available. If an agreement exists on this point, it is also possible that the technology will be provided by the State that issued the letter rogatory or the EIO.

Article 24 EIO Directive does not explicitly point out the 'not desirable' and 'not possible' requirements; it only provides that the examination through videoconference should not be against the fundamental principles of the legislation of the executing State. However, the need to ascertain the existence of the former requirements can be deemed imposed by the fact that, as provided in general by Art. 11.1.f Directive, the execution of the EIO must not hinder the fundamental rights (see Sect. 9.1.8.2).

Concerning techniques for the taking of evidence, the Convention of 2000 and the EIO Directive provide that the examination has to be led by the judicial authority of the State where the proceedings are carried out, applying the *lex fori*. The judicial authority of the executing State participates in the hearing. It must identify the witness and take any appropriate measure so that the hearing will not be carried out in violation of the fundamental principles of its domestic law.

Alternatively, Art. 11 Convention of 2000 and Art. 25 EIO Directive provide the possibility to collect the statements of a witness or of an expert witness via telephone conference.

This examination technique, given the implied higher compression of the right to confrontation, is subject to stricter admissibility requirements by the Convention of 2000: not only must it not conflict with the fundamental principles of the executing State, but it must also be provided in the national legislation of the State that requests it, and it is subject to the consent of the witness.

Instead, under the EIO Directive, if the personal appearance of the witness is neither desirable nor possible, that renders telephone conference examination admissible. However, the execution of the EIO must comply with the principle of proportionality, which suggests that a telephone conference is admissible only when it is not possible to arrange a videoconference.

9.5.3.4 The Examination in the State Where the Witness Is Located by a Single Executing Authority

The last resort consists in the examination conducted in the State where the witness is located by the sole executing judicial authority. This is the traditional procedure used in the past.

On this point, Art. 3.2 Convention of 1959 provides that the judicial authority issuing the letter rogatory can expressly ask the witness to testify under oath; the requested authority must consent if its domestic legislation is not against it.

9.5.4 Interview of Victims of Criminal Offences

Specific dispositions concerning the taking of statements by victims of criminal offences are provided in the already mentioned directives of the European Union and in the Lanzarote Convention. The purpose is to avoid the so-called secondary victimisation, meaning the psychological trauma often suffered by victims due to the re-enactment of the events, and at the same time to preserve the reliability of the statements so as not to affect the cognitive purposes of the criminal process.

The rules at stake do not regulate the transnational gathering of victims' statements. They provide minimum provisions to be observed in national proceedings that must be implemented in the single State legislation, having the purpose to reach a harmonisation.

In general, Art. 10 Directive on victim establishes that each State must ensure that victims may be heard during criminal proceedings and may provide evidence. Article 20 adds that the interviews of victims must be conducted without unjustified delay after the complaint, that their number must be kept to a minimum, that they must be carried out only where strictly necessary for the purposes of the criminal investigation and that victims must be accompanied by their legal representative and a person of their choice (this is similarly provided by Art. 20.3 Directive on child abuse, Art. 12.4 Directive on human trafficking and Art. 35.1 Lanzarote Convention).

Articles 22 and 23 Directive on victim set out more detailed rules concerning victims with specific protection needs, which must be subject to an individual assessment centred on their personal characteristics, as well as on the type or nature and on the circumstances of the crime.

In this eventuality, it is provided that the interviews of the victims must be carried out in specific premises by professionals who have trained for that purpose, and always by the same people (see also Arts. 20.3 and 5 Directive on the abuse of children, Art. 15.3 Directive on human trafficking and Art. 35.1 Lanzarote Convention).

The Directive on victim adds that it is necessary to use measures that avoid visual contact between victims and offenders, including the use of communication technology; that ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology; that avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and that allow a hearing to take place without the presence of the public (see also Arts. 12.4, 15.3 and 5 Directive on human trafficking and Arts. 31, 35.1 and 36.2 of the Lanzarote Convention).

The Directive on victim also specifies that the deposition procedures at stake must, in any case, comply with the rights of the defence; moreover, they must not be used if operational or practical constraints make this impossible or where there is a an urgent need to interview the victim.

Article 24 Directive on victim provides an additional disposition for child victims, concerning which the need to avoid secondary victimisation and to grant the

reliability of the statements is even stronger: all interviews may be audiovisually recorded, and such recorded interviews may be used as evidence in criminal proceedings (see also Art. 20.4 Directive on child abuse, Art. 15.4 Directive on human trafficking and Art. 35.2 Lanzarote Convention).

It should be added that in the *Pupino* decision (16 June 2005, C-105/03), the Court of Justice held that Framework Decision 2001/220/JHA on the protection of victim (now replaced by the Directive on victim) must be interpreted so that the national courts are able to authorise young children—who claim they were victims of abuses—to give their testimony in a way that ensures their adequate protection, for example by an interview carried out prior to the hearings of the trial.

Finally, Art. 17 Directive on victim aims to facilitate the interview of victims who are resident in a different State than the one where the criminal offence was committed. For this purpose, it is provided that the competent judicial authorities of the State where the criminal proceedings are carried out must be granted the possibility to collect the deposition of the victim immediately after the commission of the criminal offence. In addition, the use of videoconferencing and telephone conferencing should be granted to the extent possible.

Further Reading

Allegrezza S (2011) Critical remarks on the green paper on obtaining evidence in criminal matters from one member state to another and securing its admissibility. (9) www.zis-online.com

Allegrezza S (2014) Collecting criminal evidence across the European Union: the European Investigation Order between flexibility and proportionality. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 51 ff

Ambos K (2010) Transnationale Beweiserlangung: 10 Thesen zum Grünbuch der EU-Kommission "Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat". Zeitschrift für Internationale Strafrechtsdogmatik, pp 557 ff

Ambos K (ed) (2011) Europäisches Strafrecht post-Lissabon. Universitätsverlag Göttingen, Göttingen

Arasi S (2014) The EIO proposal and the rules on interception of telecommunications. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg

Armada I (2015) The European Investigation Order and the lack of European standards for gathering evidence: is a fundamental rights-based refusal the solution? New J Eur Crim Law 6(1):8 ff

Bachmaier L (2010) European Investigation Order for obtaining evidence in the criminal proceedings: study of the proposal for a European Directive. Zeitschrift für Internationale Strafrechtsdogmatik, pp 581 ff

Bachmaier Winter L (2013) Transnational criminal proceedings, witness evidence and confrontation: lessons from the ECtHR's case law. Utrecht Law Rev 9(4):127 ff

Bachmaier Winter L (2014) The proposal for a Directive on the European Investigation Order and the grounds for refusal: a critical assessment. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 71 ff

Bachmaier Winter L (2015) Towards the transposition of Directive 2014/41 regarding the European Investigation Order in criminal matters. Eucrim (2), pp 47 ff

Bachmaier Winter L (2017) Cross-border investigation of tax offences in the EU: scope of application and grounds for refusal of the European Investigation Order. Eur Crim Law Rev (1), pp 46 ff
Belfiore R (2014) Critical remarks on the proposal for a European Investigation Order and some considerations on the issue of mutual admissibility of evidence. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 91 ff
Belfiore R (2014) Exchange of DNA data across the EU: issues and perspectives in light of the principle of proportionality. In: Ruggeri F (ed) Criminal proceedings, languages and the European Union. Springer, Heidelberg, pp 181 ff
Belfiore R (2015) The European Investigation Order in criminal matters: developments in evidence-gathering across the EU. Eur Crim Law Rev (3), pp 312 ff
Belluta H (2015) Protection of particularly vulnerable victims in the Italian criminal process. In: Lupària L (ed) Victims and criminal justice. Wolters Kluwer, Assago, pp 251 ff
Biral M (2014) The right to examine or have examined witnesses as a minimum right for a fair trial. Eur J Crime Crim Law Crim Just 5(4):331 ff
Blackstock J (2010) The European Investigation Order. New J Eur Crim Law 1(4):481 ff
Buono L (2010) The global challenge of cloud computing and EU law. Eucrim (3), pp 117 ff
Burgos J (2015) Ladrón de Guevara, La Orden Europea de Investigación Penal en España, aplicación y contenido posible: relación con la Orden Europea de Protección. Diario La Ley, no. 8661
Caianiello M (2014) To sanction (or not to sanction) procedural flaws at EU level? Eur J Crime Crim L Crim Just 22(4):317 ff
Calderoni F (2010) The European legal framework on cybercrime: striving for an effective implementation. Crime Law Soc Change, pp 339 ff
Camaldo L (2014) The European Investigation Order. In: Ruggeri F (ed) Criminal proceedings, languages and the European Union. Springer, Heidelberg, pp 203 ff
Caprioli F (2013) Report on Italy. In: Ruggeri S (ed) Transnational inquiries and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg, pp 439 ff
Crupi F (2015) New perspectives for the protection of personal data in criminal proceedings in the European Union and repercussions on the Italian legal system. In: Ruggeri S (ed) Human rights in European criminal law. Springer, Heidelberg, pp 261 ff
Daniele M (2014) Testimony through a live link in the perspective of the right to confront witnesses. Crim Law Rev (3), pp 189 ff
Daniele M (2015) Evidence gathering in the realm of the European Investigation Order: from national rules to global principles. New J Eur Crim Law 6(2):179 ff
De Hert P, Papakonstantinou V (2016) The new police and criminal justice data protection directive: a first analysis. New J Eur Crim Law 7(1):7 ff
De Hert P, Weiss K, Cloosen X (2009) The framework decision of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters - a critical assessment update. New J Eur Crim Law, pp 55 ff
Depauw S (2017) A European evidence (air)space? Taking cross-border legal admissibility of forensic evidence to a higher level. Eur Crim Law Rev (1), pp 82 ff
Farries A (2010) The European Investigation Order: stepping forward with care. New J Eur Crim Law 1(4):425 ff
Fartunova M (2013) La preuve dans le droit de l'Union européenne. Primento, Bruxelles
Fletcher M, Lööf R, Gilmore B (2013) EU criminal law and justice, II edn. Edward Elgar, Cheltenham
Flore D (2014) Droit penal européen. Les enjeux d'une justice pénale européenne, II edn. Larcier, Bruxelles
Garcimartín Montero R (2017) The European investigation order and the respect for fundamental rights in criminal investigations. Eucrim, pp 45 ff

Gialuz M (2015) Victim's protection in the case law of the European Court of Justice and the European Court of Human Rights. In: Lupària L (ed) Victims and criminal justice. Wolters Kluwer, Assago, pp 21 ff
Gless S (2005) Mutual recognition, judicial inquiries, due process and fundamental rights. In: Vervaele JAE (ed) European Evidence Warrant. Intersentia, Cambridge, pp 121 ff
Gless S (2007) Beweisgrundsätze einer grenzüberschreitenden Strafverfolgung. Nomos, Baden-Baden
Gless S (2013) Transnational cooperation in criminal matters and the guarantee of a fair trial: approaches to a general principle. Utrecht Law Rev 9(4):90 ff
Gómez-Jara Diez C (2010) Models for a system of European criminal law: unification vs. harmonization. New J Eur Crim Law 1(3):385 ff
Goss R (2014) Criminal fair trial rights. Hart, Oxford
Grio A (2014) The defendant's rights in the hearing by videoconference. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 119 ff
Heard C, Mansell D (2011) The European Investigation Order: changing the face of evidence-gathering in EU cross-border cases. New J Eur Crim Law 2(4):353 ff
Hecker B (2013) Mutual recognition and transfer of evidence. The European Evidence Warrant. In: Ruggeri S (ed) Transnational inquiries and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg, pp 269 ff
Hecker B (2015) Europäisches Strafrecht. Springer, Heidelberg
Illuminati G (2015) The victim as a witness. In: Lupària L (ed) Victims and criminal justice. Wolters Kluwer, Assago, pp 65 ff
Janssens C (2013) The principle of mutual recognition in EU law. Oxford University Press, Oxford
Jiménez-Villarejo Fernández F (2011) Orden europea de investigación: adiós a las comisiones rogatorias? In: Arangüena Fanego C (ed) Cooperación judicial civil y penal en el nuevo escenario de Lisboa. Editorial Comares, Granada, pp 201 ff
Klimek L (2012) Free movement of evidence in criminal matters. (4). http://www.ilaw.cas.cz/tlq/index.php/tlq
Klimek L (2016) Mutual recognition of judicial decisions in European criminal law. Springer, Heidelberg
Klip A (2016) European criminal law. An integrative approach, 3rd edn. Intersentia, Cambridge
Kusak M (2017) Common EU minimum standards for enhancing mutual admissibility of evidence gathered in criminal matters. Eur J Crim Pol Res. 14 Mar 2017
Kusak M (2017) Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search. Maklu Publishers, Antwerpen-Apeldoorn
Lach A (2009) Transnational gathering of evidence in criminal cases in the EU de lege lata and de lege ferenda. Eucrim (3), pp 107 ff
Luif P, Trauner F (2014) The Prüm process: the effects of enhanced cooperation within Europe and with the United States in combating serious crime. In: Holzhacker RL, Luif P (eds) Freedom, security and justice in the European Union. Springer, Heidelberg, pp 101 ff
Lupària L (2014) Los veinticinco años del proceso penal italiano y las tendencias de reforma en Europa. www.penalecontemporaneo.it, 17 Nov 2014
Mangiaracina A (2014) A new and controversial scenario in the gathering of evidence at the European level: the proposal for a Directive on the European Investigation Order. Utrecht Law Rev 10(1):113 ff
Martín García AL, Bujosa Vadell LM (2016) La obtención de prueba en materia penal en la Unión Europea. Editorial Atelier, Barcelona
Martínez García E (2016) La orden europea de investigación. Tirant lo Blanch, Valencia
McClean D (2012) International co-operation in civil and criminal matters. Oxford University Press, Oxford
Miettinen S (2013) Criminal law and policy in the European Union. Routledge, London-New York
Mitsilegas V (2009) EU criminal law. Hart, Oxford

Mitsilegas V (2016) EU criminal law after Lisbon. Hart, Oxford
Murphy CC (2011) The European Evidence Warrant: mutual recognition and mutual (dis)trust? In: Eckes C, Konstadinides T (ed) Crime within the area of freedom, security and justice. A European public order. Cambridge University Press, Cambridge, pp 224 ff
Nowak C (ed) Evidence in EU fraud cases. Wolters Kluwer, Assago
Ormazábal Sánchez G (2006) La formación del espacio judicial europeo en materia penal y el principio de reconocimiento mutuo. Especial referencia a la extradición y al mutuo reconocimiento de pruebas. In: Armenta Deu T, Gascón Inchausti F, Cedeño Hernán M (eds) El derecho procesal penal en la Unión Europea. Colex, Madrid, pp 37 ff
Rafaraci T (2014) General considerations on the European Investigation Order. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 37 ff
Ryan A (2014) Towards a system of European criminal justice: the problem of admissibility of evidence. Routledge, London
Ruggeri S (2013) Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a Directive on a European Investigation Order: towards a single tool of evidence gathering in the EU? In: Ruggeri S (ed) Transnational inquiries and the protection of fundamental rights in criminal proceedings. Springer, Heidelberg, pp 279 ff
Ruggeri S (2014) Introduction to the proposal of a European Investigation Order: due process concerns and open issues. In: Ruggeri S (ed) Transnational evidence and multicultural inquiries in Europe. Springer, Heidelberg, pp 3 ff
Ruggeri S (2015) Die Verwertung im Ausland erhobener Beweise im europäischen Rechtsraum. Grundrechtliche Probleme und neue Herausforderungen am Beispiel des italienischen Strafprozessrechts. (9). www.zis-online.com
Ruggeri S (2015) Transnational prosecutions, methods of obtaining overseas evidence, human rights protection in Europe. In: Ruggeri S (ed) Human rights in European criminal law. Springer, Heidelberg, pp 147 ff
Sayers D (2011) The European Investigation Order. Travelling without a 'roadmap'. http://www.ceps.eu
Sicurella R, Scalia V (2013) Data mining and profiling in the area of freedom, security and justice. New J Eur Crim Law 4(4):409 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Simonato M (2014) Defence rights and the use of information technology in criminal procedure. Rev Int Droit Pen Law, pp 301 ff
Soleto Muñoz H, Fiodorova A (2014) DNA and law enforcement in the European Union: tools and human rights protection. Utrecht Law Rev 10(1):149 ff
Spencer JR (2008) The problems of trans-border evidence and European initiative to resolve them. In: Grasso G, Sicurella R (eds) Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale. Giuffrè, Milano, pp 471 ff
Tinière R, Vial C (2015) Protection des droits fondamentaux dans l'Union Européenne: entre évolution et permanence. Primento, Bruxelles
Todaro G (2015) The Italian system for the protection of victims of crime: analysis and prospects. In: Lupària L (ed) Victims and criminal justice. Wolters Kluwer, Assago, pp 101 ff
Van Der Vlis EJ (2012) Videoconferencing in criminal proceedings. In: Braun S, Taylor JL (eds) Videoconference and remote interpreting in criminal proceedings. Intersentia, Cambridge, pp 13 ff
Vermeulen G (2011) Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence. Maklu Publishers, Antwerpen-Apeldoorn
Vermeulen G, De Bondt W, Van Damme Y (2010) EU cross-border gathering and use of evidence in criminal matters. Maklu Publishers, Antwerpen-Apeldoorn

Vervaele JAE (ed) (2005) European Evidence Warrant: transnational judicial inquiries in the EU. Intersentia, Cambridge

Vuille J, Lupària L, Taroni F (2017) Scientific evidence and the right to a fair trial under Article 6 ECHR. Law Probab Risk (1)

Weyembergh A, De Biolley S (2006) The EU mutual legal assistance convention of 2000 and the interceptions of telecommunications. Eur J Law Reform (2–3)

Williams C (2005) Overview of the commission's proposal for a framework decision on the European Evidence Warrant. In: Vervaele JAE (ed) European Evidence Warrant. Intersentia, Cambridge, pp 69 ff

Zarza AG (2015) Exchange of information and data protection in cross-border criminal proceedings in Europe. Springer, Heidelberg

Zerbes I (2015) Legal issues of transnational exchange of electronic evidence in criminal proceedings. Eur Crim Law Rev (3), pp 304 ff

Zimmermann F, Glaser S, Motz A (2011) Mutual recognition and its implications for the gathering of evidence in criminal proceedings: a critical analysis of the initiative for a European Investigation Order. Eur Crim Law Rev (1), pp 56 ff

Chapter 10
Ne bis in idem and Conflicts of Jurisdiction

Pier Paolo Paulesu

Contents

P. P. Paulesu (✉)
School of Law, University of Padua, Padua, Italy
e-mail: pierpaolo.paulesu@unipd.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_10

10.1 *Ne bis in idem*

10.1.1 Foreword: The Issue of a Double Judgment in the European Judicial Area, Two Identical Simultaneously Pending Suits and Ne bis in idem

The protection of individuals against a combination of punitive powers on the same fact exercised by different States has long been a central problem for criminal justice in Europe for several reasons. The traditional 'punitive sovereignty' that characterises every state system, and that makes it impenetrable in general to repressive actions from the outside, must now come to terms with the globalisation of the market and the workforce, with the abolition of borders, with the free movement of persons and with the massive increase of migration. All these factors, taken together, significantly increase the probability of initiating or activating a plurality of proceedings on the same fact and against the same person in different States. On one hand, that could lead to identical simultaneously pending proceedings, i.e., the duplication of prosecution concerning the same fact, and the linked problem of what State is legitimated to prosecute the crime. On the other hand, that could lead to the risk that a second trial will be carried out after the first has been decided in another State with a final decision. The aim is more to protect an individual who has already been acquitted or convicted with a final decision by one State from the potential to be subjected to new criminal proceedings in another State, with the consequent risk of a sanctions cumulus arising from duplicate punishments for the same fact.

It is clear that the combination of punitive judicial powers in different States can exist either in the specific form of a *lis pendens* (i.e., simultaneous beginning of parallel criminal proceedings), leading to possible conflicts of jurisdiction, or in the introduction of new criminal proceedings when a previous 'foreign' final decision exists. In fact, it is possible for each legal system to claim its own punitive sovereignty due to the fact that the crime was committed in its own territory or because the perpetrator or the victim of the crime is its own citizen. Similarly, it is possible that a crime is committed (e.g., by several actions) in more territories, so determining the jurisdiction of more than one State. In fact, it is important to recall that almost all legal systems provide the possibility to exercise punitive powers even when only a part of the action or of the event was carried out in its national territory.

Therefore, the punitive sovereignty of each individual State normally reveals itself in two opposite ways: closure to repressive interferences by other States and a tendency to expand their jurisdiction, invading other's territorial areas of interest. Therefore, there are high probabilities that conflicts of jurisdiction will occur.

Let us refer to the Dutch system, which, on one hand, broadens in a significant way its punitive judicial authority outside its national borders and, on the other hand, expressly recognises the principle of international *ne bis in idem* in the sector of criminal justice. In fact, Art. 68 of the Dutch criminal code extends such prohibition to national and foreign decisions, regardless of the *locus commissi delicti*.

However, today, the phenomenon of competition of punitive judicial authorities on the same fact by different States tends to take on larger and larger dimensions, even in light of the choices of criminal policies aiming at construing criminal offences that cannot be limited within rigid territorial borders due to their structure, type of protected juridical assets, contexts and methods of execution. First of all, the complex and varied world of cybercrimes must be taken into consideration (information technology criminal offences and common criminal offences executed through information technology means). Due to the nature of these crimes, they elude any space localisation (a problem that is becoming even more relevant due to the increased use of so-called cloud computing). Second, it is also necessary to take into consideration criminal events attributable to organised crimes, international terrorism, money laundering, international corruption, frauds against European institutions and trafficking of human beings and organs: these criminal offences are characterised by some sort of transnational vocation because they are destined to assume criminal relevance in more than one jurisdiction. This makes it hard to identify a precise *locus commissi delicti*.

The simultaneous initiation of criminal proceedings in different States can lead to negative effects.

It is not rare for the simultaneous pendency of two identical suits to result in the need for evidence transmigration from one territory to another one, with the related problems of adjustment to the different system where they are integrated. This is destined to be reflected in the timing of the proceedings where the means of evidence are destined, which can slow such proceedings down in a substantial way.

In addition, initiating 'parallel' criminal proceedings seems to be able to invalidate the quality of the criminal ascertainment itself whenever the most relevant evidence to ascertain the historical fact would be found within a system that recognises lower guarantees from the point of view of the reliability of the cognitive method and of the guarantees recognised to the accused. It is necessary to recall that, notwithstanding the considerable efforts of the modern processual systems to achieve an effective *par condicio* between the prosecutor and the defence, the latter is, in any case, the so-called weak party in the trial.

The simultaneous beginning of multiple proceedings within different States could also result in issues from the point of view of the effective participation by the accused, which may incentivise proceedings *in absentia*. This is in plain contrast with the tendency to appreciate the accused's effective participation in the hearing (deemed to be the primary expression of the guarantee of self-defence) displayed now for some time in the case law of the Court of Strasbourg.

In addition, a situation of an international simultaneous pendency of two or more identical suits seems able to cause a significant increase in the 'costs' of technical defence: the need for the accused to defend himself/herself simultaneously in front of jurisdictions of different States would result in the need to appoint a counsel in each individual nation (for a series of self-evident reasons, e.g., knowledge of the language, of the procedural system, etc.). There is therefore a risk of unreasonable discriminations between wealthy and less wealthy accused from the point of view of the defensive functions.

In addition, we cannot forget the possible prejudice for the victims of the criminal offences, obliged to shift among the various states (with foreseeable and not insignificant economic burdens) to satisfy their claims for compensation.

It is already clear that the simultaneous pendency of two or more identical suits seems to be able to jeopardise individual guarantees and fundamental values, and therefore it cannot be underestimated and considered a 'lesser evil' compared to the different profile concerning initiating new criminal proceedings when there is already a final decision on the same fact. Moreover, it is now widely believed that the issue of the combination of punitive judicial authorities of the states, whether it is manifested in the forms of the simultaneous pendency of two or more identical suits or when it assumes the form of a criminal final decision, can only be effectively faced and resolved by operating simultaneously on two fronts. First, there is the preventive level, through mechanisms aiming to forestall or resolve any possible conflict of jurisdiction, based on objective parameters and with the intervention of bodies appointed with the purpose of adopting binding decisions towards interested States. Second, there is an *a posteriori* perspective, by appreciating the blocking effect of a previous final decision, under three particular profiles: by identifying the kind of measures that can have precisely that blocking power; by clarifying the meaning of the concept of the final decision; by establishing suitable criteria in advance to define and delineate the concept of the 'same fact'. Indeed, for a long time, it has been generally agreed that acknowledging that the guarantee of the international *ne bis in idem*, which prevents the individual from the risk of a duplication of the process on the same fact, is a genuine corollary of the principle of free movement of persons within the European area (see, for example, to that effect the Resolution of the European Parliament of 16 March 1984).

Similarly, there is a risk of double judgment on the same fact in a system that embraces the principle of 'mandatory' prosecution, as well as in a system based on the model of discretional prosecution. In the first case, the reiteration of the punitive demand concerning the same fact could be considered the result of a misinterpreted concept of 'legality in proceeding' based on too strict automatisms, i.e., initiating a new prosecution notwithstanding the existence of a previous final decision *in idem*. It is not possible to elude the idea that a second judgment on the same fact entails an attitude of distrust exactly towards such final decision. Instead, in the second case, what would leave space for unreasonably oppressive and persecutory initiatives is the prosecutor's extreme freedom in choosing whether or not to begin the prosecution. It could be interesting to highlight that in common law systems, a common opinion exists so that initiating a new prosecution when there is a previous final decision would lead to a situation ascribable to the so-called abuse of process (a term that is normally used to stigmatise practices that distort the prosecution). In particular, the American prohibition against double jeopardy, expressly provided in the Fifth Amendment of the US Constitution, operates from the moment that the jury is assembled and, in bench trials, from the beginning of the initial hearing. From this perspective, the prohibition at stake tends to assume a very wide significance: it represents an obstacle to reiterating the judgment concerning the same fact, and it

also prevents the accused from being diverted from the pre-empanelled jury, which is deemed a proper 'natural judge'.

It is important to point out that legal remedies intended to prevent the *lis pendens* or *bis in idem* at the supranational level are only actually effective if they are associated with substantive initiatives facilitating the construction of a 'European criminal law'. In fact, if common incriminatory provisions existed (which should be similar, particularly concerning the material elements: conduct, event), each State would be more prone to recognising and identifying itself in the punitive claim of another State, thereby going beyond the traditional cultural differences existing in the specific area of criminal protection.

The effectiveness of the solutions under analysis is significantly conditioned by the cultural and regulatory context where they are collocated. In fact, if it is true that to face and solve the problems arising from European *lis pendens* and *ne bis in idem* might be able to contribute to achieving the objective of harmonising the various systems, it is equally likely that the issue of competition between punitive powers could only be solved with solutions that are actually agreed upon only within an already ongoing harmonisation process: the more advanced such process is, the easier it is to prevent and to solve conflicts of jurisdiction, especially by stimulating the 'spontaneous settlement' of the latter through the 'voluntary waiver' of the prosecution by one State in favour of another one. Similarly, the higher is the level of recognition of foreign decisions, the more 'natural' is each juridical system's acceptance of a different nation's final decision on the same fact.

From this perspective, it would seem right to place the *ne bis in idem* guarantee in the specific dimension of the mutual recognition. Such conclusion seems to be supported by a logical reason: prohibiting *ne bis in idem* underlies, as already mentioned, the idea of adherence and adjustment to a foreign final decision and, therefore, the perspective of recognising a 'product' made elsewhere, i.e., the final decision, and, normally, with different evidence methods and procedural paths.

Certainly, even a final decision has its own non-absolute steadiness. Let us think, for example, the hypothesis of revision in compliance with the decisions of the European Court for violation of fair trial rules. This implies a definition of the relationship between the level of steadiness of the final decisions within the State where it was adopted and its ability to have a real preclusive strength at the supranational level. In fact, it could be possible that the State would refute the binding effect of the foreign final decision by claiming the lack of respect of such rules. The result is that any perspective intended to ensure the effective international value of *ne bis in idem* also supposes the elaboration of common criteria concerning any derogation of the firmness of 'internal' final decisions.

The current regulatory fragmentation concerning *ne bis in idem* (Art. 50 of the Charter of Fundamental Rights of the European Union, Art. 4 Protocol 7 ECHR, Art. 54 and following of the Convention Implementing the Schengen Agreement) is sure to be confusing and makes it harder to search shared criteria and a system for the protection of fundamental rights that leads to the maximum expansion of guarantees. The ultimate goal of this kind of path should be some sort of 'European statute' of the people convicted or acquitted with a final decision.

Again, concerning the current integrated system of sources concerning *ne bis in idem*, the question on whether it is possible to attribute to Art. 50 CFREU the same content as Art. 4 Protocol 7 ECHR in the interpretation given by the Strasbourg Court is still open (in particular, as will be mentioned later, concerning the concept of 'crime' as a 'historical fact' and the definition of a 'criminal matter'). A positive solution can result from the principle of equal value of the ECHR guarantees (and the guarantees listed in its protocols) and similar guarantees of the Charter as provided in Art. 52.3 of the Charter of Nice.

To conclude, it is necessary to note that even concerning *lis pendens* and *ne bis in idem*, similar to other sectors of criminal justice, the construction of a 'culture of European jurisdiction', inspired by shared values and homogenous criminal policies (particularly concerning the structure of criminal offences, protected rights and types of sanctions), becomes the necessary means to reach fair, efficient and reliable solutions that, above all, are destined to endure the test of time.

10.1.2 Ne bis in idem *and ECHR*

The opinion that prohibiting *ne bis in idem* does not constitute a principle of international law (not even a 'customary' one) has been deeply rooted for a long time. Therefore, it is well known that such guarantee carved out a significant space for itself in treaties within Europe. For this purpose, it is immediately necessary to trace a fundamental distinction between the conventions that oblige Member States to comply with the prohibition at stake only within their individual internal law and the conventions that instead concern the different profile of the supranational judicial cooperation, thereby inserting *ne bis in idem* in the thorny and complex dimension of inter-institutional relationships.

From the first point of view, we must highlight how Art. 4 Protocol 7 ECHR and Art. 14.7 of the International Covenant on Civil and Political Rights both explicitly refer to *ne bis in idem*. Article 4 Protocol 7 ECHR establishes that no one can be prosecuted or criminally convicted by the jurisdiction of the same State for a violation from which he or she has already been acquitted or convicted due to a definitive decision in compliance with the law and the criminal procedure of such State; therefore, it does not seem to bar initiating new criminal proceedings for the same fact in another jurisdiction. Concerning Art. 14.7 of the International Covenant on Civil and Political Rights, under which 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country', everyone agrees that even that provision only refers to a prohibition against a double judgment for the same fact within each individual State (see Human Rights Committee, *A.P. v. Italy*, Communication 204/1986).

On this issue, before going further, it is necessary to point out two more aspects. In the ECHR system, *ne bis in idem* represents a fundamental right of the individual, which cannot be derogated even in case of war or other emergency situations (Art.

4.3 Protocol 7). The *ne bis in idem* principle provided in the ECHR does not presume that it is the national legislator that qualifies a decision as 'criminal' when it closes the first proceedings on the same fact: as we will see, the European Court of Human Rights is the one that indicates the criteria to define and delineate the 'criminal subject matter'.

After establishing that Art. 4 Protocol 7 ECHR deals with *ne bis in idem* only from an internal perspective of the individual States, as already mentioned, we must ask ourselves if the case law of the European Court of Human Rights can provide us any useful spark to understand the effective value of the prohibition, even in the peculiar dimension of the judicial cooperation between Member States of the European Union, especially concerning the requisite of the 'same fact', which constitutes the real problematic core of the guarantee at stake.

Unfortunately, until now, the case law of the European Court has given rise to divergent opinions on this topic.

According to a first approach, it would be better to adopt the criteria of juridical qualification of the fact (ECtHR, 30 July 1998, *Oliveira v. Switzerland*, which excluded the violation of Art. 4 Protocol 7 ECHR in a case where an individual who was already subject to punishment for a violation of the traffic law was then subject to criminal proceedings for the same fact). The thesis under which the prohibition under Art. 4 Protocol 7 ECHR would work when a person is subject to trial twice for the same fact is the result of a compromise and a non-decisive one, even if differently qualified from a regulatory point of view, as long as there is a 'continence relationship' between the different incriminating provisions determined by the presence of common structural data, so that one contains all the constitutive elements of the other, with one or more additional elements (ECtHR, 29 May 2001, *Fischer v. Austria*; on the same line, see also ECtHR, 30 May 2002, *W.F. v. Austria*; ECtHR, 6 June 2002, *Sailer v. Austria*).

It is more convincing that what should be favoured is a requisite of identity of the conduct, to be identified through a precise analysis of all the relevant material facts (ECtHR, 23 October 1995, *Gradinger v. Austria*; similarly, ECtHR, 4 March 2014, *Grande Stevens and Others v. Italy*; ECtHR, 20 May 2014, *Nykanen v. Finland;* ECtHR, 10 February 2009, *Zolotukhin v. Russia*, under which the expression 'criminal offence' in Art. 4 Protocol 7 ECHR refers to the historical fact. On the same subject, see also ECtHR, 23 June 2015, *Butnaru er Bejan Piser v. Romania*: according to the Court, to evaluate the identity of the offence, it is necessary to consider not only its legal structure (structural elements required by the law) but also if the conduct can be considered equivalent and how they are in space and in time described in detail in the indictment; in the opinion of the Court, there is a violation of *ne bis in idem* even if an indictment contains new elements when compared to another. In this case, the accused who was previously acquitted of a charge of beating and injury was later convicted of robbery: the violent conduct was, on the one hand, the whole factual basis of the first accusation and, on the other hand, an essential requirement of the second.

Such solution contributes to substantially strengthening the conventional guarantee, widening its operative area. From this perspective, the European Court of

Human Rights might have intended to start some sort of 'dialog' with the Court of Justice, which, concerning the criteria for the individuation of the 'same fact', refers to the interpretation of the latter body (see Art. 3.b).

Continuing the analysis, it is worth highlighting that, recently, the European Court of Human Rights has often handled the issue concerning how the guarantee of *ne bis in idem* operates in the relationships between administrative and criminal proceedings. The issue arises because the already mentioned Art. 4 Protocol 7 ECHR appears to circumscribe the guarantee of *ne bis in idem* to the sole sector of relationship between criminal proceedings. Moreover, the idea is widespread that some States have not ratified Art. 4 Protocol 7 ECHR precisely to avoid the progressive extension of *ne bis in idem* to non-criminal areas, primarily to administrative proceedings.

First of all, the Court fixes the criteria to define the limits of *ne bis in idem* and therefore to identify the scope of 'criminal matters', which marks the operative borders of the principle. For that purpose, it is necessary to take into account the 'legal classification' of the violation (criminal or non-criminal) committed by each individual state system, the 'nature' of the sanction and the 'degree of seriousness' that characterises it (a perspective cultivated in the past by the ECtHR, 8 June 1976, *Engel v. The Netherlands*). These are alternative criteria, even if nothing prohibits applying them cumulatively when the separate analysis of each parameter does not consent to diagnose the existence of a 'criminal prosecution' (see ECtHR, 4 March 2014, *Grande Stevens v. Italy*, mentioned above, concerning the relationship between the administrative proceedings for abuse of preferential information with the related administrative pecuniary sanction charged by the Italian Companies and Stock Exchange Commission (Consob) under Art. 187-*ter* Legislative Decree 58/1998 and the criminal proceedings on the same facts terminated with a conviction judgment under Art. 185.1 Legislative Decree 58/1998).

On this regard, it should be noted how the hypothesis of cumulus of sanctions (administrative and criminal) concerning insider trading was expressly provided in Art. 14 Directive 2006/6/CE, now repealed; today, the topic of market abuse is regulated by Directive 2014/57/UE and by Regulation 2014/596/EU.

Therefore, the Court thinks that the banning effect of the guarantee of *ne bis in idem* under Art. 4 Protocol 7 ECHR can be achieved even in the ground of the relationship between different proceedings from the point of view of 'legal qualification' (administrative and criminal), provided, of course, that such proceedings concern the same facts, to be identified in light of the conduct criterion. In this case, applying an administrative sanction can block initiating criminal proceedings against the same person and in relation to the same challenged facts if the administrative sanction is so serious that it has an obvious repressive-punitive function, substantially and independently from its formal qualification (ECtHR, 4 March 2014, *Grande Stevens v. Italy*).

Along the same lines of the *Grande Stevens* decision lies another significant judgment of the Court, condemning the Finnish state for violation of *ne bis in idem* due to application of a double sanctioning track: a pecuniary administrative sanction and a subsequent criminal conviction for tax fraud on the same fact. According to the

Court in Strasbourg, even proceedings that lead to the imposition of a 'tax surcharge' must be considered 'criminal' for the purpose of application of Art. 4 Protocol 7 ECHR; in addition, it is provided that the celebration of two parallel proceedings is compatible with the Convention, provided that the second is interrupted when the first becomes final (ECtHR, 20 May 2014, *Nykanen v. Finland*; for a similar case, see ECtHR, 10 February 2015, *Kiiveri v. Finland,* and again concerning relationships between tax and criminal sanctions, ECtHR, 27 November 2014, *Lucky Dev. v. Sweden*; ECtHR, 27 January 2015, *Rinas v. Finland*: in the opinion of the Court, in this case, there is a violation of *ne bis in idem* when a State applies a tax and a criminal punishment to a person due to omissions in the tax return; it deals with two distinct and independent proceedings for the same fact against the same person; previously, even if with different emphasis, ECtHR, 16 June 2009, *Ruotsalainen v. Finland*; ECtHR, 10 February 2009, *Zolotukhin v. Russia*).

The evolution of the jurisprudence of the European Court regarding the principle of *ne bis in idem* in the relationships between administrative and criminal proceedings has reached a further step with the ECtHR, Grand Chamber, 15 November 2016, *A B v. Norway*, which redefines the meaning and the limits of the *Grande Stevens* judgment. The *A B v. Norway* case clarifies that the principle of *ne bis in idem* enshrined Art. 4 Protocol 7 ECHR does not in itself prevent the State from introducing a double sanction (administrative and criminal) concerning the same facts. But the double sanction must conform to the criteria fixed by the jurisprudence of the European Court (in particular, *Nykanen v. Finland*, quoted). According to *A B v. Norway*, to avoid the violation of *ne bis in idem*, the criminal proceeding and the administrative proceeding must be 'sufficiently connected in substance and in time'. And moreover, it is necessary that the sanction applied by the first judge should be taken into account by the second judge so that the principle of proportionality is respected (regarding the criteria of sufficient connection in substance and in time, see also ECtHR, 18 May 2017, *Jóhannesson and Others v. Island*).

From the outlined jurisprudence framework, it is possible to infer some bottom lines.

From a general point of view, the European Court plainly disapproves the 'internal' choices aiming to raise administrative sanctions to the rank of an 'instrument of compensation' for the criminal sanctions. The speed and efficiency during the ascertainment, the adoption of presumption mechanisms and the absence of limitations to personal freedom are all factors that justify a lower standard of procedural guarantees, to make it immediately easy to follow the 'administrative path' while waiting for the 'criminal answer'. However, when a compensatory logic of this kind is translated in the application of administrative sanctions so severe that they substantially constrict some fundamental rights of the individual, even if different from personal freedom, it is necessary to activate the protection offered by the conventional *ne bis in idem*. In addition, the European Court does not recognise the national court's power to evaluate the 'criminal nature' of the first inflicted sanction (which should act as a 'preclusive precedent'), because qualifying a violation as 'criminal' remains the exclusive duty of the Court, based on the criteria mentioned before. From this last point of view, as we will see, it is clear that the

Court of Strasbourg follows a different approach than the one chosen from the Court of Justice, and it prefers to refer such an assessment to internal courts (see Sect. 10.1.4.3).

10.1.3 Ne bis in idem *and Judicial Cooperation: The Structure of the Guarantee in the Convention Implementing the Schengen Agreement (CISA)*

Coming to the issue of relations between the guarantee of *ne bis in idem* and criminal judicial cooperation, it is immediately necessary to highlight how in this specific area the main regulatory references are Arts. 54–58 of the Convention Implementing the Schengen Agreement (CISA) of 1990 and Art. 50 of the Charter of Fundamental Rights of the European Union, under which 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

Some recent conventions link prohibiting *ne bis in idem* to the refusal of judicial cooperation when in the requesting State a final decision has been adopted against the same person and for the same facts that are object of the request of cooperation. This is the case for the Convention on Laundering, Search and Seizure of the Proceeds from Crime (1990), as well as the Italy–Switzerland agreement for judicial cooperation of 1998 and, finally, again concerning the judicial matter, the Agreement between the European Union and Japan (2010).

From a structural point of view, the regulatory structure that arises from Arts. 54–58 CISA appears to be linear. A general rule is provided, followed by some exceptions. In addition, some dispositions are provided concerning punitive profiles and relationships between Member States.

The general rule is stated in Art. 54 CISA: 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. It is clear that the disposition under analysis traces a clear distinction concerning the preclusive effects of final decisions: while a final decision of acquittal adopted by a Contracting State by itself prevents a new judgment *in idem* within a Member State, a final decision of conviction has the same effects only when some strictly provided 'conditions' exist.

The content of the rule stated in Art. 54 of the Convention results in a series of interpretative issues. To what kind of measure does the expression 'decision' refer? Does the latter refer solely to jurisdictional measures or also to administrative ones? Should the preclusive effect also be extended to different measures from the decision (e.g., a dismissal measure)? What does 'final decision' mean? When talking about acquittal, do we refer only to the one on the merits or also on the procedure (e.g.,

statute of limitations, amnesty)? What is the meaning of the expression 'same facts'? Is the conviction relevant for the preclusive effect only the one that requires a full ascertainment of the *res iudicanda*? To what does 'conviction that cannot longer be enforced' refer?

The same Schengen Convention provides two exceptions to *ne bis in idem* (Art. 55) that operate only after an express statement (acceptance) by the Contracting Party (performed at the time of endorsement, acceptance and approval of the Convention).

The first exception aims at safeguarding the territoriality principle. In fact, it is provided that the preclusions to the instauration of a new judgment *in idem* arising from a foreign decision have no effects towards a State whenever the facts object of such decision happened entirely or partially in the territory of such State (provided that the facts did not partially occur in the State in which the judgment was delivered).

The second exception is based on the need to protect the internal safety of each State. The prohibition against *ne bis in idem* does not apply if the facts object of the foreign decision integrate a crime against safety and against other fundamental interests of the State that wants to carry out other proceedings on the same fact.

Finally, the third exception is justified in light of the 'privileged' relationship between the authority and a determined person due to the circumstance that the latter acts in his/her role of public official within the State where the new proceedings are initiated and subject to the condition that the facts at stake were executed in violation of duties related to the function carried out by that person.

These exceptions to *ne bis in idem* seem to face the problem of a possible 'punishment duplication', whence the provision of a 'compensative' mechanism (Art. 56 CISA), under which initiating a new trial on the same fact entails the duty to subtract from the punishment to be charged a period equal to the time spent in detention by the accused within the State that judged him/her for the first time with a final decision (we must also take into account punishments different from the ones that result in a restriction of personal freedom). This is a solution that responds to elementary fairness and rationality needs and that find its *raison d'etre* in the principle of proportionality between the criminal offence and the punishment, a principle that inspires the most evolved legal systems.

Moreover, the persistence of this set of exemptions to *ne bis in idem* provided by Art. 55 CISA seems to be excluded in light of Art. 50 of the Charter of Nice (CFREU), with which Art. 55 CISA must coordinate itself. In fact, Art. 50 of the Charter does not provide any exception to the rule under which 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. By leveraging on the content of this provision, it may be possible to conclude that, with its primary role established under the Lisbon Treaty, the Charter would have redesigned the operative borders of *ne bis in idem* by suppressing the derogatory hypothesis provided under Art. 55 CISA. Needless to say, this could result in a sensible strengthening of such guarantee in the sector of judicial cooperation.

Moving on in the analysis of the guarantee of *ne bis in idem*, it is necessary to highlight how the same entails the fulfilment of a preventive exchange of information between States concerning the subsistence of a pre-existing final decision. From this perspective, for the competent authorities that formulated an indictment of an identified subject and that have grounded reasons to believe that the same subject has already been acquitted or convicted for the same facts in a different State, the power to ask the most recent relevant information on this fact is provided (Art. 57 CISA). Such information must be transmitted with the shortest possible delay to the requesting authorities, who have the duty to take them into account to decide on the possible continuation or interruption of the prosecution. However, the issue remains concerning the actual effects of this provision. Together with the lack of providing any sanction, the actual text leads to thinking that the authority's request for information that proceeds *in idem* is purely optional. The possible consequences are easy to deduce: the burden to provide evidence for the existence of a pre-existing foreign final decision is destined to be borne by the interested processual party, meaning by the accused.

Finally, due to the fact that it seems respectful of the autonomy of individual States, the clause of safeguard is also significant. Under this clause, the provisions of CISA concerning *ne bis in idem* do not constitute an obstacle to the adoption of 'national' regulatory solutions aiming to grant foreign decisions a wider preclusive effect compared to the one outlined in the Convention itself. However, we must ask ourselves if such a hypothesis can be realised: in a 'non-harmonized' European context, the possibility that an individual State might freely choose to limit its punitive sovereignty in favour of a foreign final decision beyond the strict duties traced at the level of the agreement seems very unrealistic.

10.1.4 Follows: The Case Law of the Court of Justice

It must be admitted that the Court of Justice of the European Communities has the merit of tracing some precious coordinates (even if not decisive, as we will discuss below) concerning the operative limits of *ne bis in idem*. For this purpose, it is necessary to underline how the Court raises the guarantee at stake to the rank of a fundamental right of the citizens in the European Union so that it can be linked directly to the values of 'fair process', which includes the need to confer strength and stability to final decisions. Here enters the idea to assign a double nature to *ne bis in idem*: subjective guarantee, as provided in favour of the individual against unjustified reiterations of the punitive powers, and objective guarantee, because it is intended to confer a strong authority to final decisions held within an individual State.

10.1.4.1 'Identity of the Person'

Moving onto the detailed analysis of the contribution by the Court of Justice concerning the applicability prerequisites for *ne bis in idem*, we must immediately state that, until now, there has been no particular interpretation issue concerning the meaning of the 'subjective' requirement provided in Art. 54 of CISA and represented by the 'identity' of the person. In fact, considering that such disposition refers to the identity of the person convicted or acquitted with a final decision in a State, i.e., the person who would be subjected to new proceedings in another State, initiating new proceedings against other people accused of the same historical fact covered by the final decision seems legitimate (let us think about the hypothesis of joint participation by more than one person to the criminal offence). Regarding the criteria of identity of the person, the Court of Justice excludes a violation of *ne bis in idem* (Art. 50 of the Charter of Fundamental Rights of the European Union) if a criminal proceeding against a physical person (the legal representative of a company) due to failure to pay VAT is started when a tax sanction has already been definitively applied to the *body* (the company) for the same fact; in this case, it would lack the essential requirement of the identity of the person (CJEU, 5 April 2017, C 217/15 and C 350/15, *Orsi* and *Baldetti*).

10.1.4.2 'Identity of the Fact' and 'Identity of the Criminal Offence': The Profile of the Protected Legal Interest

The profile concerning the 'objective' dimension of *ne bis in idem* is more complex. From this point of view, we may first ask ourselves if the expression 'same acts' provided in Art. 54 CISA refers to the 'fact' intended in its material or natural meaning, i.e., considered as a pure historical event, or if it refers to 'crime', i.e., the sole juridical dimension (the incriminating provision, the *nomen iuris*), or if it refers to the legal asset affected by the criminal offence. Until now, the Court of Justice has preferred the first solution.

On this point, the example provided in CJEU, 9 March 2006, C-436/04, *Van Esbroeck*, is significant, which concerns a conviction for illegal trafficking of drugs in one State and a subsequent conviction in another State for exporting the same drugs by the same person. The Court considered the facts consisting in the exportation and in the importation of the same drugs as the 'same acts' under Art. 54 CISA. Similarly, concerning crimes that are not very different in substance, the Court (CJEU, 28 September 2006, C-150/05, *Van Straaten*) restated that 'acts' under Art. 54 CISA must mean 'the set of events inextricably linked one to each other, being absolutely irrelevant on this point that the one who invocates the guarantee of *ne bis in idem* is accused together with people that are different on a case by case basis in the different proceedings he/she is involved with (as happened in the case under judgment)'. Similarly, see CJEU, 16 March 2010, C-261/09, *Mantello*.

The solution seems effective because it allows overcoming the expected difficulties that would arise when we use the criteria of juridical qualification or the parameter of the protected legal asset. First of all, we note that the reference to juridical qualification could be useful only in a context of 'harmonization" between criminal systems, where the expression the 'same crime' would be charged with a specific meaning and a specific value. Alternatively, it could easily happen that an individual already convicted for fact *x* in a given legal system would be afterwards subject to new proceedings in another State for the same fact *x*, although classified under a different *nomen iuris*. The result could be an unreasonable conflict with one of the values underlying the guarantee of 'European' *ne bis in idem*, meaning the free movement of persons in the Member States.

For the same reason, even the criteria of the protected legal asset would be unreliable (for a clear stance against the adoption of such parameter, see, again, CJEU, 9 March 2006, C-436/04, *Van Esbroeck*, mentioned above). After all, the criterion at stake is known to be linked with the cultural specificities of each legal system that unavoidably orientates the choice of legislative policy. For example, it could happen that a criminal offence such as an extortion that is considered a crime against property in Italy could be considered as a crime against the person in another legal system. Allowing a double judgment on the same historical fact, only because it is differently 'qualified' from the point of view of the protected juridical interest would, in short, result in a substantial injustice. Nor can we ignore the fact that the concept of legal assets changes in time within the same system. The result is the difficulty of using such concept as a reliable reference criterion to track the operative limits of *ne bis in idem* in the relationships between different States.

Interpretation issues linked to the parameter of the 'same act' also arise concerning the profile of the identity of the criminal intention underlying a plurality of crimes. We ask ourselves if the presence of such a requisite can have any relevance to this subject.

In the case of a conviction for receiving money from drug trafficking in his/her home State and a conviction in another State for laundering money received from drug trafficking, the Court of Justice pointed out that the unity of the criminal intention is by itself irrelevant for *ne bis in idem* purposes. However, it would be a duty of the national judge to evaluate if, in reality, the money laundering activity is carried out with means (cash amounts) 'inseparably linked' to the object of the precedent crime of receiving illicit cash: only in this case would it be possible to point out a 'material link' between the different operations, which could trigger the prohibition under Art. 54 CISA (CJEU, 18 July 2007, C-367/05, *Kraijenbrink*).

10.1.4.3 The Concept of 'Final Decision'

Continuing the examination of Art. 54 CISA, it is now necessary to focus our attention on the formulation 'finally disposed of' contained in that disposition.

Dismissal, Transactions on the Prosecution and Forms of 'Negotiated Justice'
A first problematic aspect concerns the possibility to include measures of dismissal or so-called negotiated trial conclusions, i.e., based on an agreement between the parties, in the concept of 'final decision'.

The Court thinks that prohibiting a second judgment finds its space only in case of procedural conclusions able to result in the definitive extinction of the prosecution (CJEU, 11 February 2003, C-187/01 and C-385/01, *Gozutok and Brugge*). The tendency to deny any preclusive effect to decisions grounded solely on procedural reasons can certainly be considered well established. This is true concerning measures of dismissal.

In this way, the prosecutor's decision to discontinue the prosecution due to the simultaneous pendency of foreign proceedings on the same fact, disregarding any valuation on the merit of the charge, would also be irrelevant under Art. 54 CISA (CJEU, 10 March 2005, C-469/03, *Miraglia*).

Also regarding the concept of 'final decision', the Court of Justice claims that Art. 54 CISA (linked to Art. 50 of Charter of Fundamental Rights of the European Union) must be interpreted in the following way: the decision of the prosecutor who closes the proceeding without any evidentiary activities and without any sanction is not a final decision as it does not involve the merit of the case (CJEU, Grand Chamber, 29 June 2016, C-486/14, *Kossowsky*). In this case, the Court claims that the principle of *ne bis in idem* guarantees the legality and the free movement of persons, but this principle must not prevent the investigation of the offence by a judge. On these grounds, the Court found in this case the lack of evaluation on the merits of the case. In fact, the decision of dismissal by the prosecutor was based on insufficient evidence, due to incomplete statement of the accused, without hearing from the victim and the only available witness. Therefore, the Court identifies a lack of trial evidentiary hearing. For this reason, the proceeding could not be considered definitively concluded and so could not apply the guarantee of *ne bis in idem*.

The same would apply to 'negotiated' conclusions, even if the European Court did not push itself so far as to deny *a priori* that certain forms of 'negotiated justice' can be relevant under Art. 54 CISA, however subject to the condition that the position of the accused would be effectively safeguarded (for example, by providing the latter with information concerning the possibility to continue with ordinary proceedings in order to consent to mindful choices by the person subject to the proceedings).This is to avoid abusive behaviours by the prosecution—a perspective that appears to be in line with Art. 58 CISA, which grants States the power to recognise a broader preclusive effect in 'judicial decisions' than the one provided by the same Convention.

In any case, it is necessary to emphasise that the Court of Justice tends to exclude all the decisions that do not preclude initiating new prosecutions on the same fact within the individual States that adopted them from the operative dimension of Art. 54 CISA (CJEU, 22 September 2008, C-491/07, *Turansky*).

Insufficient Evidence We may ask ourselves if the preclusive effect of *ne bis in idem* could be realised even in the presence of an acquittal for insufficient evidence. The

positive answer provided by the Court of Justice (to that effect, even if incidentally, see CJEU, 28 September 2006, C-150/05, *Van Straaten*, mentioned above) is based on the need to safeguard the 'certainty of right', the 'fairness' and also the 'safety' of citizens itself. Moreover, the fact that the precluding effect of *ne bis in idem* must also be extended to acquittal decisions is a conclusion that can be derived from the actual text. In highlighting that 'in case of conviction' the preclusion of the new trials is conditioned on the enforcement of the punishment (or the impossibiliy to enforce it), Art. 54 CISA goes far in providing a clarification that would be unnecessary if the guarantee of *ne bis in idem* would be limited to conviction judgments (furthermore, an explicit reference to acquittal decisions is provided in Art. 50 of the Charter of Nice, in Art. 14.7 International Covenant on Civil and Political Rights and in Art. 4.1 Protocol 4 ECHR.)

Statute of Limitations The question concerns extending *ne bis in idem* to decisions that declare that the crime is statute-barred and, more generally, to decisions on the procedure that do not involve the aspect of guilt/innocence of the accused.

In the abstract, it is possible to contemplate two solutions in this case: (a) to favour the 'formal' criterion represented by the existence of a 'decision', even if 'on the procedure' and considering the requirement for applying Art. 54 CISA as satisfied, and (b) to use a 'substantial' parameter by leveraging on the lack of a valuation on the 'merits' of the accused's guilt and denying any preclusive effect for the decision that declares the crime extinct due to the statute of limitation.

In support of this second approach, there may be an opportunity to observe, concerning criminal offences, the opportunity to separate the statute of limitation profile from the one concerning *ne bis in idem*, given that the first is based on the weight attributed to the time factor for the exercise of the state punitive judicial authority, which leads to diverging regulatory solutions from one State to another due to the variable choices of criminal policies. Meanwhile, the second wants to protect individuals from legal abuses linked to the reiteration of criminal proceedings on the same fact, with an addition that presumes a previous ascertainment on the merits related to the effective exercise of that very same punitive judicial authority. This could have particular relevance at the supranational level. In fact, while for internal purposes the relapses of a decision that considers a criminal offence extinct are minimum concerning the application of scope of *ne bis in idem*, given that in any case initiating new proceedings would be prohibited exactly due to the intervened statute of limitation, the choice to deny any preclusive relevance on the supranational level to the decision that declares the crime statute-barred could prevent 'shopping' for a forum. Considering that the time of the statute of limitation changes from one State to the other, it is not hard to predict that the accused might move to the State that adopts, in the particular circumstance, the most favourable disposition for his/her case: some sort of 'self-protection' mechanism for the accused aimed at meeting the condition to claim prohibiting *ne bis in idem* towards other nations that might prosecute him/her for the same facts in the future.

The Court of Justice does not seem to be pointing in this direction: it preferred granting preclusive effects to the decision that holds the crime statute-barred (CJEU,

28 September 2006, C-467/04, *Gasparini and Others*). The Court does take into consideration that, until now, concerning the statutes of limitation, no harmonisation of the Member States' regulations has been carried out and that, in addition, there are no regulatory indications aimed at linking *ne bis in idem* to the approximation of such regulations. However, the Court considers that the differences that can be found in Member States concerning the times for applying statutes of limitation would not also prevent extending Art. 54 CISA to this thorny topic, taking into account the purpose underlying such disposition, which remains the one to grant the free movement of persons in an area of freedom, security and justice. Finally, we think that concerning the statute of limitation of crimes, what should necessarily prevail is the principle of mutual trust between States.

Execution of the Punishment As expressly provided in Art. 54 CISA, a conviction judgment is suitable to preclude initiating new proceedings for the same fact, subject to the condition that under the laws of the State that held the judgment, the punishment has been enforced, the judgment is actually in the process of being enforced or the judgment can no longer be enforced.

A first problematic profile concerns the conditional suspension of punishment. On this point, the Court of Justice thinks that a punishment that has been 'suspended' in this way should be intended as 'enforced' or 'in the process of being enforced' under Art. 54 CISA (CJEU, 18 July 2007, C-288/5, *Kretzinger*). In particular, it is necessary to highlight that the 'suspended' punishment has a real 'punitive' value, being suitable in any case to limit the freedom of the person, even if it is clearly a lighter punishment compared with the immediately applicable punishment. Even the punishment subjected to conditioned suspension should be considered 'effectively in the process of being enforced' and, after the elapse of the suspension period, 'effectively enforced'. Clearly, if during the suspension period the requirements under which it is justified would not be met anymore, the punishment should be served entirely. Meanwhile, Art. 54 CISA would not apply to the hypothesis of limitation of personal freedom due to arrest by the police or to precautionary detention measures every time it is necessary to take into account such restrictions to freedom in the subsequent execution of the detention punishment under the law of the State that issued the conviction.

However, for the purpose of identifying the punishment enforcement requirement, whether the State where the conviction was held has the authority to issue a European arrest warrant to enforce such conviction is insignificant considering that we refer to such instrument exactly because the detention punishment was not enforced or is not in the process of being enforced. In this way, it is impossible to apply the guarantee of *ne bis in idem* to this case.

From another perspective, we can ask ourselves if *ne bis in idem* can be applied even when the first conviction was not enforced within the State where it was held due to an amnesty measure.

Emblematic, on this point, is the case of a German citizen who was sentenced to the death penalty *in absentia* by a French military court for intentional murder and desertion. He sought refuge in Germany and was subjected to criminal proceedings for the same facts. In that case, the accused invoked the guarantee of *ne bis in idem* under Art. 54 CISA, highlighting that the French conviction decision, even if it

became final, could not be enforced in France due to an amnesty granted for crimes committed by soldiers during the Algerian war and for the supervening abolition of the death penalty. The matter was referred to the Court of Justice, who pointed out that Art. 54 CISA can be applied even when the conviction decision is not enforced due to 'procedural particularities', which are the result of legislative choices made by the State that adopted such measure (CJEU, 11 December 2008, C-297/07, *Bourquain*). In this case, the Court clearly promoted the necessities of 'substantial justice', taking into account the particularities of the facts. Without mentioning anything else, let us think about the significant chronological gap between the first conviction and the initiation of the new proceedings on the same facts. To understand the effective orientation of the European judges concerning the relationship between *ne bis in idem* and amnesty, it will probably be necessary to wait for additional case law developments.

Absence of the Accused In the decision just mentioned, the Court of Justice also took a stand concerning the problem of extending *ne bis in idem* to conviction decisions *in absentia*. On this point, the clear reference by the Court of Justice to the case law of the European Court of Human Rights is interesting, according to which there is an obligation for the national judges to verify (beyond any reasonable doubt) if the accused has unequivocally renounced his/her right to appear at trial or if he/she willfully avoided such trial; the result is that lacking these conditions, each national system has a duty to safeguard the right of the accused to new proceedings on the merits of the case (ECtHR, 18 May 2004, *Somogy v. Italy*).

On these grounds, the Court of Justice prefers to adopt solutions that allow reconciling the guarantee of the right of the accused to participate in the hearing, provided under Art. 6 ECHR, with the principle of *ne bis in idem*. First of all, the value of the argument strictly based on the wording is enhanced, highlighting how Art. 54 CISA does not literally exclude decisions adopted *in absentia* from the scope of application of *ne bis in idem*. Second, it is affirmed that for the purpose of applying *ne bis in idem* to decisions held *in absentia*, the activity of harmonising legislation concerning proceedings *in absentia* should be considered irrelevant. This leads to the preclusion of initiating a new trial on the same fact in a different State, notwithstanding the circumstance that the accused asks for a new trial in the State that previously held the decision *in absentia*.

Relationships Between the Administrative and the Criminal Proceedings The relationship between *ne bis in idem* and the judgments that apply administrative sanctions is contentious. We refer to the risk of cumulus (or combination) of different sanctions for the same fact on the same person. Such a phenomenon can manifest itself both within each individual State (e.g., in the case *Fransson* below) and in the relationships between the different national legal systems. Let us simply refer to violations relating to traffic law, which can assume relevance for both criminal and administrative purposes, or the frequent resort to duplication of sanctions (administrative and criminal) in corporate and tax matters (even if to be balanced with criteria aiming at avoiding excessive punitive effects). We should

not forget that sanctions with different natures might correspond to different ascertainment methods in terms of guarantees and evidence rules.

The Court of Justice dealt in different cases with the relationships between administrative and criminal sanctions in the specific dimension of *ne bis in idem.*

A particular significance is assumed, on this point, by CJEU, 26 February 2013, C-617/10, *Fransson*, on tax fraud.

In a reference for a preliminary ruling, the court of Harapanda (Sweden) asked if the proceedings begun against a Swedish citizen for aggravated tax fraud were inadmissible due to the fact that he had been sanctioned for the same facts with a surcharge by the tax authority, which had become final.

Without prejudice to the autonomy of the 'European' regulation of *ne bis in idem* (as expressly highlighted by European judges, who focus their attention on Art. 50 of the Charter of Nice, without taking any stand as to whether or not it is necessary to interpret such disposition in light of Art. 4 Protocol 7 ECHR and its related case law), the Court thinks that Member States are legitimated to identify administrative sanctions and criminal sanctions for certain behaviours provided that—and this is the key point—a similar choice would not concretely result in applying a double sanction with a 'criminal' nature for the same fact against the same person. Essentially, the Court warns that Art. 50 Charter of Nice does not prohibit a Member State from applying a combination of surcharges and criminal sanction for the same violations of duties to report VAT. This is to ensure the collection of revenues and to thereby protect the financial interests of the European Union; nevertheless, when the surcharge has a criminal nature under Art. 50 of the Charter, and when it is final, 'this impedes initiating criminal proceedings for the same facts towards the same person'; finally, concerning the verification of the valuation of the criminal nature of sanctions, the Court refers to the parameters already developed by the European Court concerning the juridical qualification of criminal offences in national law, their nature and the sanctions' nature and degree of strictness.

However (and this remark has a fundamental importance), the Court assigns the duty to verify the compatibility of the cumulus of sanctions (fiscal and criminal) on the same fact with the guarantee of *ne bis in idem* as a priority to the national courts, in compliance with the criteria of effectiveness, proportionality and deterrence. However, these are vague criteria: we ask ourselves until what point national courts will be able to push themselves in the interpretation of Art. 50 of the Charter of Nice without simultaneously exposing the Member State to a sanction by the Court of Strasbourg.

Therefore, the dialogue between the two courts on the preclusive effect of *ne bis in idem* remains problematic at the moment. Not to reduce too much the area of activity of the 'European' *ne bis in idem*, it could therefore be possible to extend such prohibition to decisions that, even if not adopted by criminal judicial bodies, can still be appealed in front of a court.

10.1.5 Final Remarks

From what has been discussed so far concerning the 'European' *ne bis in idem* principle, it is possible to infer a basic fact. In a 'non-harmonized' European context, the expressions 'same acts' and 'final decision' provided in CISA are inevitably subject to 'adjustments', with the purpose of satisfying the particularities of the individual state systems (which in several cases are the heritage of solid juridical traditions). After all, it would seem unrealistic to rely today only on the case law developed by the Court of Justice, which, on one hand, is physiologically linked to an approach to the 'cases' that impedes the elaboration of 'common principles' (this is true even if a mechanism of referral for a preliminary ruling is provided, which allows the Court to provide general interpretative criteria). On the other hand, the Court of Justice tends to 'delegate' too often to national courts. The result is some sort of a vicious circle. Therefore, there are two alternatives at the moment. The first is a regulatory intervention that would better specify the content of Art. 54 CISA, with the purpose of sensibly 'reducing' any room for interpretation by the Court of Justice (although with the risk of stiffening the guarantee of *ne bis in idem* too much and thereby limiting its broad potential to protect civil rights). Otherwise, the only alternative is to trust the case law of the Court, accepting solutions closely linked to the actual case and therefore not always fully consistent with themselves.

However, it is clear that there is a 'red thread' in the case law of the Court of Justice. We refer to the attention devoted to the freedom of movement of persons in the European area and the consequent development, from that peculiar perspective, of *ne bis in idem* as an (considered) instrument that can provide a valuable contribution to the protection of such a value.

10.2 Conflicts of Jurisdiction

10.2.1 General Profiles

The fact that *ne bis in idem* is a valuable but insufficient instrument for effective judicial cooperation at the European level is obvious. The logic under *ne bis in idem* enhances two elements, the final decision and the time factor: the authority of the State that first adopts a final decision creates the preconditions to block the beginning or continuation of new proceedings in another State. In this way, the objective to avoid initiating a new trial *in idem* (or, in case it has already begun, to interrupt it) is achieved, but there is no direct action on the genetic moment of the trial, i.e., on initiating parallel criminal actions on the same fact within different States, by identifying *a priori*, based on objective parameters, which State has the legitimacy to act. Therefore, if on one hand *ne bis in idem* shelters individuals from the risk of a double trial, thereby promoting the freedom of movement of persons between the States, on the other hand it neglects the needs of the State legitimated to claim its

right to a punitive power because, for example, the *locus commissi delicti* is located right in its territory. This is without considering the possible negative relapses on the quality of the ascertainment: if the State that adopts the final decision is not the same State where the *locus commissi delicti* is located, some relevant sources of proof could be unavailable or difficult to find.

This all suggests that the guarantee of *ne bis in idem* must be considered some sort of *extrema ratio*, 'downstream' of a series of mechanisms to prevent or solve cases of simultaneous pendency between authorities belonging to different nations, without the need to wait for the final outcome of a trial. In short, this is about satisfying the needs of judicial cooperation through a form of anticipated protection compared to the one granted by *ne bis in idem*, exactly in the perspective provided in the EU Treaty (Art. 31.1.d).

Moreover, in this context, there is an additional need to satisfy the protection of the individual relative to the choice of the competent judicial authority, in line with the principles of a natural and pre-identified judge. The common shared opinion is that the natural and pre-identified judge is a guarantee aiming at protecting the person even more than at protecting the legal system (emblematic is the text of Art. 25.1 of the Italian Constitution, under which 'no one can be diverted from his/her natural judge, pre-identified under the law'). We should therefore avoid confining the accused in the margins of proceedings aiming at selecting the State legitimated to exercise the punitive power, at least granting to the defence the possibility to get involved on this point. Otherwise, the accused would remain subject to a judge who is not only different from the one of the *locus commissi delicti* but not even pre-identified as he/she would be pinpointed after the commission of the crime.

10.2.2 Types of Conflicts and Solutions: The Document of the So-called 'Freiburg Group' and the Green Paper of 2005

We refer to conflicts of jurisdiction anytime two or more States simultaneously claim their competence to exercise their punitive power concerning the same fact against the same person. Under this profile, normally we distinguish between potential and real conflicts of jurisdiction. The former kind of conflicts exists when two or more States have jurisdiction *in idem* in the abstract and can therefore claim the power to exercise such jurisdiction on the case. On the other hand, the latter sort of conflicts exists whenever two or more States are actually exercising prosecution on the same fact. Hence, there is a double requirement: (a) to act preventively through the arrangement of criteria aiming at identifying in advance the authority with the legitimacy to act, to orientate the States towards a spontaneous composition of the conflict, and (b) to entrust to a body the duty to intervene with binding powers whenever such hypothesis is not realised.

These requirements have led to the elaboration of some proposal. Particularly articulate is the one outlined by a group of scholars of the Max Planck Institute of Freiburg (2003) based on three guidelines: the identification of coordination criteria between the States for the assignment of jurisdiction, the guarantee of *ne bis in idem* as a remedy for any negative outcome of the activity of coordination and the deduction of the amount of corresponding punishment previously served in another State from any possible second sanction inflicted on the same fact by another State. Moreover, concerning the specific coordination mechanism between States that intend to act *in idem*, there is a need to exchange information between the interested authorities to achieve a spontaneous composition of the conflict of jurisdiction. For that purpose, the proposal points out some criteria for the identification of the competent court: the *locus commissi delicti*, the nationality (or, alternatively, the residence) of the suspect or accused, the nationality of the victim and the place where evidence is located. However, this proposal presents a patent omission because it does not identify a hierarchy applicable to the selected criteria. In addition, it contains a clause providing the possibility to take into consideration any other 'fundamental interest of the State', including territorial integrity, internal and external safety, democratic organisation, the protection of the environment and of natural resources, which thereby risks granting a convenient excuse to the State potentially inclined not to renounce the exercise of its punitive judicial power.

In 2005, the sensitivity to the problem of conflicts of jurisdiction led to the draft of a Green Paper, which had the virtue of highlighting two unavoidable needs: the realisation of an effective exchange of information between Member States on conviction decisions that they each adopted and the recognition by each and every State of the power to relinquish the exercise of prosecution in favour of the State considered more suitable to act. To make the latter solution practicable even in legal systems that provide for a mandatory prosecution, it could be appropriate to adopt a legislative instrument that would allow the derogation of such obligation by leveraging on the fact that, in any case, the punitive claim would be satisfied, even if within another State. Moreover, concerning the proceedings aiming to identify which State is legitimated to act, three different steps are outlined: the exchange of information between interested States, the consultation/discussion between such States aiming to find an agreement on the competent jurisdiction and, finally, if the conflict persists, a phase for the mediation/composition of such conflict in front of an *ad hoc* body of national senior judges. From this perspective, we highlight both the need to prohibit the involved States from issuing a request of committal to trial during a consultation or decision phase concerning the conflict and the need to involve the accused (as well as the victim of the crime) in the proceedings aiming at identifying the competent judge. This solution is in line with the need to safeguard the prerogatives of the counsel, who might be interested in challenging the criteria adopted to choose the competent judge, not differently from what happens on the level of internal law when a party claims the incompetence of a determined jurisdictional body. However, it is clear that the choice to reveal the existence of a plurality of proceedings on the same fact within different States could compromise the quality of the ongoing investigations.

10.2.3 Framework Decision 2009/948/JHA on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings

Right before the Treaty of Lisbon entered into force, we finally reached Framework Decision 2009/948/JHA on the prevention and resolution of conflicts of jurisdiction in criminal matters. As the Preamble of such decision states, the objective is to prevent any possible violation of *ne bis in idem*.

The first significant data that can be found in that measure consist in the provision of a duty for the State that has a 'grounded reason' to believe that a proceeding is pending in another State against the same person on the same fact. That State has the duty to contact the competent authority of the other State, which has a duty to answer within the term indicated in the request and, in any case, 'without undue delay'. The answer must be communicated with urgency whenever the suspect or accused person is in a precautionary detention state. Moreover, the exchange of information must be documented precisely (Art. 5). In addition, after acknowledging the existence of a *lis pendens*, the States must hold consultations with the purpose of agreeing on a solution.

In case they do not reach an agreement, it is possible to exploit the coordination powers entrusted to Eurojust (Art. 10). This point is worth a detailed analysis, even considering that the Treaty of Lisbon expressly obligates Eurojust to strengthen judicial cooperation with the composition of conflicts of jurisdiction (Art. 85.1.c). Considering that conflicts of jurisdiction often arise due to insufficient cooperation between the prosecutor's offices of the individual States, the result is that the coordination powers for supranational investigations entrusted to Eurojust could contribute to preventing them. The coordination can be realised in two different ways: (a) after being informed of a possible situation of *lis pendens*, the College of Eurojust can ask the authority of one of the interested States to accept that another State has the authority to undertake the investigations and eventually to exercise the prosecution (Art. 6.1.a Framework Decision 2002/187/JHA), and (b) the national authority can autonomously assume the initiative to request direct assistance from Eurojust so that it will coordinate the investigations by identifying the legitimate authority to carry them out and to subsequently exercise the prosecution (Art. 7.1.a Framework Decision 2002/187/JHA). For that purpose, the national representatives of Eurojust suggested favouring the criterion of the place where the largest part of the criminal acts took place or where the most significant damages occurred, to consider where the accused resides, to take into account the need for witnesses to participate in the proceedings and the protection of the latter. Beyond these remarks, there are still doubts linked to the perspective of granting any duty that should otherwise logically belong to judicial bodies to an office that coordinates prosecutors, such as Eurojust, because the judicial bodies are more trustworthy in terms of impartiality and independence.

However, Framework Decision 2009/948/JHA presents some patent omissions. There are no indications concerning the maximum duration of the consultation

procedure. In addition, the duty of Member States to consider 'relevant criteria' along the lines of those adopted by Eurojust (recital 9) is too generic to be substantively useful. Moreover, the silence on the legal remedies that can be employed in case the agreement on the competent judge is not complied with can be criticised. In addition, the lack of any reference to the role of the defence in the consultation procedures is cause for confusion, an omission that is even more serious considering that the waiver by a State to the exercise of the punitive power could be effectively counterbalanced exactly in the protection of guarantees of the individual in front of the competent court. Finally, the Framework Decision is silent on any incompatibilities between the solution based on the agreement between the involved States and compliance with the principle of mandatory prosecution: a silence that weighs, given that there are some legal systems where such principle represents the product of a solid traditional culture.

10.2.4 Transfer of Criminal Proceedings

Within the scope of judicial cooperation, the transfer of criminal proceedings also assumes a central role. The fact that this solution is already practised in the past for the purpose of international cooperation (even if with non-satisfactory outcomes) is well known: please note the Convention on the transfer of criminal proceedings of 15 May 1972 (in force from 30 March 1978 but ratified only by some Member States).

The mechanism for the transfer of criminal proceedings can be summarised as follows: when more than one State exists, all of which are competent concerning an identified criminal offence, the legitimation to proceed is recognised only for one of them; consequentially, it could be possible for all other States concerned to technically recognise a real lack of jurisdiction. However, it is legitimate to ask ourselves if from that point of view the transfer of criminal proceedings from one State to another would not clash with the principle of the natural judge pre-identified under the law. Perhaps the effective involvement of the accused in the transfer proceedings could somehow attenuate that potential conflict.

On this matter, it is necessary to point out a proposal in a framework decision (2009/C/219/3) that has the objective to solve conflicts of jurisdiction 'by concentrating' the exercise of the punitive judicial authority in an individual Member State (with the consequent waiver of the right to act for that purpose by the States concerned). Given that the transfer of criminal proceedings between competent authorities is allowed only if the requisite of 'double incrimination' exists (meaning that the fact must also be a crime in the State where the criminal proceedings flows into), it is provided that the authority of a Member State might ask the authority of another Member State to 'succeed' the former in the exercise of the prosecution, taking into account a series of strictly listed requirements, including the usual residences of the accused and the victim, the presence of relevant evidence for the decision and the social rehabilitation perspectives that make it appropriate to execute

a punishment in a State more than in another. Concerning the guarantees, what seems to be significant is the identification of an obligation imposed on the authority that transfers the proceedings to inform the accused and the victim concerning the request of transfer, with the possibility to transfer any remark made by the counsel of the accused to the authority of the State where the proceedings flow into.

With the purpose of strengthening judicial cooperation, the reasons that each State can claim to oppose the transfer of the proceedings are also listed: the need to safeguard the prohibition against *ne bis in idem*, the need to respect immunities or privileges and the existence of amnesty measures or decisions that barred the criminal offence statute. In addition, the possibility to request the assistance of Eurojust during the whole transfer procedure is provided.

Finally, we must ask ourselves: what is the destiny of evidence acquired before the transfer of the proceedings? The legislative initiative under analysis aims at safeguarding previously collected evidentiary materials, inspired by some sort of principle for the conservation of acts (Art. 17.2). However, in a non-harmonised European context, there are still doubts and unknowns linked to an automatic transfer of evidence from one legal system to another without considering the different rules provided in the individual legal systems concerning evidence searches, rules for exclusion and sanctions for the violation of evidentiary prohibitions, especially when the latter are provided in defence of fundamental values such as privacy, domicile, private property and freedom of communication.

10.2.5 Exchange of Information Between States Concerning Final Decisions: European Criminal Records Information System

There has long been an agreement that judicial cooperation implies a constant exchange of information between States in order to ensure prompt knowledge of final decisions adopted by the national authorities. This kind of solution has the advantage of avoiding useless wastes of time, not only because it favours the prevention of *lis pendens* but also because it facilitates the immediate application of the preclusive effects of *ne bis in idem*. Moreover, the existence of an effective and constant flow of information between the States could also be valuable from the perspective of initiating new criminal proceedings against the same person for different facts; please note the importance that could assume the knowledge of an individual's criminal records for the purpose of challenging any recurrences and for granting (or revoking) the conditional suspension of the punishment. Instead, we can incidentally emphasise that the information exchange mechanism between States seems less significant concerning the specific profile of the execution of a foreign decision, given that, in this case, the mere transmission of the decision to the State entrusted with the enforcement would be sufficient.

On this basis, it is then necessary to arrange some sort of database that each interested State can access freely to obtain useful data for retracing a specific person's criminal record. In fact, it could be possible that the individual subject to new proceedings in a different State might abstain from providing information concerning the existence of a previous foreign conviction on the same facts, and, even if it would provide such information, it would still be necessary to verify its accuracy.

In reality, attention towards this thorny topic has never diminished. Recall the European Convention on Mutual Assistance of 1959, which provided a double mechanism: the exchange of information upon the request of the interested State and a system characterised by some sort of automatic mechanism that obliged each State to annually transmit any data related to the criminal decisions issued in their territory towards a convicted person to the State where such person was citizen. Unfortunately, both solutions revealed themselves to be ineffective (as conveniently pointed out in the White Paper concerning the exchange of information on criminal convictions drawn up by the European Commission in 2005) due to the non-homogenous criminal records of the individual States, the lack of transcription of convictions against legal entities, the difficulty of understanding the data, the different registration methods and, above all, delays in transmitting the information.

The non-homogenous regulation between the various European countries also arises concerning the cancellation of the registrations. For example, in Ireland, there is no time limit; in Denmark, the term is 10 years; and in Spain, two years must pass from the end of the enforcement of the punishment.

Once the idea to create European centralised criminal records is set aside, initially there was a trend towards solutions only aiming to fill up the omissions in the Convention of 1959. It was from this perspective that Framework Decision 2005/876/JHA on the exchange of information extracted from the criminal record positioned itself. It provided the following duties for the individual Member States: the immediate transmission of information on criminal convictions registered in the criminal records, the adoption of a standardised model for requests for information and the provision of a ten-day term for the reply.

Afterwards, Decision 2005/876/JHA was repealed by Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal records, which, together with Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS), currently constitutes the main source of legislation concerning managing the flow of information between Member States. The leap in quality in Framework Decision 2009/315/JHA is evident. In fact, the obligations provided in the precedent Decision 2005/8876/JHA became more stringent, and some completely new obligations are provided for. In summary, each individual State has a duty to communicate without delay any conviction held in its territory against its own citizens to other Member States (Art. 4.2), as well as the duty to transmit, upon request, the related decisions (Art. 4.4). The transmission of such data is carried out through the European criminal certificate and in the official language of the State that received the request. The Framework Decision of 2009 identifies three types of information. The

communication of certain data, such as the personal data of the convicted person, the nature of the decision, the type of crime and the content of the decision, is compulsory. Other information must be sent only if it is included in the criminal records, such as information concerning any interdiction consequent to a conviction. Finally, other data, such as identification documents and fingerprints, must be communicated only if available. In addition, the obligations are diversified depending on how the State interested in obtaining such information intends to make use of the latter (Art. 7). If the request is directed at obtaining useful data for the purpose of criminal proceedings, the communication of such data is a purely non-discretionary act. Instead, if the purpose of the request is different, the State that holds the information shall send it only if the fulfilment of the request is not against its domestic law (Art. 7.2).

One of the weak points of the informational system outlined in Framework Decision 2009/315/JHA is that it remains limited only to citizens of the European Union and does not provide any information concerning citizens of non-EU countries convicted by the authorities of the Member States (see the remarks of the European Commission: COM (2009)26).

Finally, concerning the already mentioned Decision 2009/316/JHA, the provision of a link to a network of the criminal records of Member States seems to be important. The objective is to build a computerised system for the exchange of data concerning the convictions charged within Member States. To make this system truly effective, the decision provides for the adoption of connection software and a standard format of transmission based on numeric codes, therefore not the European Centralized Criminal Records system but a decentralised system based on fast and complete communication. Each Member State has the duty to manage and update the data related to conviction decisions issued against its own citizens. In addition, no direct online access to the criminal records of other Member States is provided.

However, many grey areas still exist. Above all, there is still a grey area concerning the protection of personal data, given that both Decisions of 2009 refrain from providing any indication on this matter.

Further Reading

Aguilera Morales F, Hernan MC (2011) El principio non bis in idem a la luz dela jurisprudencia del Tribunal de justicia. Arch. pen., pp 3 ff

Allegrezza S (2012) Art. 4 Prot. 7. In: Bartole S, Conforti B, Zagrebelski V (eds) Commentario breve alla Convenzione europea dei diritti dell'uomo. Cedam, Padova, pp 897 ff

Amalfitano C (2006) Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea. Giuffrè, Milano

Bartsch HJ (2002) Ne bis in idem. The European perspective. Rev Int de droit pénal, pp 1163 ff

Blockel BV (2010) The ne bis in idem principle. EU law, pp 217 ff

Bose M (2003) Der Grudsatz "ne bis in idem" in der EU. Goltdammer's Archiv, pp 744 ff

Coffey G (2008) The principle of Ne bis in idem in criminal proceedings. Irish Crim Law J 18(1):2 ff

Copain C (2013) Le principe ne bis in idem: entre hamornisation et dissonance européennes. Actualité Juridique Pénal, pp 270 ff

De Amicis G (2014) Ne bis in idem e “doppio binario” sanzionatorio: prime riflessioni sugli effetti della sentenza “Grande Stevens” nell'ordinamento italiano. Dir. pen. cont. – Riv. trim. (3–4), pp 201 ff
De La Cuesta JL (2002) Concurrent national and international criminal jurisdiction and the principle “ne bis in idem”. General Report Rev int droit pénal, pp 725 ff
Duesberg E (2017) Das Vollstreckungselement des Art. 54 SDÜ im Spannungsfeld zwischen Europäisierung und nationalen Sicherheitsinteressen. Plädoyer fÜr einen vermittelnden Standpunkt. Zeitschrift fÜr Internationale Strafrechtsdogmatik, pp 66 ff
Fletcher M (2003) Some developments to the ne bis in idem principles in the European Union. Mod Law Rev 66:769 ff
Fletcher M (2007) The problem of multiple criminal prosecutions: buildings an effective EU response. Yearb Eur Law, pp 33 ff
Gaeta P (2014) Gerarchie e antinomie di interpretazioni conformi nella materia penale: il caso del ne bis in idem. Cass pen., pp 1863 ff
Galantini N (2011) Il ne bis idem nello spazio giudiziario europeo: traguardi e prospettive. www.dirittopenalecontemporaneo.it., 24 February 2011
Garin A (2016) Non bis in idem et Convention européenne des droits de l’homme - Du nébuleux au clair-obscur: état des lieux d’un principe ambivalent. Rev. trim. droits de l’homme, pp 395 ff
Hochmayr G (ed) (2015) “Ne bis in idem” in Europa. Praxis, Probleme und Perspektiven des Doppelverfolgungsverbots. Nomos, Baden-Baden
Hochmayr G, Ligocki D (2016) Der Strafregisteraustausch in der Europäischen Union und das Recht auf Resozialisierung. Zeitschrift fÜr Internationale Strafrechtsdogmatik, pp 159 ff
Kaiafa-Gbandi M (2017) Jurisdictional conflicts in criminal matters and their settlement within EU’s supranational settings. Eur Crim Law Rev (1), pp 30 ff
Klip A, Van Der Wilt H (2002) Ne bis in idem. Rev. int. dr. pénal, pp 1095 ff
Kniebuhler RM (2005) Transnationales “ne bis in idem”. Duncker & Humblot, Berlin
Lelieur J (2005) La règle ne bis in idem. Thése pour le Doctorat en Droit. Université Panthéon-Sorbonne, Paris
Lelieur J (2013a) “Transnationalising” ne bis in idem: how the rule of ne bis in idem reveals the principle of personal legal certainty. Utrecht Law Rev 9:198 ff
Lelieur J (2013b) L’Union européenne face aux conflits de compétence pénales. Questions de droit pénal international, européen et compare. Mélanges en l’honneur du professeur Alain Fournier. Presses universitaires de Nancy - Editions universitaires de Lorraine, pp 257 ff
Ligeti K (2009) Rules on the application of ne bis in idem in the EU. Is further legislative action required? Eucrim (1–2), pp 37 ff
Ligeti K, Simonato M (2014) Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept. In: Galli F, Weyembergh A (eds) Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU. Editions de l’Université de Bruxelles, Bruxelles, pp 81 ff
Lupària L (2012) La litispendenza internazionale tra ne bis in idem europeo e processo penale italiano. Giuffrè, Milano
Marletta A (2017) A new course for mutual trust in the AFSJ? Transnational ne bis in idem and the determination of the merits of the case in Kossowski. New J Eur Crim Law 8(2):108 ff
Maulet L (2017) Le principe ne bis in idem, objet d’un “dialogue” contrasté entre la Cour de justice de l’Union européenne et la Cour européenne des droits de l’homme. Rev. trim. droits de l’homme, pp 107 ff
Mitsilegas V (2015) The symbiotic relationship between mutual trust and fundamental rights in Europe’s area of criminal justice. New J Eur Crim Law 6(4):457 ff
Mock H (2009) Ne bis in idem: Strasbourg tranche en faveur de l’identité des faits. Cour européenne des droits de l’homme (Grande Chambre), Zolotoukhine c. Russie, 10 février 2009. Rev. trim. droits de l’homme, pp 867 ff
Panayides P (2006) Conflicts of jurisdiction in criminal proceedings: analysis and possible improvements to the EU legal framework. Rev int de droit penal, pp 113 ff

Paulesu PP (2016) Riflessioni in tema di ne bis in idem europeo, Riv dir proc, pp 638 ff
Rafaraci T (2008) Procedural safeguards and the principle of ne bis in idem in the European Union. In: Bassiouni MC, Militello V, Satzger H (eds) European cooperation in penal matters: issues and perspectives. Cedam, Padova, pp 363 ff
Roberts P (2002) Double Jeopardy law reform: a criminal justice commentary. Mod Law Rev, pp 393 ff
Sarmiento D (2007) El principio ne bis in idem en la jurisprudencia del Tribunal de Justicia de la Comunidad Europea. In: Zapatero LA, Martin AN (eds) El principio ne bis in idem en el Derecho penal europeo e internacional. Ediciones De La Universidad De Castilla-La Mancha, Cuenca, pp 56 ff
Schomburg W (2012) Criminal matters: transnational ne bis in idem in Europe – conflicts of jurisdiction – transfer of proceedings. ERA Forum 13(3):331 ff
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europaieshes Strafrecht. Nomos, Baden-Baden
Spinellis D (2002) The ne bis in idem principle in "global" instruments. Rev int de droit pénal, pp 1149 ff
Thorhauer NI (2015) Conflicts of jurisdiction in cross-border criminal cases in the area of freedom, security, and justice: risks and opportunities from an individual rights-oriented perspective. New J Eur Crim Law, pp 78 ff
Vander Beken T, Vermeulen G, Ongena T (2002) Concurrent national and international criminal jurisdiction and the principle "ne bis in idem". Rev int dr pénal, pp 818 ff
Vervaele JAE (2004) Case law. Common Mark Law Rev 41:804 ff
Vervaele JAE (2005) The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights. Utrecht Law Rev, pp 100 ff
Vervaele JAE (2006) Multilevel and multiple punishment in Europe. The ne bis in idem principle and the protection of human rights in Europe's area of freedom, security and justice. In: van Hoek A et al (eds) Multilevel governance in enforcement and adjudication. Intersentia, Antwerpen, pp 1 ff
Vervaele JAE (2013) Ne bis in idem. Towards a transnational constitutional principle in the EU? Utrecht Law Rev, pp 211 ff
Viganò F (2014) Doppio binario sanzionatorio e ne bis in idem: verso una diretta applicazione dell'Art. 50 della Carta? (a margine della sentenza Grande Stevens della Corte Edu). Dir. pen. cont. – Riv. trim. (3–4), pp 219 ff
Wesmeier M (2006) The principle of ne bis in idem. Rev int de droit penal, pp 121 ff
Wesmeier M, Thwaites M (2006) The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments. Eur Law Rev pp 565 ff
Wasmeier M. (2014) ne bis in idem and the enforcement condition. New J Eur Crim Law pp 548 ff
Weyembergh A (2004) Le principe ne bis in idem: pierre d'achoppement de l'espace pènal européen? Cahiers droiteur., pp 337 ff
Weyembergh A (2013) Le Principe Non Bis In Idem: Une Contribution Essentielle De La CJUE. In: Court of Justice of the European Union (ed) The Court of Justice and the construction of Europe: analyses and perspectives on sixty years of case law. Curia, Asser Press, Springer, Luxembourg, The Hague, Heidelberg, pp 539 ff
Weyembergh A, Joncheray N (2016) Punitive administrative sanctions and procedural safeguards: a blurred picture that needs to be addressed. New J Eur Crim Law 7(2):190 ff
Wyngaert CV, Stessens G (1999) The international non bis in idem principle: resolving some unanswered questions. Int Comp Law Q 48:779 ff
Zimmermann F (2015) Conflicts of criminal jurisdiction in the European Union. Bergen J Crim Law Crim Justice, pp 1 ff

Chapter 11
Enforcement of Judicial Decisions

Pier Paolo Paulesu

Contents

11.1 Enforcement Profiles

11.1.1 Foreword

The enforcement of a conviction in a different State than the one to which the court that issues such decision belongs also finds its place in the framework of judicial cooperation.

On this matter, Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union was enacted. It fixes the rules that a Member State must comply with to recognise a judgment and apply the punishment, with the aim of reconciling two opposing demands: the interest of the State that issued the conviction judgment to the enforcement of the punishment and the interest of the convicted person to begin a process of re-socialisation while and after he/she serves

P. P. Paulesu (✉)
School of Law, University of Padua, Padua, Italy
e-mail: pierpaolo.paulesu@unipd.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_11

his/her sentence. Indeed, often the foreigner has no relationship whatsoever with the State that issued a conviction against him/her. Often he/she has no stable family or professional bonds with such a State; at times he/she does not even have the right to reside there, to the point that after serving his/her sentence, the authorities orders his/her expulsion.

Therefore, the judicial cooperation on the enforcement of the punishment represents a significant step forward in the process of building and strengthening the European Judicial Area. Nonetheless, it is not without pitfalls. As we also will highlight below, the risk of abuses and exploitation remains in this thorny area. Consider the fact that the mechanism of transferring inmates between Member States for enforcement purposes could aim merely to reduce the number of inmates in prisons, with the risk of confining safeguarding the rights and prerogatives of inmates to the background (i.e., social re-integration, rehabilitation, prison treatment, etc.).

11.1.2 The Enforcement of Conviction Judgments

Framework Decision 2008/909/JHA points out some conditions for the transmission of a conviction or of a certificate (containing the data of the judicial body that issued the judgment between the Members States (Art. 4): (a) the presence of the convicted person in the State that issued the judgment or where the latter must be enforced, (b) the consent of the convicted person (with certain exceptions) and (c) the double incrimination requirement (the fact must be considered a crime in all States involved in the procedure under exam), which can be waived for a series of criminal offences that have transnational relevance, e.g., terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering the proceeds of crime; and computer-related crimes (Art. 7). In addition, the Framework Decision provides for some cases in which the authority of the executing State can refuse to recognise the judgment and the enforcement thereof, when, for example, there is the need to safeguard *ne bis in idem*, when the enforcement of the sentence is statute-barred and when there is immunity under the law of the executing State (Art. 9).

Moreover, concerning the enforcement of convictions, we must consider the benefits of conditionally suspending the punishment or applying alternative punishments. In this matter, judicial cooperation is realised by granting the necessary control on the correct application of such measures to the Member State, which is different from the one that issued the decision, to whom the authority belongs. In fact, Framework Decision 2008/947/JHA, which presents itself as an expression of the mutual recognition principle, requires Member States to monitor that the convicted person is respecting the prescriptions imposed by the judgment; such prescriptions concern communications related to the change of residence, the prohibition against frequenting certain places, the prohibition against leaving the

territory of the executing State, the prohibition against contacting certain specific people, the duty to carry out community services and to cooperate with the oversight personnel and the duty to undergo therapeutic treatment.

In any case, the cooperation requests surrender when facing other needs: if the provisions imposed by the judgments are deemed to be discriminatory or in conflict with the essential interests of the executing State, the latter is legitimated to refuse to execute the State that issued the conviction, and therefore it is authorised not to comply with such provisions.

11.1.3 Follows: Transfer of Sentenced Persons

Framework Decision 2008/909/JHA also deals with the transfer of sentenced persons in the Member States of which they are citizen or where they have their habitual residence. The objective, as already mentioned, is to facilitate the effective social re-integration of the convicted person, allowing him/her to serve his/her sentence in his/her country of origin, thereby eliminating the various critical profiles provided in the Convention of the Council of Europe on the transfer of sentenced persons (signed in Strasbourg on 21 March 1983), which is considered by many people as time-worn, incomplete and, overall, not suitable to provide adequate protections to the States and, above all, to the persons concerned.

The transfer, which is selectively aimed at the enforcement of the sentence, must be carried out within a term agreed upon by the States concerned and, in any case, not later than 30 days from when the executing State has decided whether to recognise the 'foreign' decision (Art. 15). Some rules are provided concerning the transfer of the person through Member States, and in addition, some sort of principle of specialty is applied (Art. 18) consisting in the prohibition against the executing State of prosecuting, convicting or in any case limiting the personal freedom of the transferred individual for a crime committed before the transfer and different from the one that justified such procedure. Finally, a net allocation of functions between the States concerned is provided: the decisions on the methods for applying the sentence (including the conditional suspension of the punishment) belong to the State that is legitimated to enforce it, while the power to decide on the request to review such judgment is reserved exclusively to the State that issued the judgment. Instead, both States benefit from a full decisional autonomy concerning pardon and amnesty measures (Art. 19).

It is important to highlight that, concerning the transfer of sentenced persons, the necessity to safeguard the fundamental rights of the individual has central relevance. Even if a specification is provided in this sense in Art. 3.4 of the Framework Decision, the fact remains that the transfer is not conditioned on the previous consent by the convicted person. Therefore, there is a risk—conveniently highlighted in the Green Paper COM/2011/327 (concerning the application of EU criminal justice legislation in the field of detention)—that a violation of the fundamental rights of the individual may occur after the transfer. For this reason, and from a 'transparency'

perspective, the Green Paper looks forward to the launching of a constant cooperation on an informative level between Member States concerning the characteristics of national penitentiary systems. In fact, as already highlighted, the mechanism to transfer inmates might be used by a State as a remedy for overcrowded prisons (consider the case in which a Member State has a high percentage of inmates that are citizens of another Member State). The purpose of this solution is to balance any 'structural' deficiency that, as a matter of fact, would merely move the issue of penitentiary emergency from one Member State to another.

Furthermore, the Green Paper of 2011 highlights an additional issue linked to detention. If a person is sentenced in one Member State for a custodial sentence to be enforced in another State, it is fundamental that such person knows in advance the amount of the sentence that he/she will actually serve. Otherwise, there is a risk of discouraging the transfer of inmates: consider that significant differences remain among Member States concerning the regimes of parole or anticipated release; neither can we ignore the hypothesis that the State where the sentence must be enforced provides mechanisms of anticipated release that are, in any case, less advantageous compared to the one existing in the State that issued the conviction.

11.1.4 Enforcement of Financial Penalties

The aim of Framework Decision 2005/214/JHA is to guarantee mutual recognition at the European level of convictions that inflict financial penalties by highlighting the need to intervene not only on costs to be borne for collecting the penalty charged abroad (not rarely higher than the penalty itself) but also for redistributing the amounts collected among the interested Member States. Instead, what remains outside the operative scope of this Framework Decision are orders to confiscate the proceeds of crime due to the fact that they are not financial penalties.

In the matter of enforcement of financial penalties, we again face a form of mandatory and binding cooperation that directly involves the States concerned. The procedure is structured in two steps: (a) the issue of the order of execution (or Euro order) by the State where the sentenced person resides or where his/her assets are located and (b) the execution of such measure by the State that is requested to do so.

Concerning the first step, some sort of precondition is provided. If the financial penalty was issued by non-judicial authorities or was due to a violation of administrative provisions, the State that issued the conviction must guarantee to the interested party the right to appeal the measure in front of a criminal jurisdictional body. Therefore, what is important for the execution of the financial penalty in a different State than the one that issued the conviction is not really the nature of the body that adopted such measure but the possibility to subject it to a control by a criminal judge. For this reason, in the European execution order of the financial penalty, it is necessary to list the kind of decision that applied the financial penalty

and the authority that issued such measure; otherwise, the State that receives the order can legitimately refuse to execute it.

Four kinds of measure are relevant for the purposes of issuing the enforcement order: (a) judgments issued by the judicial authority following the commission of a crime, (b) judgments adopted by the judicial authority concerning violations with an administrative nature, (c) measures issued by non-judicial bodies following the commission of a criminal offence and (d) measures issued by non-judicial bodies for administrative violations.

Once the Euro order has been issued, it must be transmitted to the competent authority of the State legitimated to enforce it through the certificate provided by Framework Decision 2005/214/JHA. The Euro order must be translated into the language of the executing State. The executing State is identified based on the habitual residence or the location of the assets or revenues of the person concerned. However, if the enforcement order concerns a legal person, it is necessary to refer to the registered office of the latter or the place where its assets are located. The 'formal' requisite of the certificate under exam is binding, given that any possible breach of the latter authorises the State recipient of the Euro order not to execute it. Finally, it is necessary to transmit the measure that applies the financial penalty to the executing State.

The issue and transmission of the Euro order produce a peculiar effect: the State that issues such measure loses the punitive authority towards the convicted subject (physical person or legal person) and can no longer apply the financial penalty (Art. 15 Framework Decision 2005/214/JHA), except for some hypothesis where the recipient State of the Euro order is legitimated not to execute it. However, the punitive authority of the State that issues the Euro order is extinguished permanently in the following cases: (a) the sentenced person pays the amount, (b) amnesty is granted by one of the States involved in the procedure and (c) the execution order and the fundamental rights set forth in Art. 6 TEU are in conflict.

As already anticipated, the State that receives the enforcement order might legitimately refuse to execute such measure (therefore, in that sense there is a residual area of discretion). This happens in the following cases (Art. 7 Framework Decision 2005/214/JHA): a certificate of transmission that is incomplete or does not correspond to the judgment that inflicts the financial penalty, violation of *ne bis in idem*, the criminal offence being statute-barred, immunity under the law of the executing State and exemption of the subject from criminal liability due to his/her age. The list of grounds for refusal is exhaustive, and the number should therefore be restricted to those provided. The use of a conditional clause is necessary because some States widen the category of such grounds in implementing the Framework Decision under examination. For example, in the Czech Republic, a specific ground for refusal is provided when it comes to executing a financial penalty towards a legal entity, while the Republic of Slovenia provides the possibility not to execute the Euro order when the other State's conviction does not comply with the principles of the Slovenian Constitution.

The Euro order must be executed according to the rules of internal law of the State of execution (*lex loci*). However, the possibility to oppose the refusal is excluded when the system of the executing State does not provide any criminal liability for legal entities or does not provide such liability for the criminal offence that is the object of the conviction.

Finally, we can ask ourselves if the authority competent for the execution of the Euro order can modify the financial penalty imposed together with the conviction by reducing the amount or converting it into alternative (e.g., community services) or custody penalties. The first solution is possible whenever the conviction also concerns conducts carried out outside the State that issued such conviction; the second is possible when it is impossible to apply the financial penalty as a matter of fact or of law.

11.2 Effects of Conviction Judgments

11.2.1 Recognition of the Effects of Conviction Judgments, Criminal Records and 'European' Recidivism

Finally, concerning the aspect of recognising the effects of conviction judgments, it is necessary to point out a framework decision (2008/675/JHA) that has the objective to allow a Member State to take into account, during criminal proceedings against a determined person, previous convictions issued against the same person for different facts in other Member States (therefore outside the area of relevance of *ne bis in idem* under Art. 54 CISA, relating to the same fact).

In this regard, we refer to the assimilation of the effects of the 'foreign' judgment. It is clear that it is a very insidious territory. Two big problems that are not easy to solve underlie the claim to grant to a conviction effects outside the State that handed it down: to ensure that the effects that the judgment produces in the foreign State are the same as the ones provided to it in the jurisdiction where it was issued and to ensure that such effects are not incompatible with the law of the State that must recognise such effects.

From this perspective, it is important to point out that Framework Decision 2008/675/JHA does not pursue the objective of 'harmonization' or 'approximation' of Member States' legislation concerning the effects of convictions. It only aims to grant each Member State the power to give the same effects to a conviction as in the State where it was issued, above all with regard to the type and level of the sentence, and the rules governing the execution of the decision. The Framework Decision notes that the duty of assimilation applies to 'any final decision of a criminal court establishing guilt of a criminal offence', and for the moment, it does not extend to legal persons. Moreover, Member States have a wide discretion concerning the kind of effect to attribute to the conviction, even if they cannot revoke it or subject it to review.

Obviously, the thorny aspect of recidivism is also relevant in this area. It is not disputed that the need to differentiate primary delinquents from the so-called repeat offenders represents a corollary of the principle of mutual recognition. However, it is necessary to add that, in this area, mutual recognition selectively aims to grant value to criminal records within the European Judicial Area, without interfering with the enforcement of judgments within each State and with any possible preclusion that can be attributed to the *ne bis in idem* principle. Unfortunately, there is currently only one rule concerning recidivism in the Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (2001/888/JHA), which provides that each Member State acknowledges, for the purpose of recidivism, any conviction issued in another Member State for one of the criminal offences listed in the same Framework Decision. In any case, it seems unrealistic to expect to solve the issue of recidivism in a 'non-harmonized' European context. Consider that some elements that might vary significantly from one State to another are relevant in this field, for example, the qualification of the criminal offence by the court that issued the first judgment, especially because certain Member States provide only for specific recidivism that actually entails the precise identity of the juridical qualification of criminal offences.

11.2.2 Follows: Convictions in Absentia *and Individual Guarantees*

Finally, concerning the enforcement of convictions, it is important not to disregard the thorny profile of the absence of the accused.

In light of the positions of the European Court of Human Rights, which has always been sensitive to the issue of protecting the accused in proceedings *in absentia*, and ascertained that the framework decisions on the recognition and execution of convictions already examined (2005/214/JHA, 2008/909/JHA, 2008/947/JHA) do not provide any protection of persons convicted *in absentia*, an *ad hoc* legislative intervention aiming to fill such gap in the field of judicial cooperation could no longer be postponed. Hence, it was adopted Framework Decision 2009/299/JHA, which, on the basis of the case law of the Court of Strasbourg, aims to balance two fundamental necessities: strengthening of judicial cooperation on the executive level, which is realised through the mutual recognition of decisions by Member States and the safeguard of the accused's right to defence, which in this context is deemed to be the effective participation of that subject in the trial. In this perspective, Framework Decision 2009/299/JHA provides the 'conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused' (recital 6). In particular, no refusal should be opposed in the following cases: (a) if the person concerned was summoned in person and thereby informed of the scheduled date and

place of the trial (provided that such communications are 'timely', meaning that they allow the accused to participate in the trial and to effectively defend himself/herself); (b) if the person concerned was represented by a counsel appointed by him/her, a counsel appointed by the Court or a counsel appointed and paid by the State; (c) if the person concerned was informed of his/her right to a retrial or an appeal, and he/she has declared not to oppose the judgment and in any case failed to exercise such rights within the provided term; and (d) if the person concerned was not personally served with the decision and has been expressly informed of his/her right to a retrial or appeal, which allows the merits of the case. As it appears, this strengthens the idea that, within the European Judicial Area, even if only for enforcement purposes, the effective participation of the accused in the trial must be the general rule, which can be waived only in some cases exhaustively provided under the law.

Further Reading

Brodowski D (2017) Strafrechtsrelevante Entwicklungen in der Europäischen Union – ein Überblick. Zeitschrift für Internationale Strafrechtsdogmatik, pp 11 ff

Bujosa Vadell LM (2009) El reconocimiento y la ejecución de sentencias privativas de libertad en la Unión Europea. Comentario a la decisión marco 2008/909/JAI, del Consejo, de 27 de noviembre de 2008. Revista General de Derecho Europeo 18, § 407522

Buzzelli S (2008) Processo penale europeo. Enc. dir., Annali, II, I. Giuffrè, Milano, pp 701 ff

Di Paolo G (2011) La circolazione dei dati personali e del casellario giudiziario. Cass. pen., pp 1334 ff

Gialuz M (2009) Il casellario giudiziario europeo: una frontiera dell'integrazione in materia penale. In: Peroni F, Gialuz M (eds) Cooperazione informativa e giustizia penale nell'Unione europea. EUT, Trieste, pp 190 ff

Iuzzolino G (2012) L'esecuzione delle sanzioni pecuniarie. In: Kalb L (ed) Spazio europeo di giustizia e procedimento penale italiano. Giappichelli, Torino, pp 623 ff

Iuzzolino G (2012) La recidiva europea. Il valore dei precedenti penali negli Stati membri. In: Kalb L (ed) Spazio europeo di giustizia e procedimento penale italiano. Giappichelli, Torino, pp 667 ff

Kuczyńska H (2009) Mutual recognition of judicial decisions in criminal matters with regard to probation measures and alternative sanctions. Eucrim (1–2):43 ff

Larrauri E (2014) Are police records criminal records? Eur J Crime Crim Law Crim Justice 22 (4):377 ff

Meijer S (2017) Rehabilitation as a positive obligation. Eur J Crime Crim Law Crim Justice 25(2):145 ff

Neveu S (2016) Reconnaissance mutuelle et droits fondamentaux: quelles limites à la coopération judiciaire pénale? Revue Trim. des Droits de l'Homme 105:119 ff

Paglia M (2005) Ne bis in idem internazionale e riconoscimento delle sentenze penali straniere. Dig disc. pen., III Agg. UTET, Torino, pp 927 ff

Plastina N (2012) L'esecuzione delle pene detentive. In: Kalb L (ed) Spazio europeo di giustizia e procedimento penale italiano. Giappichelli, Torino, pp 591 ff

Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden

Spielmann D (2011) La reconnaissance et l'exécution des décisions judiciaires étrangères et les exigences de la Convention européenne des droits de l'homme: Un essai de synthèse. Revue Trim. des Droits de l'Homme 88, pp 761 ff

Vervaele JAE (2004) Case law. Common Mark Law Rev 41:804 ff

Vervaele JAE (2005) The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights. Utrecht Law Rev, pp 100 ff

Chapter 12
Enforcement of Confiscation Orders

Ersilia Calvanese

Contents

E. Calvanese (✉)
Italian Court of Cassation, Rome, Italy
e-mail: ersilia.calvanese@giustizia.it

R. E. Kostoris (ed.), *Handbook of European Criminal Procedure*,
https://doi.org/10.1007/978-3-319-72462-1_12

12.1 Confiscation Orders Between Mutual Recognition and Harmonisation

12.1.1 Mutual Recognition and Harmonisation of Confiscation Orders

Since its establishment, the European Union set out as one of its priorities to facilitate confiscation and recovery of the proceeds of cross-border serious crime for Member States' authorities.

This action was developed with two specific aims: on the one hand, the approximation of national policies concerning confiscation measures by identifying common standards so as to remove the differences between national systems, and, on the other hand, the improvement of the rules on judicial cooperation for the cross-border execution of confiscation orders, given the inherent transnationality of money laundering and of other serious forms of economic crimes.

In this perspective, and differently from other judicial measures, the application of the principle of mutual recognition of confiscation orders has been greatly facilitated by the parallel path towards harmonisation of Member States' legislation.

12.2 The 2005 Framework Decision and the 2014 Directive: Mutual Intersections

12.2.1 The Harmonisation of National Rules on Confiscation: From Framework Decision 2005/212/JHA to Directive 2014/42/EU

A significant impetus for strengthening the regulation on confiscation came from the extraordinary Meeting of Tampere, where the heads of State and government emphasised the need for approximating the legislation concerning the confiscation of assets, urging the Council to ensure that 'concrete steps' would be taken to trace, seize and confiscate the proceeds of crime. This commitment has been reaffirmed with the adoption of the 'European Union Strategy for the beginning of the new millennium' on 29 March 2000.

After having enacted two legal acts on confiscating instrumentalities and proceeds of criminal offences, which had little success—Joint Action 98/699/JHA of 3 December 1998 and Framework Decision 2001/500/JHA of 26 June 2001—the European Union redesigned the overall regulatory framework concerning confiscation with the approval of Framework Decision 2005/212/JHA on confiscating assets, instrumentalities and proceeds of criminal offences, adopted on 24 February 2005, which provides for more modern instruments to combat economic crimes.

Moreover, even after such Framework Decision was issued, the situation was still unsatisfactory due to the States' reluctance to execute confiscation measures not matching the confiscation model provided in their domestic law.

Therefore, in order to make the commitments undertaken more binding, and in coherence with the Stockholm Programme, on 3 April 2014, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union was enacted.

From this perspective, the Directive of 2014, since the first recitals, emphasises the importance of adopting common minimum rules concerning confiscation in order to promote the mutual recognition of confiscation measures between Member States.

However, compared to the Framework Decision of 2005, the scope of the Directive of 2014 is limited to a list of serious criminal offences, including terrorism, human trafficking and sexual abuse of women and children, illicit drug trafficking, illicit gun trafficking, money laundering, corruption, counterfeiting on non-cash means of payment, cybercrime and organised crime. Therefore, the Framework Decision of 2005 will maintain its scope of application concerning other criminal offences.

Given that the aforementioned EU acts have such a similar structure that they integrate a common European confiscation model, it is appropriate to elucidate the common traits of this model, pointing out moreover the main differences of the confiscation that are outlined in the Directive of 2014.

12.2.1.1 The Concept of Confiscation

The concept of confiscation, as well as the other relevant concepts in this matter ('proceeds', 'assets' and 'instrumentalities'), are the result of a consolidated harmonisation efforts made at the European level by a series of previous conventions, especially by the Convention of the European Council on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, opened for signing in Strasbourg on 8 November 1990.

This Convention, which was expressly dedicated to the confiscation of the proceeds arising from any criminal offence, has been the basis of the confiscation systems of European countries for many years. It developed the characterising features of this legal institute already set out with specific reference to drug trafficking by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, approved in Wien on 20 December 1988, which defined the minimum elements on which confiscation shall be based. These criteria, which characterise also the 'European confiscation model', are, on one hand, the definitive deprivation of property ordered by a judicial authority, even if not necessarily competent in criminal matters, and, on the other hand, the connection of confiscation with the ascertainment of a criminal offence.

However, the Directive of 2014 establishes that the confiscation order must necessarily be linked with a final conviction decision, even if pronounced *in*

absentia. In fact, unlike the Framework Decision of 2005, and notwithstanding the strong impulse made during the preparatory works, the Directive of 2014 does not adopt a confiscation model that can disregard the ascertainment of the criminal liability of the offender, like the *actiones in rem* model, whose purpose is to directly affect the asset, on the presumption of dangerousness of the asset in itself, due to the fact that it is the result of the commission of a crime. In these last type of proceedings, known as 'civil forfeiture' in the Anglo-Saxon tradition, the guilt of the current owner of the asset is irrelevant, and through a *fictio iuris* the asset itself is considered 'guilty'. This allows to avoid the application to the confiscation proceedings of the same guarantees and evidentiary burdens provided for criminal trials for the ascertainment of the accused's liability.

The sole exceptions provided by the 2014 Directive to the requirement that a final conviction is needed to execute a confiscation order are represented by cases where it is not possible to obtain such conviction due to the fact that the accused is ill or has escaped.

However, it is necessary to specify that the 'European confiscation model', even where it has its legal basis in a conviction judgment, does not necessarily have punitive nature: in fact, it is a hybrid model that leaves Member States the freedom to assign a different nature to this measure in their domestic legislation: sometimes purely punitive, sometimes preventive, aimed at avoiding the commission of further offences. The confiscation might also assume a multifunctional character, as occurs in the Italian system, where it is attributable case by case to one or the other function. Certainly, it is important to recall that the model established by the Directive represents the minimum common standard that each State must adopt, the result of an obvious compromise between two competing needs: on the one hand, the protection of the guarantees of the person affected by the confiscation order and, on the other hand, the effectiveness of the fight against economic crimes. This system does not nevertheless prevent domestic legislation from adopting further forms of confiscation different from the ones imposed by the Directive, e.g., with no need for the requirement of a conviction judgment.

12.2.1.2 Object of the Confiscation

As already mentioned, the 'European confiscation model' incorporates, even the object of the deprivation measure, the concepts of 'instrumentalities' and 'proceeds' already set out in the previous regulatory instruments.

'Instrumentalities' means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences.

Instead, 'proceeds' include 'any economic advantage derived from a criminal offence'. It may consist of any form of property, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. This is a very broad definition that does not require a close connection between the asset with the object of the criminal offence or the existence of a causal link between the assets confiscated and the criminal offence itself,

considering sufficient any other connection, even a merely indirect and mediated one, so as to any transformation of the immediate product of the criminal offence and the so-called proceeds substitutes, i.e., the assets acquired with money whose actual illegal origin has been ascertained.

This feature of the confiscation was further emphasised by the 2014 Directive, which was the first to expressly extend the concept of proceeds to those profits that only indirectly derive from criminal offences.

12.2.1.3 The Different Types of Confiscation: Confiscation of Property and of Equivalent Value

Concerning illegal proceeds, the Framework Decision of 2005 and the Directive of 2014 provide various types of confiscation.

The confiscation for the equivalent and the 'extended' confiscation are provided besides the traditional confiscation of 'property', even if they are subject to differently modulated forms of legislative approximation.

Aiming to further broaden the object of the confiscation of illicit proceeds, the 'European confiscation model' provides, in line with the indications of the Convention of 1990, that such measure will not affect solely the illegal proceeds as such or their surrogates (e.g., the sum of money obtained through extortion acts or the real estate assets purchased with that sum), but should be also applied to those assets, legally purchased and owned, found in the estate of the person affected by the measure and having an 'equivalent value' to the proceeds ascertained as illegal.

The confiscation for equivalent—already provided in the previous conventions, even if it was only optional—appears to be an efficient instrument to overcome the impossibility of attacking specific assets representing the proceeds or the product of a specific criminal offence, when it is hard to prove the link—even if mediated—that connects them to the criminal offence or to overcome the fraudulent operations of the owner aiming at avoiding specific assets to be subject to confiscation. With that instrument, it is possible to return to the State what was obtained illegally, even if in a different way.

The European legislation requires Member States to adopt both of these type of measures—the traditional confiscation (including confiscation of the instrumentalities of the crime) and the confiscation of property of equivalent value—for all criminal offences subject to a detention longer than 1 year.

Such obligation of approximation is the outcome of a long path, started with the Convention of Strasbourg and continued at the times of the so-called Third Pillar of the European Union, intended to extend the scope of confiscation to an increasing number of crimes, regardless of their abstract suitability to generate illegal proceeds.

12.2.1.4 The 'Extended' Confiscation

In line with the Action Plan to combat organised crime, adopted by the Council of the European Union and approved by the European Council at Amsterdam in April

1997, which pointed out the need to take into consideration alternative types of confiscation order in case of convictions for serious crimes, the Framework Decision of 2005 included—among its most significant innovations—more modern forms of confiscation, even if limited to certain categories of crimes, where the deprivation measure is used as an instrument to prevent organisational forms of wealth having a 'high mimetic nature', build up through fake ownership and other expedients with the purpose of hiding and transforming the original features of illicit proceeds.

While the confiscation for equivalent had the purpose of compensating for the difficulty of finding the illegal proceeds the existence of which had been ascertained (in the example already mentioned, the extorted sum of money), allowing attacking property of equivalent value (for example, an automobile having the same value as that of the extorted proceeds), the 'extended' confiscation had the purpose of lessening the burden of proof concerning the illegal origin of assets found in the estate of the convicted person.

The most complex issue that the Framework Decision of 2005 had to deal with was to not condition this form of confiscation order to the need to prove a strict link of pertinency between the offence for which the conviction is pronounced and the object of the confiscation. What were at stake were the legal traditions and fundamental principles of national systems and, in particular, the presumption of innocence and the burden of proof concerning the illegal origin of the assets.

The solution adopted by the Framework Decision of 2005 was to provide wide powers of confiscation under certain conditions (without prejudice to the possibility for single Member States to broaden their scope).

First of all, the person affected by the confiscation order must be convicted of one of the criminal offences provided in a mandatory list (euro counterfeiting, money laundering, human trafficking, illegal immigration, exploitation of prostitution, child pornography and drug trafficking) already sufficiently harmonised within the European Union, provided that they are committed in the framework of a criminal organisation and punished with maximum custodial sentences of a certain significant level, or of criminal offences related to terrorist crimes. In any case, the criminal offences must be able to generate economic profits.

Second, the judge must be convinced, on the basis of specific facts (therefore, not in case of mere suspects or presumptions), that the assets considered represent the proceeds of activities carried out during a period prior to the conviction or that the value of the assets is disproportionate with regard to the lawful income of the convicted person and the judge is fully satisfied that these are the proceeds of the criminal activity carried out by the convicted person (in this case, there is no need for a temporal connection between the illegal activities and the purchase of the assets).

Therefore, the choice was to avoid a full inversion of the burden of proof concerning the illegal origin of the assets, by demanding a demonstration of the existence of a 'connection' between the asset and the illegal activities ascribable to the convicted person, instead of the evidence of a strict link of pertinency. In any case, single assets and estates considered altogether must be concerned.

The Framework Decision of 2005 also extended the confiscation, although only optionally and in connection with Member States' adjustment obligations, to assets

available for the convicted person but officially owned by third parties with which the former has a close relationship (for example, his/her spouse) or to assets assigned to a legal person over which the convicted person exercises control, alone or through connection with other people with whom he/she has a close relationships, or from which he/she receives a significant part of the relevant income.

The Directive of 2014 has made significant changes to the previous legislation, some of which were to clarify the scope of the Framework Decision of 2005, which proved to be difficult to understand and excessively fragmented.

In particular, the Directive enlarged the scope of application of the 'extended' confiscation to a broader range of criminal offences, and it provided that this type of measure must be adopted concerning any criminal offence capable, directly or indirectly, of generating economic benefits. In this respect, the Directive of 2014 encompassed some types of serious criminal offences, including corruption and participation in a criminal organisation, at least when the criminal offence resulted in economic benefits, or criminal offences that are punishable by a custodial sentence of a maximum of at least 4 years.

Moreover, according to the 2014 Directive, the fact that the judge is satisfied, on the basis of specific facts and evidence, that the assets are derived from criminal activities is considered to be a sufficient condition for confiscation, irrespective of any time requirement provided under the 2005 Framework Decision. For this purpose, the 2014 Directive considers that it is sufficient for the judge to establish the disproportion between the goods and the legitimate income of the convicted person.

In addition, the Directive made the duty of confiscation of assets transferred from the accused to third parties—which was merely optional under the Framework Decision of 2005—more binding. In any case, it must be proved that third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation on the basis of concrete facts and circumstances. In this case, the evidence has a presumptive character: a purchase price significantly lower than the market value or a transfer free of charge demonstrates the lack of good faith of the third party.

12.2.1.5 Provisional Measures: The Freezing

Innovating with respect to the Framework Decision of 2005, the Directive of 2014 established the obligation of Member States to provide provisional measures to avoid the dispersion of assets while waiting for the execution of the confiscation measure.

However, on this point, there are no common minimum rules, and States are free to regulate by themselves the features of the freezing measure.

The Directive only provides that this measure must be adopted by a 'competent authority', thus excluding any monopoly by judicial authorities in a strict sense.

12.2.1.6 Safeguards

The Framework Decision of 2005 expressly obligated Member States to grant effective safeguards for the rights of persons affected by the confiscation measures.

However, only the Directive of 2014 has indicated the minimum guarantees that States must grant to such persons in order to safeguard their rights in the confiscation proceedings, including the freezing phase.

Among these guarantees, the right to an effective remedy before an impartial court assumes a particular prominence. For this purpose, the person affected by the measure should be informed about the reasons on which such measure is based and should have the right to be assisted by a lawyer during the proceedings.

Furthermore, by providing protection in favour of the victims of a criminal offence who claim rights on the confiscated properties, the Directive establishes an exception to the rule that provides the definitive conferral of the properties belonging to the convicted person to the State, when it is necessary to ensure that the confiscation measure does not prevent the victims from seeking compensation.

12.2.2 Mutual Recognition of Confiscation Orders in the Framework of Judicial Cooperation

Even where the efforts to approximate substantive legislation concerning the confiscation of illegal proceeds would have laid the foundations for improving international judicial cooperation by imposing on the national systems a common standard of confiscation 'recognizable' by all Member States, the European Union nevertheless considered necessary to provide specific procedural rules of cooperation by applying the principle of mutual recognition also to decisions concerning confiscation.

12.2.2.1 The Object of the Mutual Recognition

The need to first and foremost strengthen the mutual recognition of preliminary or precautionary orders aiming at the confiscation of assets that are easily movable was already observed during the Meeting of Tampere.

This is the context in which the initiative that led to the approval of the Framework Decision of the Council of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, which we have already mentioned (see Sect. 9.2.2), found its place.

To complete the framework of cooperation and solve the various gaps left over from the Framework Decision of 2003, a new regulatory instrument was adopted on 6 October 2006 to apply the principle of mutual recognition to the execution of confiscation decisions: Framework Decision 2006/783/JHA.

This Framework Decision starts defining the features that the measures included in its scope of application must present.

Moreover, the types of measures discussed above are reaffirmed. In fact, the mechanism of mutual recognition provided in the new Framework Decision correspondingly refers to the same types of confiscation (of property, for equivalent or 'extended') harmonised by the similar instrument of 2005.

12.2.2.2 The Recognition Procedure: The Transmission of the Certificate

Similarly to the choice made concerning the precautionary measures of freezing or seizure, the recognition procedure provides that the judicial authority who adopted the national confiscation measure to be executed on the territory of another Member State shall transmit it to the authority of the latter, together with a 'certificate' or a form containing the essential standard information for the cooperation.

In addition to the information concerning the issuing authority, the details of the order to be executed and the natural or legal person against whom it is issued, the form must also specify the object of the confiscation.

First of all, if it concerns specific assets, it must describe the asset to be confiscated and its 'exact' location (if it is unknown, its last known location).

In fact, a requirement for activating the cooperation mechanism is the fact that the asset to be confiscated is located in the territory of the executing State.

If the confiscation concerns amounts of money, the request must be transmitted to the Member State where the convicted person has an income, while, in other cases, to the Member State where the person (physical or legal) has such assets available or where these are located. If it is not possible to apply these criteria, the competence belongs to the State where the person against whom the confiscation was ordered has habitual residence (or, in the case of a legal entity, where its registered office is located).

Furthermore, it is necessary to specify the object of the confiscation order, meaning if it is the instrumentality, the proceeds of the crime (or its equivalent value), a property with no justified origin or, finally, a property acquired by third parties having a qualified relationship with the convicted person.

The form must also identify the criminal offence that has been prosecuted and the description of the related conduct. As already established in the Framework Decision on the freezing of assets, the cooperation was simplified for a list of criminal offences (the 32 particular cases) by removing the control on the double criminality, provided they are of a certain gravity, identified with the maximum punishment provided in the domestic law of the issuing State.

Further provisions require compliance with minimum rights of defence in the proceedings that led to the adoption of the confiscation order (and, in particular, the guarantee that the person affected by the measure might have participated in such proceedings).

Finally, the certificate must describe the legal remedies provided by national legislation for the protection of the interested parties.

12.2.2.3 Recognition of the Confiscation Order

After receiving the certificate with the national confiscation measure attached thereto, the competent authority of the executing State provides for its recognition by adopting the measures necessary to execute it.

A confiscation decision must be recognised without the need for any further formalities, by adopting all necessary measures for its execution 'without delay'. With that formulation, which is frequently used concerning mutual recognition instruments, the intention was to explicate the underlying rationale that must direct the judicial cooperation mechanism, compared to the *exequatur* that characterised intergovernmental cooperation: in general, the execution of the confiscation order is mandatory, and in any case it requires only a quick check concerning the compliance of the national order with the European standard.

The expression 'without further formality' appears to exclude that the decision on the recognition is assumed with an adversarial procedure in which the intervention of the parties is guaranteed.

In order to ensure a rapid action, the recognition procedure was simplified by reducing the number of cases where the executing State can refuse to execute the confiscation order. All provided grounds for refusal are optional for Member States, which can choose whether or not to implement them. If they are implemented, the grounds for refusal must be in any case incorporated into the domestic legislation as optional for the competent executing authority ('The competent authority of the executing State may refuse. . .'). Given that these grounds consist in a derogation from the principle of mutual recognition, the related list is mandatory, and Member States cannot include any additional ground for refusal in their implementing legislation.

Together with the lack of completeness and other deficiencies in the certificate (which might be rectifiable), the substantive grounds for refusal of the recognition consistently reflect the ones already provided for the freezing of assets (immunity, *bis in idem* and, if required, lack of double criminality), with the addition of other hypotheses linked to the non-provisional nature of the measure to be recognised.

In this way, what is taken into account are the rights of interested parties, including third parties having good faith, which make it impossible to execute the confiscation decision under the law of the executing State.

In addition, the lack of participation of the interested party in the proceedings that led to the issuance of the confiscation order is also relevant, provided that such absence is not due to his/her own conscious choice.

Other grounds for refusal are common to other forms of mutual recognition, such as the principle of territoriality, already discussed concerning the European Arrest Warrant, and the statute of limitation.

Finally, the execution of the so-called extended confiscation is optional due to its advanced nature.

12.2.2.4 The Execution of the Confiscation Order

After the recognition, the strictly executive phase opens with the adoption of the 'necessary measures' to execute the confiscation of the asset. The executing State must assume, according to its legal system, a confiscation order in the sense mentioned in the Framework Decision, meaning a judicial decision resulting in the definitive deprivation of property.

However, the Framework Decision allows States to 'convert' the object of the confiscation, if so allowed in their domestic legal system. In other words, if the confiscation of a specific asset is required, it is possible to transform it into a request for payment of an amount of equivalent value of the asset and vice versa.

In case of a confiscation order related to a legal person, its execution cannot be refused due to the fact that the executing State does not recognise the principle of criminal liability of legal persons.

12.2.2.5 The Destination of the Confiscated Assets

A classic rule of cooperation on the topic of confiscation permitted the requested party to dispose of the confiscated assets, following the cooperation, according to its domestic law, without prejudice to specific agreements between the parties to share the object of the confiscation (i.e., asset sharing). The asset sharing provided in these agreements reflects, in general, the percentage of participation of each party to the case and is intended to promote the cooperation on the side of States that are more reluctant to execute cooperation requests.

A similar approach is followed by the Framework Decision, which confers to the parties the option to agree on the destination of the confiscated assets. In case of a lack of any agreement, some general rules are provided to simplify the procedure.

In case of confiscation of sums of money, these are assigned to the executing State only if the amount is lower or equal to EUR 10,000, while in the other cases the amount must be equally divided between the States. For the other types of assets, the executing State can decide, from time to time, whether to sell them (unless they are cultural assets that are part of the national heritage of that State) and allocate the related proceeds as mentioned above or to transfer the confiscated assets to the issuing State.

12.2.2.6 Legal Remedies

Against the recognition and execution of a confiscation order, the Framework Decision provides that any interested party (including *bona fide* third parties) must have specific legal remedies against the executing State. Such remedies must be judicial in nature, and they may have suspending effect. In any case, they cannot address the merits of the confiscation order.

The interested party will have further legal remedies in the issuing State against the national confiscation order that is the object of recognition. Moreover, taking into account the definitive nature of the confiscation order, the appeals will concern at most third parties who are extraneous to the criminal offence and who want to defend their case against the measure.

12.2.2.7 New Perspectives

Lastly, in order to reduce the shortcomings still present in the current system, a proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing orders and the confiscation of proceeds of crime has been submitted on December 2016 (COM(2016) 819 final). The proposal firstly provides a single legal instrument—directly applicable in all Member States—for the recognition of freezing orders and confiscation in EU countries, simplifying the current legal framework. Moreover, it extends the scope of the current cross-border recognition rules, including confiscation of assets in the possession of third parties connected with criminals and enabling confiscation also when a conviction is not possible because the suspected or accused person is ill or has absconded. The proposal aims also to improve the speed and the efficiency of freezing or confiscation orders through a standard certificate for mutual recognition of confiscation orders and a standard form for freezing orders, the obligation for competent authorities to communicate with each other and closer deadlines for freezing orders. Finally, it ensures that the right of victims to compensation and restitution has priority over the executing and issuing States' interest.

Further Reading

Acosta Arcarazo D, Murphy CC (eds) (2014) EU security and justice law. After Lisbon and Stockholm. Hart Publishing, Oxford

Alagna F (2015) Non-conviction based confiscation: why the EU Directive is a missed opportunity. Eur J Crim Policy Res 21(4):447 ff

Albert J, Merlin JB (2015) Is the EU ready for automatic mutual recognition . . .in the fight against crime? Eucrim (2), pp 60 ff

Arcifa G (2014) The new EU Directive on confiscation: a good (even if still prudent) starting point for the post-Lisbon EU strategy on tracking and confiscating illicit money. University of Catania Working Papers, no. 64

Balsamo A, Contrafatto V, Nicastro G (2011) Le misure patrimoniali contro la criminalità organizzata. Giuffrè, Milano

Balsamo A, Maltese C (2011) Il Codice antimafia. Giuffrè, Milano

Boucht J (2013) Extended confiscation and the proposed directive on freezing and confiscation of criminal proceeds in the EU: on striking a balance between efficiency, fairness and legal certainty. Eur J Crime Crim Law Crim Just 21:141 ff

Brown AN (1996) Proceeds of crime, money laundering, confiscation and forfeiture. W. Green, Edinburgh

Delmas-Marty M, Spencer JR (eds) (2002) European criminal procedures. Cambridge University Press, Cambridge
Faraldo Cabana P (2014) Improving the recovery of assets resulting from organised crime. Eur J Crime Crim Law Crim Just 22:13 ff
Flore D (2014) Droit pénale européenne. Les enjeux d'une justice pénale européenne. Larcier, Bruxelles
Gascón Inchausti F (2013) Mutual recognition and transnational confiscation orders. In: Ruggeri S (ed) Transnational inquiries and the protection of fundamental rights in criminal proceedings: a study in memory of Vittorio Grevi and Giovanni Tranchina. Springer, Heidelberg, pp 253 ff
Ioannides E (2014) Fundamental principles of EU law against money laundering. Routledge, London-New York
Iuzzolino G (2006) L'armonizzazione della confisca. In: VV.AA., Diritto penale europeo e ordinamento italiano. Giuffrè, Milano, pp 353 ff
Kaye N (2006) Freezing and confiscation of criminal proceeds. Revue internationale de droit pénal, pp 323 ff
Kilchling M (2001) Tracing, seizing and confiscating proceeds from corruption (and other illegal conduct) within or outside the criminal justice system. Eur J Crime Crim Law Crim Just, pp 263 ff
Lelieur J (2015) Freezing and confiscating criminal assets in the European Union. Eur Crim Law Rev (3), pp 279 ff
Manes V (2016) The last imperative of criminal policy: Nullum Crimen Sine Confiscatione. Eur Crim Law Rev, pp 143 ff
Maugeri AM (2014) La Direttiva 2014/42/UE relativa alla confisca degli strumenti e dei proventi da reato nell'Unione europea tra garanzie ed efficienza: un "work in progress". Dir. pen. cont. – Riv. trim. (1), pp 300 ff
Miettinen S (2013) Criminal law and policy in the European Union. Routledge, London-New York
Milone S (2017) On the borders of criminal law. A tentative assessment of Italian "non-conviction based extended confiscation. New J Eur Crim Law, pp 150 ff
Montaldo S (2015) Directive 2014/42/EU and social reuse of confiscated assets in the EU: advancing a culture of legality. New J Eur Crim Law, pp 195 ff
Rui JP (2011) The civil asset forfeiture approach to organised crime. Exploring the possibilities for an EU model. Eucrim (4), pp 153 ff
Rui JP (2012) Non-conviction based confiscation in the European Union: an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. ERA-Forum III, pp 349 ff
Rui JP, Sieber U (eds) (2015) Non-conviction-based confiscation in Europe. Possibilities and limitations on rules enabling confiscation without a criminal conviction. Duncker & Humblot, Berlin
Selvaggi N (2014) On instruments adopted in the area of freezing and confiscation. www.penalecontemporaneo.it, 31 July 2015
Sieber U, Brüner FH, Satzger H, Von Heintschel-Heinegg B (eds) (2011) Europäisches Strafrecht. Nomos, Baden-Baden
Simonato M (2015) Directive 2014/42/EU and non-conviction based confiscation: a step forward on assets recovery? New J Eur Crim Law, pp 213 ff
Vermeulen G (ed) (2014) Essential texts on international and European criminal law. Maklu Publishers, Antwerpen-Apeldoorn
Vervaele JAE (2005) European evidence warrant: transnational judicial inquiries in the EU. Intersentia, Cambridge, pp 67 ff
Zagaris B, Kingma E (1991) Asset forfeiture international and foreign law: an emerging regime. Emory Int Law Rev, pp 445 ff