Themis Competition 2015

Free movement of evidence in the European Union

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The European Investigation Order (DIRECTIVE 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters) attempts to follow the success of the European Arrest Warrant. The Directive deals with the cross-border movement of evidence. It aims to transform the area of freedom, security and justice into an area where evidence can move (more or less) freely from one Member State to the other. This leads to the question as to what role is played by the rights of the affected citizens (suspected/accused person, third persons esp. witnesses). On the one hand, procedural rights might be perceived as barriers for prosecution. In contrast, they can equally be seen as an engine for the use of European Investigation Orders, as a high level of protection increases the mutual trust between the Member States.

In analogy to the mechanisms in the area of the free movement of goods, there are positive and negative harmonisation models in the area of judicial cooperation in criminal matters: as equivalent to positive harmonisation a minimum harmonisation of procedural rights in the Member States was introduced (DIRECTIVE 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings; DIRECTIVE 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings; DIRECTIVE 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings). By the example of negative integration the forum-rule can provide that evidence moves from the executing Member State to the issuing Member State largely unaffected by barriers constituted by the legal rules of the executing state.

First, we will demonstrate some of the problems when national authorities take evidence in transnational cases (I). Second, we will discuss how these problems are approached under the directive on the European Investigation Order and how some of the remaining issues could be solved (II, III). Finally, we will examine the role of the Courts in strengthening the rights of citizens in European criminal matters (IV).

We will argue that in order to strengthen the position of the accused person in face of increasing competences of the prosecution the case-law of the European Court of Human rights is not sufficient. Moreover, it is desirable that further procedural guarantees are introduced on EU-Level. This would allow the Court of Justice of the European Union to take a stronger role in the development of minimum rights for the affected citizens. Finally, we consider it desirable that the complex issue of legal remedies is addressed on EU-level and that information tools or networks are organised on EU-level for defence lawyers.

(I). Problems in transnational cases

Throughout the European Union a variety of different criminal procedural rules exist. Often, these rules are deeply embedded in the constitutional understanding of the legal system. "Procedural Criminal law is the seismograph of the constitutional system of a State" (K. Ambos quoted in: Van Puyenbroeck/Vermeulen, Towards minimum procedural guarantees for the defence in criminal proceedings in the EU). As such, Germany allows no interception of telecommunication that infringes the core of private life (section 100 c IV, V German Code of Criminal Procedure). Conversations of wife and husband in their bedroom or information obtained by listening to a suspect who speaks alone to himself in his car about the crime are, therefore, not admissible under German law (German Constitutional Court, 03.03.2004 - 1 BvR 2378/98, NJW 2004, 999; German Federal Court of Justice, 22. 12. 2011 − 2 StR 509/10, NJW 2012, 945).

§§ 81 ff German Code of Criminal Procedure gives competence to the court to order medical examinations of the accused person. There are several conditions for medical examinations, especially if the accused person should be brought to a psychiatric institution in order to obtain a psychiatric report. The French Code of Criminal Procedure on the other hand provides that the investigating judge can prescribe any medical exam, psychological exam and can order all useful measures (Art. 81 VIII French Code of Criminal Procedure).

This leads to the question, which law is applicable when an investigation is made in a different Member State and which law governs the admissibility of the obtained evidence.

1. Crack in the System

Once a case against the suspect has been built with the help of evidence gathered and the accused is charged, the court will have to decide whether the evidence that is produced by the prosecution is admissible. For evidence solely collected within the national state the court refers to its own legal system that provides for the suspect certain rights in the investigation stage and later on certain rights during the trial. If an investigation takes place in one state and is followed by a trial in another state, there is the risk of a "crack in the system". It is then for example possible, that relatively large competences of the prosecution during the investigation stage are not anymore compensated by a strongly protected position of the accused during the trial.

This problem is illustrated by the following cases:

Case 1

Judgement of the German Federal Court of Justice (17.1.2010 - 2 StR 397/09; NJW 2010, 2224, accessed by Beck-Online)

In a small town in the east of Turkey a dispute between two families arose in which a brother of the suspect was severely injured by the village chief. Thereupon the suspect, who lived in Germany, travelled incognito with two brothers to Turkey to take revenge. The village chief was shopping at the butcher's shop, when he was attacked and fatally injured by the two brothers of the suspect. In the meantime the suspect was waiting in front of the butcher's shop in the getaway car. Somehow the suspect – although a search warrant had been issued for him – made it back to Germany, where he was then charged. The German court sentenced him for murder and based its criminal judgment inter alia on the testimony of two witnesses, who had been in the butcher's shop. Because those witnesses did not want to come to Germany for the trial two German judges questioned them in Turkey and testified about those questionings later on as witnesses in the trial before the German court. Turkey had allowed the interrogation, because of a mutual assistance treaty. However the Turkish authorities did not allow the defence lawyers of the suspect to take part in the interrogation, although the German court had intensively tried to ensure his presence. The defence could not at any stage of the proceedings confront the witness of the prosecution.

According to the Federal Court of Justice the right to a fair trial (Art. 6 ECHR) was not infringed. If the right to confront the witness directly is refused, it does not lead automatically to the inadmissibility of the testimony. It is rather necessary, that the entire trial appears unfair. Therefore it has to be assessed, if the court is responsible for that situation and if compensatory measures were taken by the court (such as a questioning via video conference). If the court is not responsible and tried to find compensation, the testimony can still be used, as long as it is not the only piece of evidence and carefully appraised. The court considered, that those preconditions had been met and therefore the testimony was admissible.

The reasoning of this case can also be transposed to a case between two Member States:

Case 2

Fictitious example by Sabine Gleß (ZSTW 2013; 125 (3), 573–608, page 576):

B is suspected of insider trading in Switzerland. Chased by the police he tries to escape to Bregenz in Austria by crossing the Lake Constance, where he is arrested. As the crime has a

transnational dimension, Swiss, German and Austrian prosecution investigate at the same time. B gets interrogated by an Austrian prosecutor in Bregenz. On request by the German judiciary, a German prosecutor from Constance is present. Although B and the German prosecutor explicitly request it, B is not allowed to have his attorney present. During the interrogation, B makes an incriminating statement about the circumstances of the crime, which he is accused of. Shortly after, he escapes from prison. He is rearrested in Zurich, Switzerland and handed over to Germany. In the criminal proceedings before the German court he refuses to testify.

This case illustrates that different procedural standards concerning the right to an attorney also exists between Members States. According to Swiss law the defendant's attorney cannot be excluded from any interrogation. In Germany, this is only possible under very narrow circumstances. In Austria the exclusion is possible on less strict conditions (see Gleß, ZSTW 2013; 125(3): 573–608, page 577 ff).

The question arises, how this affects the use of the gathered evidence in criminal proceedings in Germany and Switzerland. If we take the example of Germany, the way the evidence was gathered would not have been in accordance with Section 137 of the German Code of Criminal Procedure. That section establishes the right to have a defendant present at every stage of the criminal proceedings, including the first interrogations by the prosecution as a suspect. The right to an attorney is considered one of the main procedural rights of a defendant. The German Federal Court of Justice therefore ruled that a violation of this principle on national territory results in the inadmissibility of the evidence in court (29.20.1992, 4 StR 126/92, accessed by jurion).

It is problematic if this applies in transnational cases if the evidence was gathered in accordance with Austrian law. Unlike Germany, Austria balances the colliding interests of an "uninterrupted" interrogation and the right to an attorney in a different way. Which procedural code is the relevant now to judge if the evidence is admissible in a German court? It seems curious to let the prosecution benefit from the fact that the Austrian legal system sets a lower procedural standard. Especially considering that to balance those differences, the Austrian system may have a different kind of balance at a later stage, which might result into a legal gap, the "crack in the system".

A written rule how to treat evidence gathered in different legal systems is missing in the current stage of transposition in Germany. It remains to be seen how the directive on the right of access to a lawyer will affect the admissibility of transnational evidence (DIRECTIVE

2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings (...))

2. Extent of Judicial Control?

A further problem is to what extent the Courts of the requesting state controls if the evidence was lawfully obtained in the executing state.

Case 3

(German Federal Court of Justice, 21.11.2012-1 StR 310/12, accessed by Beck-Online)

In 2012 the German Federal Supreme Court rendered a judgment about the scope of examination attributed to national courts when deciding on the admissibility of evidence collected by another state. In this case suspects smuggled cigarettes from the harbour of Hamburg to the Czech Republic, where the cigarettes were sold. Although the Czech authorities had taped the smugglers, no evidence about crimes committed in the Czech Republic was gathered. Later on the German authorities asked their Czech colleagues for help, who than passed on the already collected evidence. The German Federal Court had now to decide whether German courts were allowed to review the decision of the Czech court to intercept the telephone communication of the smugglers under Czech law. The Court considered that this was not possible because the control would constitute a violation of Czech Sovereignty.

3. Procedural Equality of Arms

Case 4

(example by Sabine Gless, Utrecht Law Review,Volume 9, Issue 4 (September) 2013 page 90 ff.)

D, a Belgian national and middle manager at a medium-sized pharmaceutical company situated in Germany, travels by train from Mannheim to Brussels for work on a monthly basis. One day, the German police finds a suitcase on the train containing what seems to be performance-enhancing drugs. After running an identity check, they discover that D is listed for 'discreet surveillance' in the Schengen Information System (SIS). D is arrested. Back at the police station, information comes that D is wanted by the Spanish authorities for alleged complicity in a large doping scheme. D claims that he has nothing to do with the suitcase and holds a German permit for dealing with certain substances, but is quickly sent to Madrid on

the basis of a European arrest warrant. D's Spanish defence lawyer is the typical loner: he dedicates himself to time-consuming, poorly paid criminal defence work on D's behalf. This case should illustrate the problem of procedural equality of arms. Do the defendant and his lawyer have the same chances as prosecution in transnational cases?
The prosecution has received the statement by the German police. They profit from the close cooperation with the German authorities. D however is now being accused because of a report filed under a different jurisdiction. It will be problematic for him and his lawyer to challenge the report. It may prove to be especially difficult to challenge statements made by witness whose whereabouts remain unknown. It is possible that the prosecution will use the written testimony against him, although the domestic legal system would not allow evidence gathered that way. The transnational nature of the case therefore results in an inequality of arms for the defendant (see Sabine Gless http://www.utrechtlawreview.org | Volume 9, Issue 4 (September) 2013, page 91).

II. Solutions offered on EU-level, especially the European Investigation Order

The directive regarding the European Investigation Order (directive 2014/41/EU) follows, in principle, the forum-rule with some modifications in favour of the application of the law of the executing state. According to article 14 of the directive, the substantive reasons should be challenged only in an action brought in the issuing state, without prejudice to the guarantees of fundamental rights in the executing state.

As such, the directive decides that the law of the issuing state governs in principle the procedure to obtain the evidence and also the admissibility of the evidence. It allows each Member State to gather evidence in another Member State according to their own law. It avoids cracks in the systems because in principle only one system is applicable: the law of the issuing state. The forum rule ensures that the whole procedure - from investigations to the trial and until the judgement - will be governed by the law of the issuing state.

In some cases the law of the executing state, however, remains relevant (Art. 24, 28, 30) and in other cases both laws are relevant (Art. 24, right not to testify). Furthermore, some issues are left to the agreement of both states (protection of person Art. 24 (5) b), which might exclude a legal remedy for the person concerned all together. This leads to the following rules:

rules of the issuing state:

- substantive reasons against EIO (Art. 14)
- additionally for hearing by video-conference: person has to be informed of the rights under the law of the issuing state by the executing state (Art. 24 (3) b)
- hearing by video-conference: the hearing shall be conducted by the competent authority of the issuing state in accordance with its own laws (Art. 24 (5) c)

rules of executing state

- fundamental rights (Art. 14)
- the executing state can refuse the EIO if the measure indicated in the EIO does not exist under the law of the executing State or would not be available in a similar domestic case if there is no other investigation measure which would have the same result as the investigative measure requested (Art. 10 (5))
- hearing by video-conference: summon the suspected or accused person to appear in accordance with law of the executing state (Art. 24 (3) b)
- hearing by video-conference: respect for the fundamental principles of the executing state (Art. 24 (5) a)
- consequences of breach of an obligation to testify or testify the truth, law of the executing state (Art. 24 (7))
- investigative measures of evidence in real time, interception of telecommunication: execution can be refused if execution concerned would not be authorised in a similar domestic case (Art. 28 I in fine; Art. 30 (5))

rules of both Member States:

- information about procedural rights, including right not to testify under issuing and executing state (Art. 24 (5) e)

The directive, therefore, allows the German authorities to refuse to intercept telecommunication in the core area of private life of the suspect (fundamental principle).
The grounds for refusal are more difficult to apply for the example of medical examination named above. The German Code of Criminal Procedure for example provides that in order to obtain a psychiatric evaluation the suspect can only be held up to 6 weeks in a psychiatric institution (section 81 Code of Criminal Procedure). Supposing the French investigative judge was allowed to prescribe a longer period, could the German authority refuse this investigation

order on the basis that such an order would not be allowed in a similar domestic case (Art. 10 (5) directive)? In any case the German authority could not refuse a psychiatric observation on the basis that the defendant lawyer was not heard or that the measure would not be proportionate (as provided for in German national proceedings, section 81 I Code of Criminal Procedure). The directive gives competence to the issuing state to ensure the respect of proportionality (Art. 6 (1) a directive).

Under the application of the directive regarding the European Investigation Order the issuing state in case 1 and 2 could have opted for a video conference according to the rules of its own law. This enables the defence to confront the witnesses of the prosecution if they are allowed under national law of the issuing state to be present during the hearing. The executing state could, therefore, not prohibit the presence of the defence attorney during the hearing as Turkey did in case 1.

The directive also takes account of an important aspect of the procedural equality of arms. According to Art. 1 (3) of the directive the suspect or accused person may request the issuing of an EIO in conformity with national procedure.
This is conditioned, of course, by the existence of such a national procedure that allows the accused person in the investigation phase to request certain investigation measures. This touches on one of the issues that is left mainly to national law, but is of great importance to the individual concerned: the legal remedies against an EIO.

III. Remaining problems: split of legal remedies and procedural equality of arms

The legal remedies provided for in the directive on the European Investigation Order are mainly left to national laws. Art. 14 states that Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the EIO. Furthermore, the directive provides for a split regime. The substantive reasons should be challenged only in an action brought in the issuing state, without prejudice to the guarantees of fundamental rights in the executing state.

For the accused person and concerned third parties the split regime is problematic under two angles. First, the different rules on which law is applicable might lead to difficulties in determining in which state an action should be brought. Second, the concerned person might be obliged to bring an action in a Member State where he does not know the language and the

legal system. This can bring several further difficulties in practice, as finding a lawyer who knows the legal system in the other Member State.
The second point is easily justified for the accused person: if the issuing state has competence to pursue an alleged offense, there should be some link to its territory. The accused person does not have a right to not be confronted with a foreign legal system if his alleged crime was committed or caused damage in the territory of that Member State.
Concerning the execution of an EIO against a third person, however, a justification seems more difficult. The EIO does not provide explicitly legal remedies for such a case. This loophole bares the risk to impede on the rights of uninvolved third party. Imagine for example, a situation where the executing state performs a search warrant in the wrong house because the issuing state made a mistake. According to Art. 14 (2) EIO the third party would now have to take legal action against the issuing state. Signifying that without any cause whatever by the third party, he is now confronted with a foreign legal system. In the end this signifies a poorer legal protection for the third party.

Furthermore, there is the question if the individual may invoke a ground of refusal when in his opinion the executing state executed the EIO despite the possibility to refuse the execution. Is evidence inadmissible in the issuing state that was obtained in the executing state by interception of telecommunication although this measures would not have been authorised in a similar domestic case? The directive only provides that the executing state "may" refuse execution of the EIO (Art. 30 (5) directive). If the executing state has an obligation to refuse execution under its national law will be decided by its national courts. In the case that the court will decide the EIO should have been refused it is possible that the trial in the issuing state has already begun, so the accused person would need to invoke the illegality of the obtained evidence in the issuing state.

While procedural guarantees like the right to obtain information about the alleged crime, the right to a lawyer and right to translations and interpreters have been addressed by the directives on procedural guarantees (DIRECTIVE 2012/13/; DIRECTIVE 2010/64/EU; DIRECTIVE 2013/48/EU), the difficult question of legal remedies, however, remains. A solution to soften the effect on affected third parties, would be to introduce a "most-favourable principle". This is also provided for in the directive regarding the European Investigation Order for the right not to testify. The witness has to be informed about his right not to testify under the issuing and executing state (Art. 24 (5) e). Regarding the legal remedy,

a system could be introduced where the affected third person could bring an action in either the issuing or executing state. If the legality of the other state is relevant in the proceedings an obligation to stay the proceedings and submit to a national court of the other state could be introduced. This would allow third parties to bring a claim in their home country.

Regarding procedural equality of arms it is desirable that a network for European defence lawyers is established (as suggested by Study Analysis of the future of mutual recognition in criminal matters in the European Union by Gisèle Vernimmen-Van Tiggelen and Laura Surano). While the directives provide obligations to inform the accused person of his rights, it is essential that the lawyers are able to obtain the necessary knowledge about the legal mechanisms on EU-level.

IV. The Role of the Courts

In order to ensure the rights of the defendant and the right of affected third parties several mechanisms are possible. We will argue that the protection by the ECHR is not sufficient in the area of judicial cooperation in criminal matters. This is why, there is a need for more detailed procedural guarantees on EU-level and a further possibility for defence lawyers to obtain information about the European mechanisms.

1. ECHR protection not sufficient

It could be argued, that for protection of the **fundamental rights of the accused person** the standard as provided by the ECHR, especially in Art. 5 and 6, is sufficient. Indeed, previous attempts to lay down a set of minimum rules to protect the defendant have failed, due to the Member States opinion that the level of protection as provided ECHR is enough (Mar Jimeno-Bulnes, Towards Common Standards on Rights of Suspected and Accused Persons, in Criminal Proceedings in the EU? page 4, in CEPS 2010 accessed through SSRN). Since then, only a sector by sector approach has been attempted. A closer look at the ECHR, however, shows that the EU cannot leave it up to Strasbourg to protect fundamental rights. The ECHR does not contain detailed provisions about the fair trial. It has been the European Court of Human Rights (ECtHR) that has been shaping human rights and developing principles as the fair trial. Its jurisprudence is also significant for the European Union, as the fair trial in the EU Charter is based on the concept of a fair trial in the ECHR.

In the field of a further integration of the judicial cooperation in criminal matters with increased competences of the Member State's authorities the protection of the ECHR does not seem to be sufficient for two major reason: the standard of review by the ECtHR and the role of a Court in general.

a) Standard of Review

In order to assume a violation of the right to a fair trial the Court requires that the proceedings as a whole were unfair (ECtHR, 12.07.1988 - 10862/84; Schenk v. Switzerland). This means that several violations of basic procedural rights go unpunished by the ECtHR. In cases of extradition for example, the Court introduced the "flagrant denial test" (ECtHR, 7.7.1989 - 14038/88 Soering v. the United Kingdom) If in the requesting country, the defendant would flagrantly be denied a fair trial, Art. 6 ECHR was violated. Concerning our case 1 the German Federal Court of Justice considered there was no violation of article 6 ECHR because the court was not responsible for the lack of possibility to confront the victims. Therefore the testimony was admissible. For the accused person, however, it does not seem to matter if Germany or Turkey is responsible for the missing opportunity to confront the victims but that his lawyer did not have this opportunity at all. In a purely national case it would haven been possible to make sure that the witnesses can be questioned during the trial. The German Federal Court of Justice relies in this judgement on the case law of the ECtHR (23.11.2005, NJW 2006, 2753 Haas/Germany). In consequence, the ECtHR functions as a last resort; all national remedies must have been exhausted and the trial as a whole is assessed regarding its fairness not single procedural rights.

b) Role of the Court

The case law of the Court provides legal protection for individual cases, it was not set up to expand human rights further then the ECHR allows. It is not the Courts task to impose higher standards on the signatory countries (ECtHR 7.7.1989-14038/88Case of Soering v. the United Kingdom,). Its cases are not supposed to create principles, let alone binding ones (Ester Herlin-Karnell: Is the Citizen Driving the EU's Criminal Law Agenda? page 8). The review of the Court is necessarily limited to individual cases and subsequently to alleged violations.
Additionally, studies show a high number of violations of the ECHR (Van Puyenbroeck/Vermeulen, I.C.L.Q. 2011, 60(4), 1017, 1019).

Nevertheless, the ECtHR plays an important role when it comes to procedural rights. A lot of the appeals are closely connected to defendant rights in criminal proceedings. Thus, in 2014, judgments concerning violations of the rights to a fair trial and the right to liberty and security, Art. 6 and Art. 5., made up for 42 % of violations. Violations of Art. 5, which states the Prohibition of torture and inhuman or degrading treatment, was accountable for 19.85 %. (http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf). These violations show the on going importance of the Court, still so after the establishment of the EU Charter. In 2014, 73 out of 149 ECtHR judgements concerned Fair-Trial violations by EU-Member States (http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf page 22).

2. The role of the CJEU in providing defendants rights

The CJEU has played a vital role in furthering the common market in the EU. Criminal matters however are a different story. When it came to competition, tearing down barriers to create a free market was very effective. Such negative integration does not apply to criminal law (Alicia Hinarejos, Integration in criminal matters and the role of the Court of Justice). There is, however, one aspect in which the CJEU could further the integration of criminal prosecution indirectly. If minimum procedural standards for the Court to apply were introduced, the CJEU could fill the gap in legal protection, that arises when criminal procedurals differ. This would result in increased trust between the Member States and could therefore act as an engine of mutual recognition (Is the Citizen Driving the EU's Criminal Law Agenda?, page 21, 22, Ester Herlin-Karnell, accessedy through SSRN).

The Court has already strengthened human rights in its IB decision by stating that the mutual recognition is not an absolute principle (CJEU Case C-306/09 21.10.10 "IB"). Concerning a judgement in absentia, the Member States have discretion to refuse an arrest warrant. The Court specified the conditions of recognition of transnational decisions. This does not result into a harmonisation of national laws but merely offers states that provide a higher level of procedural rights a way out of a dilemma (Ester Herlin-Karnell, Is the Citizen Driving the EU's Criminal Law Agenda?, page 14).
In 2009, the Council amended the European Arrest Warrant. It agreed on a list of reasons why a requested Member State could refuse to execute an EAW issued on an absentia ruling by the insertion of Art. 4a
(http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF;

53 Garantien in der EU, 4). In 2013, the CJEU interpreted Art. 4a in a way that the requested Member State cannot refuse the execution if the defendant had been aware of the trial in due time (CJEU Case C - 399/11 Melloni, 41, 42)
This enhances effective judicial cooperation, it does not establish the CJEU as a "constitutional court" when it comes to the role of human rights.

This example shows that indeed EU Legislator is needed to create a minimum standard of procedural rights. The matter has not been addressed in any of the recent "Roadmaps", which has been criticised (http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com%282004%290328_en.pdf, Footnote 14).

3. Necessity of minimum procedural standards in the European Union

In consequence, there is a need for procedural minimum standards on the level of the European Union. The EU is competent to establish minimum criminal procedural standards in the EU since the Lisbon Treaty laid in Art. 82 II TFEU. It has made use of it by adopting a couple of singular directives which grant the defendant rights (DIRECTIVE 2012/13/; DIRECTIVE 2010/64/EU; DIRECTIVE 2013/48/EU). No widespread legislation has been provided yet. Further rules on procedural guarantees would allow the CJEU to strengthen its competence in creating unified application of the procedural standards.

Conclusion

In this essay, we have pointed out some of, in our opinion, most important questions **for the citizens involved** concerning the cooperation of **investigation** in criminal matters. These included, which rules apply to the investigation measures, how cracks in the systems can occur, to what extent there is a judicial control and how the procedural equality of arms can be ensured. A set of new directives have gone in the right direction of finding a balance between the conflicting interests of the defence and the prosecution. As such, the forum rule provided for by the Directive on the European Investigation Order allows largely to eliminate cracks in the system and the question which law governs the admissibility of evidence. The three directives on procedural rights (DIRECTIVE 2012/13/; DIRECTIVE 2010/64/EU; DIRECTIVE 2013/48/EU) provide for important basic rights in transnational cases.

The directives remain, however, largely silent on the mechanisms of judicial control leaving them to national law. The split system of legal remedies might lead to practical difficulties. The forum rule is especially difficult for involved third parties (witnesses etc.) who do not have any connection to the forum state. As a conceivable solution, we suggested that involved third parties might benefit from a "most-favourable-rule", meaning that they can bring their claims in either the executing or the issuing state. This would include an obligation to submit to a Court of the other Member State if the success of the claim depends on the law of that Member State.

In order to ensure procedural equality of arms, it is necessary to strengthen the position and knowledge of the defence attorneys throughout the European Union.

More should be done in the matters of laying down a set of minimum procedural standards. As a result, transnational cases will become more transparent for all involved. That means that the concept of mutual recognition will be strengthened because a clear set of underlying rules and legal remedies will further the necessary mutual trust.

While we have argued that the existing protection through the European Court of Human Rights is not sufficient to compensate the increased competences of the judicial authorities in criminal matters throughout the European Union, it is desirable that the CJEU will take an active part in furthering the procedural rights in this particular field.

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