

TRANSNATIONAL CRIMINAL PROCEEDINGS AND THE POSITION OF THE DEFENCE

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I. INTRODUCTION: NEED TO BUILD A DEFENCE-ORIENTED PERSPECTIVE

In EU criminal law, there is an ongoing process of the development of a genuine *European transnational criminal procedure*. Whenever a criminal case exceeds the boundaries of a single Member State, national competent authorities become intertwined in a network which encompasses competent judicial authorities of other Member States and supranational authorities created specifically for those situations. Investigation of such a criminal case can no longer be regarded as a national investigation which includes some elements of trans-nationality which are resolved through the use of mechanisms of judicial cooperation in criminal matters, rather it is a genuine transnational criminal investigation and prosecution.¹ This shift in the nature of investigation and prosecution of crime in the EU is also characterised by the development of an EU-own model of judicial cooperation in criminal matters which is based on the principle of mutual recognition. If we look at this development from the perspective of *security*, which is from the viewpoint of the need to successfully tackle the problem of transnational criminality in the EU, which can be seen as a specific goal of the EU in the area of criminal law², there can be no objections to this development. If the endeavours of national criminal authorities, whose powers are confined to national jurisdictional boundaries and who can only unreliably count on the help of the national criminal authorities of other States, are not enough to bring an investigation and prosecution of a transnational criminal case to a successful end, it is a welcome development to try to bring national prosecution authorities closer together, to develop supranational institutions which will help them to coordinate their activities, and to put efficient judicial cooperation mechanisms at their disposal.

However, the perspective which is being analysed here is a different one. It is the perspective of *freedom*, built from a premise that the purpose of criminal

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¹ Compare Schomburg, Wolfgang; Lagodny, Otto, *Verteidigung im international-arbeitsrechtlichen Strafverfahren*, NJW 6(2012), p. 348-349.

² Sieber, Ulrich, *Die Zukunft des Europäischen Strafrechts, Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems*, ZStW 1(2009), p. 3-4.

proceedings is not only to bring the guilty wrongdoer before the court and to punish him in accordance with the law, but also to acquit the person who is brought before the court innocent of the crime he is charged with. The main mechanism which European legal thought has developed in order to be able to accomplish this difficult task, namely to punish the guilty and to acquit the innocent, is a fair criminal trial. One of the main characteristics of a fair criminal trial is that both parties, the prosecution and the defence, need to be given a reasonable opportunity to affect the outcome of the case, and must not be put in a disadvantaged position vis-à-vis their opponent.

The purpose of this article is to look at the development of European transnational criminal procedure from a defence-oriented point of view. In order to do this, the article is first going to look at whether the development of transnational criminal procedure in the area of freedom, security and justice has affected the position of the defence in criminal proceedings (II.). This part of the article will be followed by an analysis of the efforts undertaken at the EU level in order to re-establish the balance between the parties in European transnational criminal proceedings and an evaluation of those efforts. Two areas of EU criminal law will be the subject of analysis: transnational evidence gathering (III. 1.) and the harmonization of the rights of the defence in criminal proceedings (III. 2.). In the closing part of the article, its conclusion (IV.), a summary of the findings shall be given with a brief outlook at possible solutions for the improvement of the position of the defence in European transnational criminal proceedings.

II. STRUCTURAL WEAKENING OF THE POSITION OF THE DEFENCE

The development of the *security agenda* at the EU level has undoubtedly affected the position of the defence. This will best be shown if we compare the differences in the position of the defence in national criminal proceedings and in European transnational criminal proceedings.

First, when the case is a European one, the defence faces not only the law enforcement authorities of one Member State, it also faces the possibility of the involvement of law enforcement authorities of all other Member States. Law enforcement authorities of different Member States are encouraged to work together whenever a case has a transnational dimension. The prospects of their joint work are strengthened through the establishment of supranational institutions the purpose of which is to coordinate their work (*Europol*, *Eurojust*). They are supported by access to common databases, under the principle of availability.³ At the same time, it is very difficult for the defence to function in

³ Gleß, Sabine, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, *Utrecht Law Review* 4(2013), p. 99-100.

a transnational setting. The defence does not have access to information, does not get involved in data-exchange, is not encouraged to work together, and does not enjoy the support of supra-national coordinating institutions.⁴ This lack of encouragement from the EU for the defence lawyers to work together, to exchange information and to help them in their work across borders with the establishment of a central European defence-coordinating institution, has forced defence lawyers to work alone and to connect on an informal basis and to establish private associations which might help them in their work.⁵ The most prominent ones are the European Criminal Bar Association (ECBA) and the Council of Bars and Law Societies of Europe (CCBE). Proposals from the academic community went in the direction of the establishment of a central EU-funded institution for the support of the defence in a transnational context, Eurodefensor⁶, but this has had no success so far. This structural weakening of the position of the defence in the EU context might become even more acute if the proposal for the establishment of the Office of the European Public Prosecutor⁷ is accepted.⁸

The fact that law enforcement authorities of different Member States have the potential to be brought together to work on a single case leads to other problems for the defence. The defence may encounter a situation in which its procedural opponent decides where the trial is going to take place, thereby being driven by interests of prosecutorial efficiency. Namely, the fact that EU criminal law lacks binding rules on jurisdiction leads to scenarios where *forum shopping* is possible, in the sense that prosecuting authorities can decide to take the case to whichever jurisdiction is most favourable to them – wherever the probability of a conviction is higher. The possibility of this practice raises doubts in relation to a number of questions, not only with regard to the equal powers both parties to affect the outcome of the case, but also with regard to defendant's right to be tried before a court established by law.⁹

Furthermore, the fact that a case is a transnational one may lead to circumvention, or at least a lowering, of some basic criminal procedural safeguards, especially in relation to evidence. The fact that evidence is gathered in a jurisdiction different from the one where the trial is taking place makes it harder

⁴ Ahlbrecht, Heiko, *Strukturelle Defizite Europäischer Verteidigung – Gründe und Möglichkeiten ihrer Überwindung*, StV 8(2012), p. 494.

⁵ *Ibid.*

⁶ Nestler, Cornelius, *European defence in trans-national criminal proceedings*, in Schünemann, Bernd (ed.) *A Programme for European Criminal Justice*, Carl Heymanns Verlag, 2006, p. 418-426.

⁷ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17.7.2013, COM(2013) 534 final.

⁸ Ahlbrecht, *op. cit.* (note 4), p. 492.

⁹ Gleß, Sabine, *OHN(E)MACHT – Abschied von der Fiktion einer Waffengleichheit gegenüber europäischer Strafverfolgung?*, StV 5(2013), p. 320.

for the defence to test the reliability of such evidence. If there are significant differences between the procedural orders of the evidence State and the trial State, problems may arise with regard to the admissibility of such evidence. These problems, where the interests of truth finding in criminal process collide with trial State's procedural safeguards relating to the gathering of evidence, are normally dealt with by trial courts through the lowering of those safeguards, which is through the admittance of evidence gathered abroad although its gathering does not correspond to the procedural safeguards of the trial State.¹⁰

If we compare the already presented changes in the position of the defence in a national and in a European setting, and if we also take into account other obvious problems – the need to work in a foreign language and the need to work in a foreign legal system(s) – we must arrive at the conclusion that the position of the defence significantly changes – by becoming weaker – when the defence is taking part in transnational European criminal proceedings.

Now we turn to the other question – has EU law reacted to this, and if so how? First, we are going to look at the specific area of transnational European criminal procedure – transnational evidence gathering – and analyse the extent to which the interests of the defence have been taken into account in numerous instruments that the EU has adopted in this area.

III. REACTION OF EU CRIMINAL LAW

Having established that the position of the defence changes when the case becomes a transnational one and when the defence faces, as its procedural opponent, a “European criminal prosecution”, we turn to other object of our interest as expressed in the introduction – an analysis and evaluation of the reaction of EU law to this shift in power in European transnational criminal proceedings. This part of the article is divided into two sections: in the first section, a defence-oriented view of transnational evidence gathering in EU criminal law will be given. The purpose of this section is to analyse the extent to which the interests of the defence have been taken into consideration in EU legal instruments which regulate this area. The extent to which these interests have been considered shows the extent to which EU law has taken seriously the need to re-establish the balance in European transnational criminal proceedings. The second section will offer an evaluation of the appropriateness of the harmonization of defence rights in criminal proceedings as mechanisms for the re-establishment of that balance.

¹⁰ Gleß, *op. cit.* (note 3), p. 95.

1. DEFENCE-ORIENTED VIEW OF TRANSNATIONAL EVIDENCE GATHERING

1.1. DEVELOPMENT OF TRANSNATIONAL EVIDENCE GATHERING IN EU CRIMINAL LAW

Ever since the principle of mutual recognition was proclaimed as the cornerstone of judicial cooperation in criminal matters in the EU¹¹, judicial cooperation with regard to criminal evidence has been a central issue. For more than ten years, the EU has struggled in an effort to shift judicial cooperation with regard to evidence in criminal matters from a mutual legal assistance context to a context based on the premises of an EU-specific mutual recognition model of cooperation.¹² To a certain extent, this cumbersome process is comparable to the process which was happening in parallel in the area of the harmonization of rights of the individual in criminal proceedings (see *infra* 2. 1.). In other words, both of these processes were faced with many problems which slowed their progress. However, the origins of the problems encountered in both areas were quite different. In the area of the harmonization of the rights of the individual in criminal proceedings, the problems were mainly caused, as will be shown later, by the vague legal basis for EU action in the area and by the political opposition of certain Member States, who successfully blocked the process of the EU adopting measures in this area. In the area of evidence in criminal matters, on the other hand, the problems were caused primarily by the extreme complexity of the area and its questionable capability to be governed by rules with a mutual recognition origin¹³.

1.1.1. Developments within the mutual legal assistance system

Traditional judicial cooperation with regard to evidence in criminal matters in Europe is governed by multilateral and bilateral international agreements. The fundamental multilateral agreement in this area is the European Convention on Mutual Assistance in Criminal Matters which was adopted in the framework of the Council of Europe in 1959.¹⁴ At the time of its adoption, it was the first multilateral international treaty on mutual legal assistance, not only in Europe, but in the world.¹⁵ One of the main characteristics of the

¹¹ Tampere European Council 15 and 16 October 1999, Presidency Conclusions, § 33.

¹² Rackow, Peter, *Das Anerkennungsprinzip auf dem Prüfstein der Beweisrechtshilfe*, in Ambos, Kai (ed.), *Europäisches Strafrecht post-Lissabon*, Universitätsverlag Göttingen, 2011, p. 117-118.

¹³ On this issue, see, among many others, Ambos, Kai, *Transnationale Beweiserlangung – 10 Thesen zum Grünbuch der EU-Kommission „Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat“*, ZIS 9(2010), p. 559.

¹⁴ Council of Europe Treaty Series – No. 30.

¹⁵ McClean, David, *International Cooperation in Civil and Criminal Matters*, Oxford University Press, 2012, p. 171.

Convention is that its provisions are drafted very broadly, which grants the Contracting parties a lot of flexibility in their application. This was necessary in order for the provisions of the Convention to be acceptable to countries with different legal traditions and systems.¹⁶ This attitude resulted in the wide acceptance of the Convention, which has 50 Contracting Parties and regulates cooperation with regard to evidence not only in relations between EU Member States (which are all party to it), but also in relations among other European states.¹⁷ The provisions of the Convention were supplemented by two additional protocols, the first one adopted in 1978¹⁸, and the second one adopted in 2001¹⁹.

Multilateral treaties that govern judicial cooperation in relation to evidence in criminal matters in Europe were not adopted only within the framework of the Council of Europe, but also in the framework of other forms of inter-State cooperation. In 1985, a group of 5 EU Member States (Germany, France, and the Benelux countries) signed, outside of the EU institutional framework, the Schengen Agreement on Gradual Abolition of Checks at their Common Borders²⁰. The provisions of the Agreement were, in 1990, surpassed by the provisions of the Convention Implementing the Schengen Agreement, which was also concluded outside of the EU institutional framework.²¹ The Convention contains, as a counter-measure to the abolition of checks at the common borders of the Contracting States²², provisions on police and judicial cooperation in criminal matters²³. With the Amsterdam Treaty, the provisions of the Schengen *acquis* were integrated into the institutional framework of the EU.²⁴

¹⁶ *Ibid.*

¹⁷ Ditscher, Christine, *Europäische Beweise, Der Rahmenbeschluss über die Europäische Beweisordnung zur Erlangung von Sachen, Schriftstücken und Daten zur Verwendung in Strafsachen*, Peter Lang, Frankfurt am Main, 2012, p. 98.

¹⁸ Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Council of Europe Treaty Series – No. 99.

¹⁹ Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Council of Europe Treaty Series – No. 182.

²⁰ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22. 9. 2000.

²¹ 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 on the gradual abolition of checks at their common borders, OJ L 239, 22. 9. 2000.

²² Ligeti, Katalin, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*, Duncker & Humblot, Berlin, 2006, p. 56.

²³ For provisions on police cooperation, see Articles 39-47, for mutual assistance in criminal matters, see Articles 49-53 of the Schengen Implementing Convention.

²⁴ Protocol integrating the Schengen *acquis* into the framework of the European Union, OJ C 340, 10. 11. 1997.

The last adopted multilateral convention which regulates questions of judicial cooperation with regard to evidence in criminal matters in Europe is the EU Convention on mutual assistance in criminal matters, which was adopted in 2000.²⁵ This instrument is the first Convention which was adopted after the entry into force of the Amsterdam Treaty. Therefore, it represents the first step taken on the path of establishing an area of freedom, security and justice²⁶, which was proclaimed a specific EU objective for the first time in the provisions of the Amsterdam Treaty.²⁷ This Convention presents a further step in the development of mutual legal assistance in the EU context.²⁸ For it to come into force, it needed to be ratified by at least eight Member States²⁹, which only happened in August 2005. Today, it has been ratified by 24 Member States.³⁰ Its provisions were supplemented by the provisions of a Protocol from 2001.³¹

1.1.2. Transition to mutual recognition model of cooperation

In the area of judicial cooperation with regard to evidence, the transition from the mutual legal assistance to the mutual recognition model of cooperation was a gradual, lengthy, and cumbersome process. The first steps to introduce the principle of mutual recognition in the area of criminal evidence started right after the principle of mutual recognition was announced as the cornerstone of judicial cooperation in criminal matters in the EU. In the Tampere European Council Conclusions, the application of the principle of mutual recognition to pre-trial orders, “in particular to those which would enable competent authorities quickly to secure evidence” was specifically emphasized.³² In March 2001 a group of Member States put forward an Initiative

²⁵ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12. 7. 2000.

²⁶ Wasmeier, Martin, *Entwicklung des Rechtshilferechts in der EU*, in Sieber *et al.* (eds.), *Europäisches Strafrecht*, Nomos, 2011, p. 509.

²⁷ Article 2 of the Amsterdam Treaty: „The Union shall set itself the following objectives :... - to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;”

²⁸ Hecker, Bernd, *Europäisches Strafrecht*, Springer, 2012, p. 404.

²⁹ Article 27(3) of the Convention.

³⁰ It has not yet been ratified by Croatia, Greece, Ireland, and Italy only. See the web page of the European Judicial Network, at the following link: http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_RatificationsByCou.aspx (last accessed 22 July 2015).

³¹ Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 326, 21. 11. 2001.

³² Tampere European Council 15 and 16 October 1999, Presidency Conclusions, § 36. This was further elaborated in the Programme of measures to implement the principle of

for the adoption of a Framework Decision on the execution in the European Union of orders freezing property or evidence.³³ The Initiative was successfully adopted by the Council in July 2003³⁴, as the first mutual recognition instrument in the area of mutual legal assistance.³⁵ The Framework Decision applies only to freezing of evidence in the territory of the executing State, and not to its eventual subsequent transfer to the territory of the issuing State. This means that a freezing order issued with the goal of having a certain piece of evidence secured in the territory of the executing State needs to be accompanied by a mutual legal assistance request if the issuing State wants the secured evidence to be transferred to its territory.³⁶ The fact that the measure did not cover the entire area of cross-border evidence gathering, by dealing only with the freezing of evidence, and not also its eventual transfer, leads to its failure in practice.³⁷ In other words, it was not reasonable to expect the practitioners to use a freezing order and a request for mutual legal assistance, which was required by the Framework Decision in order to have the secured evidence transferred to the territory of the issuing State, instead of a request for mutual legal assistance alone, which was, pursuant to the provisions of the applicable multilateral conventions described above, enough to have the evidence secured in the requested State and transferred to the requesting State.

mutual recognition of decisions in criminal matters (OJ C 12, 15. 1. 2001), where measure 6 foresaw the “drawing up of an instrument concerning the recognition of decisions on the freezing of evidence, in order to prevent the loss of evidence located in the territory of another Member State”.

³³ Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence, OJ C 75, 7.3.2001. On this initiative, see Stessens, Guy, *The Joint Initiative of France, Sweden and Belgium for the adoption of a Council Framework Decision on the Execution in the European Union of Orders Freezing Assets or Evidence*, in de Kerchove, Gilles; Weyembergh, Anne (eds.), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Européenne*, Editions de l'Université de Bruxelles, 2001, p. 91-100.

³⁴ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2. 8. 2003.

³⁵ Gleß, Sabine, *Sicherstellung von Vermögensgegenständen oder Beweismitteln in der EU*, in Sieber, Ulrich *et al.* (eds.), *Europäisches Strafrecht*, Nomos, 2011, p. 611.

³⁶ *Ibid.*, p. 611.

³⁷ Replies to the questionnaire on the evaluation of the tools for judicial cooperation in criminal matters, EJM 6, COPEN 13, Brussels, 26. 1. 2009, p. 6. The experience of competent Croatian judicial authorities shows that, during the period in which Croatian authorities were able to use this instrument, which was from the day of Croatian accession to the EU, 1 July 2013, until the end of 2014, Croatian authorities have executed the freezing order in 9 cases, and have issued it in 21 cases (see Burić, Zoran; Hržina, Danka, *Pribavljanje i osiguranje dokaza te osiguranje i oduzimanje imovine i predmeta prema Zakonu o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije*, Hrvatski ljetopis za kazneno pravo i praksu 2(2014), p. 394.

Experimenting with mutual recognition in the area of criminal evidence continued with the Proposal for a Framework Decision on the European Evidence Warrant which was presented by the Commission in November 2003³⁸. Unlike the freezing order, the European evidence warrant would apply to the gathering of evidence in the executing State and to its transfer to the territory of the issuing State, therefore covering the entire process of cross-border evidence gathering.³⁹ What followed was a lengthy and burdensome negotiating process in the Council⁴⁰, which resulted in the Proposal finally being adopted more than five years after the negotiating process started, in December 2008.⁴¹ Although the European evidence warrant does cover the entire process of cross-border evidence gathering, its scope of application is still limited only to certain types of evidence. It applies only to objects, documents, and data, and the Framework Decision contains a lengthy list of types of evidence which are explicitly excluded from the scope of application of the European evidence warrant.⁴² Only evidence which is already existing and directly available in the territory of the executing State can be the object of a European evidence warrant.⁴³ This means that judicial cooperation in relation to all other types of evidence, namely those which are excluded from the scope of application of the European evidence warrant, needs to be governed by traditional instruments of judicial cooperation in criminal matters, and not by the Framework Decision. Consequently, the Framework Decision on the European evidence warrant, just like the Framework Decision on orders freezing evidence, did not accomplish the full transition of judicial cooperation in the area of criminal evidence from the traditional model of cooperation to the mutual recognition model of cooperation.

Has this new instrument been used in practice and has it shown any advantages in comparison to traditional mechanisms of judicial cooperation? No. However, unlike the Framework Decision on freezing orders which failed in practice, the Framework Decision on the European evidence warrant was hardly given an opportunity to be used in practice. So far, it has only been im-

³⁸ Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, Brussels, 14. 11. 2003, COM(2003) 688 final.

³⁹ Gleß, Sabine, *Kommentar zum Vorschlag für einen Rahmenbeschluss über eine „Europäische Beweisanordnung“*, StV 12(2004), p. 679.

⁴⁰ Bachmaier Winter, Lorena, *European Investigation Order for Obtaining Evidence in Criminal Proceedings, Study of the Proposal for a European Directive*, ZIS 9(2010), p. 583.

⁴¹ Council Framework Decision 2008/978/JHA 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, OJ L 350, 30. 12. 2008.

⁴² Article 4(2) of the Framework Decision.

⁴³ Mavany, Markus, *Die Europäische Beweisanordnung und das Prinzip der gegenseitigen Anerkennung*, C. F. Müller, 2012, p. 97.

plemented by six Member States.⁴⁴ Member States are hardly to blame for this – soon after the Framework Decision was adopted, the European Commission launched an idea about the adoption of a new instrument which would replace all the existing legal instruments in the area, including the Framework Decision.⁴⁵ It would be unreasonable to expect Member States to trouble themselves with the implementation of an instrument the replacement of which, before the deadline for the implementation of the instrument had expired, was announced by the Commission.

The idea put forward by the Commission was welcomed by the Council in the Stockholm Programme, in which the Council invited the Commission to “propose a comprehensive system [...] to replace all the existing instruments in this area, including Council Framework Decision 2008/978/JHA 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”⁴⁶. Following the political mandate given to it by the Council, the Commission announced that in 2011 it would bring forward a Proposal for such an instrument.⁴⁷ However, before the Commission had a chance to put forward its proposal, a group of eight Member States came out in April 2010 with an initiative for the adoption of an instrument with all the characteristics previously announced by the Commission. It was an Initiative for a Directive regarding the European investigation order in criminal matters.⁴⁸

The announced instrument was supposed to have two characteristics which would significantly differentiate it from previously adopted EU mutual recognition instruments in the area of criminal evidence. First, it should have a general scope of application, covering, as far as possible, all investigative

⁴⁴ For its status of implementation, see the web site of the European Judicial Network, at the following link: http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=40 (last accessed 22 July 2015). Croatia is one of the Member States which implemented the Framework Decision. From Croatia’s accession to the EU until the end of 2014, Croatian competent judicial authorities have acted as issuing authorities in 1 case, and as executing authorities in 5 cases which involved the use of the European evidence warrant, Burić/Hržina, *op. cit.* (note 37), p. 394.

⁴⁵ Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, Brussels, 10. 6. 2009, COM(2009) 262 final, p. 17. The idea was further elaborated in the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, Brussels, 11. 11. 2009, COM(2009) 624 final.

⁴⁶ The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4. 5. 2010, point 3. 1. 1. Criminal law.

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe’s citizens, Action Plan Implementing the Stockholm programme, Brussels, 20. 4. 2010, COM (2010) 171 final, p. 18.

⁴⁸ Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels, 29 April 2010, 9145/10.

(evidence-gathering) measures.⁴⁹ As we have seen before, both the Framework Decision on freezing orders and the Framework Decision on the European Evidence Warrant, had a limited scope of application. Second, which is closely connected with the first issue, since all evidence-gathering actions will be covered by this instrument, the instrument will replace all the existing instruments in the area, traditional as well as mutual recognition instruments on judicial cooperation with regard to criminal evidence.⁵⁰ As we have seen before, both previously adopted Framework Decisions in the area of criminal evidence have failed to do this.

The fact that this new instrument was going to have a general scope of application lead to a reshaping of the ordinary attitude towards the relationship between the traditional and mutual recognition approaches to judicial cooperation in criminal matters. Until then, this relationship was seen as an excluding one – either judicial cooperation is going to be based on the premises of the traditional model of cooperation, or it is going to be based on the premises of the mutual recognition model of cooperation.⁵¹ The Initiative introduced a new approach to this relationship by proposing a combination of elements of traditional and mutual recognition systems of judicial cooperation in criminal matters.⁵² Pursuant to this combination, a mutual recognition approach should dominate the instrument by governing the general scheme for cross-border evidence gathering. However, for certain, more sensitive measures, like for example the interception of telecommunications, a special regime should apply. This special regime is to a great extent based on the provisions of the EU Convention on mutual assistance in criminal matters.⁵³

The Directive regarding the European investigation order was adopted in April 2014.⁵⁴ With it, a comprehensive system for cross-border evidence gathering was established. Any investigative (evidence-gathering) measure can be undertaken in the territory of other Member States by using the provisions of the Directive. Only the setting up of a joint investigative team and the gather-

⁴⁹ Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters – Detailed Statement, Brussels, 23 June 2010, 9288/10 ADD 2, p. 20.

⁵⁰ *Ibid.*, p. 24-25.

⁵¹ Ruggeri, Stefano, *Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues*, in Ruggeri, Stefano (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer, 2014, p. 9.

⁵² Detailed Statement, *op. cit.* (note 49), p. 19.

⁵³ Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters – Explanatory Memorandum, Brussels, 3 June 2010, 9288/10 ADD 1, p. 17.

⁵⁴ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1. 5. 2014.

ing of evidence within such a team⁵⁵, as well as cross-border surveillance⁵⁶, are excluded from its scope of application. After the provisions of the Directive are transposed into the national legal systems of Member State, which must be done by 22 May 2017⁵⁷, they will replace all the corresponding provisions of all traditional instruments on judicial cooperation in criminal matters which have been mentioned in this text, as well as the Framework Decision on the European evidence warrant, and the Framework Decision on freezing orders relating to freezing of evidence.⁵⁸ Therefore, it can be concluded that after more than a decade of a very burdensome legislative process, the EU has finally adopted an instrument in the area of criminal evidence which promises a longer period of normative stability. Such a period is necessary to give practitioners a chance to test this new regime in practice, which is an indispensable precondition for an assessment of justification for all the effort invested in its creation.

1.2. POSITION OF THE DEFENCE IN TRANSNATIONAL EVIDENCE GATHERING

Now we are going to take a closer look at the position of the defence in transnational evidence gathering in EU criminal law. Two issues shall be the object of specific attention: the ability of the defence to initiate the process of transnational evidence gathering, and the ability of the defence to participate in the process of evidence gathering abroad. These two issues have been selected because, in the opinion of the author, they are crucial in order to safeguard equality of rights between the defence and the prosecution in transnational criminal proceedings.⁵⁹

1.2.1. Ability to initiate the process of transnational evidence gathering

We can ask ourselves, why should the defence be given the ability to initiate the process of transnational evidence gathering, by requiring the competent judicial authorities of its State to issue a request/order for the purpose of gathering evidence abroad?

⁵⁵ Article 3 of the Directive.

⁵⁶ Recital 9 of the Preamble to the Directive.

⁵⁷ Article 36(1) of the Directive.

⁵⁸ Article 34(1) and (2) of the Directive.

⁵⁹ They are equally important in safeguarding equality of rights in the national context. For a view of the Strasbourg court, see Trechsel, Stefan, *Human Rights in Criminal Proceedings*, Oxford University Press, 2006, p. 291-326. For the transnational context, see Stellungnahme der Bundesrechtsanwaltskammer zum Grünbuch der Kommission der Europäischen Gemeinschaften „Erlangung verwertbarer Beweise in Strafsachen aus einem anderen Mitgliedstaat“, Nr. 2/2010, p. 4, 13.

In finding an answer to this question, we may start with the text of the European Convention on Human Rights which guarantees, to anyone charged with a criminal offence, a minimum right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”⁶⁰. Without further elaborating this minimum right⁶¹, we may claim that its purpose is to guarantee equality of rights between the prosecution and the defence with regard to adducing evidence in criminal proceedings.⁶² Does this guarantee go so far as to give the defence investigative powers equal to those of its procedural opponent? Obviously not. If we look at national criminal procedural systems, we can see that the ability of the defence to investigate the case or to affect the outcome of the investigative stage of the process significantly differs. In England and Wales, for example, the defence is expected to undertake its own investigations, which normally include interviewing witnesses who are willing to cooperate.⁶³ In Germany, the defence can also undertake its own investigations, which are normally limited to obtaining information offered voluntarily, but it can also suggest to the prosecutor or the investigating judge that they undertake certain evidence gathering actions that may help the defence case.⁶⁴ The abilities of the defence to affect the outcome of the investigation in Croatia are comparable to those in Germany. The ability of the defence to gather evidence in the early stages of the proceedings, whether independently or through a prosecutor or a judge, is especially important in those instances where there is a possibility that the evidence will not be available at the trial stage of the process.⁶⁵

If it is a right which is guaranteed by the European Convention on Human Rights, which is recognised in the national criminal justice systems of Member States, it is reasonable to claim that this right should also find some recognition in the instruments which regulate transnational evidence gathering in EU criminal law. However, this recognition has happened only recently, as will be shown in the following paragraphs.

The instruments of traditional judicial cooperation in criminal matters did not contain a provision which would guarantee the ability of the defence to initiate the process of gathering evidence abroad. The regulation of this matter was therefore left to the national laws of Contracting States. The situation did not change with the first two mutual recognition instruments which regulated judicial cooperation with regard to criminal evidence. Neither the Framework

⁶⁰ Article 6(3)(d) of the European Convention on Human Rights.

⁶¹ For the jurisprudence of the Strasbourg court, see Trechsel, *op. cit.* (note 59), p. 322-326.

⁶² *Ibid.*, p. 326.

⁶³ Cape, Ed; Hodgson, Jacqueline, *The Investigative Stage of the Criminal Process in England and Wales*, in Cape, Ed et al (eds.), *Suspects in Europe*, Intersentia, 2007, p. 76.

⁶⁴ Weigend, Thomas; Salditt, Franz, *The Investigative Stage of Criminal Process in Germany*, in Cape, Ed et al (eds.), *Suspects in Europe*, Intersentia, 2007, p. 91.

⁶⁵ Trechsel, *op. cit.* (note 59), p. 323.

Decision on freezing orders nor the Framework Decision on the European Evidence Warrant regulated the position of the defence with regard to the issuing of the order/warrant. This situation was noticed and brought to the fore in the process of the adoption of the Directive regarding the European investigation order. Associations of defence attorneys particularly claimed that, in order to safeguard the equality of rights between the prosecution and the defence, it was necessary to give the defence an opportunity to request the issuing of an order, under the same conditions as the prosecuting authorities.⁶⁶ These efforts resulted in the insertion of a special provision in the text of the Directive which regulates the ability of the defence to request the issuing of a European investigation order. Pursuant to Article 1(3) of the Directive “[t]he issuing of an EIO may be requested by a suspected or accused person, or by a lawyer on his behalf, within the framework of applicable defence rights in conformity with national criminal procedure”. As we can see, this provision contains a significant limitation: the issuing of an EIO may be requested by the defence only within the framework of applicable defence rights in conformity with national criminal procedure. Therefore, EU criminal law does not regulate this question independently, but makes the position of the defence dependent on the national criminal procedural orders of Member States. This means that EU criminal law does not guarantee a right for the defence to request the issuing of an EIO, but only an ability which is dependent on the national criminal procedural laws of Member States.

To a certain extent, this provision is understandable. In other words, the position of the defence in national criminal procedural laws of Member States regarding the ability to participate in the evidence-gathering process differs. If the ability of the defence to request the issuing of an EIO would be recognized in EU criminal law, in some Member States a difference in the position of the defence regarding its ability to participate in the evidence-gathering process in national and transnational contexts would be introduced. A situation would be created where it would be possible for the defence to request the issuing of an EIO in a transnational context, without a comparable possibility – to request the gathering of evidence from the national investigating authority – existing in a solely national context. Bearing this in mind, the harmonization of national criminal procedural laws regarding the ability of the defence to participate in the evidence-gathering process seems like a reasonable first step, preceding

⁶⁶ See ECBA Statement on the Member State Initiative regarding the European Investigation Order in Criminal Matters, point V. 1. i., *Stellungnahme der Bundesrechtsanwaltschaft zur Initiative für eine Richtlinie des Europäischen Parlaments und des Rates über die Europäische Ermittlungsanordnung in Strafsachen*, Nr. 10/2010, p. 4. Critically about the ignorance of the position of the defence, see Belfiore, Rosanna, *Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence*, in Ruggeri, Stefano (ed.), *Transnational Evidence and Multicultural Inquiries in Europe*, Springer, 2014, p. 101.

the recognition of a right of the defence to participate in the process of transnational evidence-gathering.⁶⁷

On the other hand, this provision leaves in force the difference in the position of the defence and the prosecution in transnational evidence gathering. Not only does the prosecution have the right to request the issuing of an EIO, in many cases the prosecution will act as the competent issuing authority. This situation, together with greater possibilities for the prosecution to cooperate, exchange information and therefore become aware of the existence of evidence abroad, creates a framework where the ability of the prosecution to affect the outcome of the case is much stronger than the comparable ability of the defence. Seen from this perspective, it seems reasonable to plead for the recognition of the right of the defence to request the issuing of an EIO. The recognition of such a right in the transnational context should then lead to the “backdoor harmonization” of national criminal procedural laws of Member States. In other words, if the defence has a certain right in the transnational context, it is only reasonable to recognize the same right of the defence in the national context as well. However, as we have seen before, EU criminal law has not gone so far yet, and the ability of the defence to request the issuing of an order has been made dependent on the national criminal laws of Member States.

1.2.2. Participation in the evidence gathering process abroad

The second issue of great importance for the defence when the evidence is gathered on the territory of another Member State is the ability of the defence to participate in the evidence gathering process abroad. This ability is important for two reasons. First, participation in the evidence gathering process is crucial for the defence to have a reasonable opportunity to challenge the use of evidence which has been gathered abroad. Only if the defence has the opportunity to monitor the way in which the evidence has been gathered, will it have a reasonable opportunity to challenge the use of such evidence.⁶⁸ Second, participation in the evidence gathering process might be necessary in order to enable the defence to exercise its participatory rights in the evidence gathering process, which is, at least with some evidence gathering actions, a necessary precondition for the admissibility of evidence so gathered in the criminal proceedings of the issuing State.⁶⁹ For example, if the evidence gathered abroad is a statement by the prosecution witness, and there is a possibility that the witness is not going to appear at the trial of the issuing State, the defence needs to be given an opportunity to cross-examine the witness at the investigative stage

⁶⁷ See Stellungnahme der Bundesrechtsanwaltskammer, *op. cit.* (note 59), p. 13.

⁶⁸ Belfiore, *op. cit.* (note 66), p. 102.

⁶⁹ *Ibid.*

of the process. Only if the defence has the opportunity to cross-examine the witness, will the statement be admissible at the trial in the issuing State.

Instruments of traditional judicial cooperation in criminal matters do not guarantee the defence a right to participate in the evidence gathering process abroad. However, they do foresee the ability of the defence to participate in the process. Article 4 of the European Convention on Mutual Assistance in Criminal Matters foresees the possibility not only for the officials of the requesting State, but also for other “interested persons”, to be present in the execution of a letter rogatory. The term “interested persons” refers primarily to the accused and the defence attorneys. The ability of the defence to participate in the execution of a letter rogatory is dependent on the consent of the requested Party. Mutual recognition instruments of judicial cooperation in criminal matters are completely silent on the issue. Neither the Framework Decision on the European Evidence Warrant nor the Directive regarding the European Investigation Order guarantee a right or foresee the ability of the defence to participate in the evidence gathering process in the executing State. Such participation of the defence might be covered by the provision on formalities and procedures, which may be indicated by the issuing authority, and need to be followed by the executing authority, unless they are contrary to the fundamental principles of law of the executing State.⁷⁰

1.3. PRELIMINARY CONCLUSION

The purpose of this part of the article was to analyse the extent to which EU criminal law, in the specific area of transnational evidence gathering, has reacted to changes in the position of the defence with the development of a transnational criminal procedure within the single EU area of freedom, security, and justice. The two issues which are of great importance for the position of the defence in transnational evidence gathering were the object of the analysis. Both issues are very important if the defence is to be given a reasonable opportunity to affect the outcome of a transnational criminal case.

The analysis of the ability of the defence to request the issuing of a request/warrant/order for the gathering of evidence abroad showed that the last instrument adopted in this area, the Directive regarding the European investigation order, recognized the importance of the issue. It is the first instrument which explicitly regulated the ability of the defence to initiate the process of cross-border evidence gathering. However, the Directive did not regulate the issue independently. Rather, it referred to national criminal procedural law by providing that the defence may request the issuing of an EIO “within the framework of applicable defence rights in conformity with national criminal procedure”. It is

⁷⁰ Article 12 of the Framework Decision on the European Evidence Warrant, Article 9(2) Directive regarding the European Investigation Order.

regrettable that EU criminal law, while developing the possibilities for transnational activity of national law enforcement authorities, keeps the defence locked in boundaries established by national criminal procedural orders.

Unfortunately, the other issue which was the object of the analysis – the ability of the defence to participate in the evidence gathering process abroad – did not find explicit recognition in EU instruments on judicial cooperation with regard to evidence in criminal matters. This issue is regulated only indirectly, through the provision on the application of the *forum regit actum* principle, though the ability of the defence to participate in the evidence gathering process is dependent on the express indication of the issuing authority. The executing authority is bound to follow such formalities and procedures, unless they are contrary to the fundamental principles of the legal order of the executing State.

2. HARMONIZATION OF PROCEDURAL RIGHTS

2.1. FAILURE OF THE FIRST INITIATIVE

Ever since the introduction of the principle of mutual recognition in the area of judicial cooperation in criminal matters, EU institutions have been aware of the fact that the smooth functioning of this principle might require some degree of harmonization of national criminal laws. This can be seen from the Tampere Conclusions, where the European Council referred to mutual recognition and approximation of legislation as complementary measures⁷¹ and asked the Council and the Commission to identify “those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition”⁷². In its Communication to the Council and the European Parliament of 26 July 2000, the Commission identified the rights of the defence and the rights of the victims of crime as those areas where adoption of common minimum standards is necessary, and clarified that harmonization of national criminal laws is not a self-standing goal of EU criminal law, but a mutual trust-building measure, meaning that its purpose is to facilitate the application of the principle of mutual recognition.⁷³ Common minimum standards on the rights of victims of crime were adopted shortly after – already in March 2001 a Framework Decision on the standing of victims in criminal proceedings was adopted.⁷⁴ On

⁷¹ Tampere European Council 15 and 16 October 1999, Presidency Conclusions, § 33.

⁷² *Ibid.*, § 37.

⁷³ Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 26. 7. 2000, COM(2000) 495 final, p. 16-17.

⁷⁴ OJ L 82, 22. 3. 2001. The Framework Decision laid down a number of rights for victims of crime both within and outside of the scope of criminal procedure, for example: the rights

the other hand, the process of adopting common minimum standards in the area of defence rights proved much more cumbersome, as will be shown in the following part of the article.

The process of harmonization of defence rights at the EU level started immediately after the publication of the above mentioned Communication. Following important preparatory work⁷⁵, this process culminated in February 2003 with the publication of the Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union⁷⁶. In the Green Paper, the Commission identified the following areas “as appropriate for immediate consideration”: access to legal representation, both before the trial and at trial, access to interpretation and translation, notifying suspects and defendants of their rights (the “Letter of Rights”), ensuring that vulnerable suspects and defendants in particular are properly protected, and consular assistance for foreign detainees.⁷⁷ The need to include a number of other rights in the harmonization process was considered - namely, the right to bail (provisional release pending trial), the right to have evidence handled fairly (fairness in the gathering and handling of evidence), *ne bis in idem*, and trials *in absentia* – but the Commission concluded that these matters would be better treated separately and were therefore not included in the Green Paper.⁷⁸

With the publication of the Green Paper a consultation process involving Member States and all other interested stakeholders was initiated. During this process it became clear that the adoption of common minimum standards for suspects and defendants in criminal proceedings at the EU level does not enjoy the unanimous support of the governments of Member States.. Despite opposition, in April 2004 the Commission put forward a Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union⁷⁹.

Member States opposing the adoption of common minimum standards for suspects and defendants in criminal proceedings claimed that such an action at the EU level is illegal and unnecessary. Its illegality lay, they claimed, in the fact that it is contrary to the principle of subsidiarity, and the fact that it

to be heard and to supply evidence, the right to receive information, the right to protection. In October 2012, the provisions of the Framework Decision were replaced by the provisions of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, OJ L 315, 14. 11. 2012.

⁷⁵ For steps undertaken in the preparation of the Green Paper, see Rafaraci, Tommaso, *The Right of Defence in EU Judicial Cooperation in Criminal Matters*, in Ruggeri, Stefano (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Springer-Verlag, 2013, p. 333.

⁷⁶ Brussels, 19. 2. 2003, COM(2003) 75 final.

⁷⁷ *Ibid.*, p. 4.

⁷⁸ *Ibid.*, p. 15-16. See also Rafaraci, *op. cit.* (note 75), p. 334.

⁷⁹ Brussels, 28. 4. 2004, COM(2004) 328 final.

lacks a legal basis in the Treaties. Moreover, such an action is redundant, because Member States have already developed common minimum standards in relation to the rights of the defendant in criminal proceedings. These common minimum standards arise out of the jurisprudence of the European Court of Human Rights.⁸⁰ The Commission rejected the arguments of the opponents⁸¹ and the procedure for the adoption of the Framework Decision started. However, the fact that the envisaged action did not enjoy the full support of Member States had a significant impact on the process of the adoption of the Framework Decision, and, as will be shown further on in the text, resulted in its failure.

The Proposal followed the path announced by the Green Paper and aimed at the harmonization of the following rights of the defendant in criminal proceedings: legal advice and legal assistance, including free legal advice (Articles 2-5), free interpretation and free translation of relevant documents (Articles 6-9), specific rights for vulnerable defendants (Articles 10-11), rights of persons remanded in custody to communicate with the members of their families and with consular authorities (Articles 12-13), and right to be informed about the charges and the available procedural rights in writing – ‘Letter of rights’

⁸⁰ *Ibid.*, p. 5-6.

⁸¹ In relation to the alleged breach of the *principle of subsidiarity*, the Commission contested this argument with the explanation that only an action on the EU level (and not the national, regional, or local levels) “can be effective in ensuring *common* minimum standards”. If the action was to be undertaken on the national level, there would still remain discrepancies in the way defence rights standards are applied throughout Europe, which would again result in the absence of *common* minimum standards. The Commission found the *legal basis* for its action in Article 31 (1) (c) pre-Lisbon Treaty on European Union (OJ C 325, 24. 12. 2002), which determined that “common action on judicial cooperation in criminal matters” also included “ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation”. The Commission argued that this provision enabled the EU to adopt common minimum standards in relation to the rights of the defendants in criminal proceedings, since these indisputably lead to compatibility in rules applicable in Member States, and these rules are necessary to facilitate cooperation in criminal matters, especially the one based on the principle of mutual recognition (thoroughly on the question of the legal basis, see Lööf, Robin, *Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU*, European Law Journal 3(2006), p. 422-425. For EU competences in the area of harmonization of domestic criminal procedures pre-Lisbon, see Peers, Steve, *EU Justice and Home Affairs Law*, Oxford University Press, 2006, p. 435). On a number of occasions the Commission repeatedly argued that the *jurisprudence of the European Court of Human Rights* is not enough for the development of common minimum standards in relation to the rights of the defendant in criminal proceedings. Standards developed in the jurisprudence of the Strasbourg court leave a lot of discretion to national competent authorities regarding the way in which these standards are going to be recognized in national legislation and applied in national criminal justice systems. Consequently, implementation of the European Court of Human Rights standards in national criminal justice systems of Member States did not result in common, but in differing standards. *Ibid.*, p. 6.

(Article 14). The selection of these five rights was explained by the Commission by the fact that these rights are most in need of harmonization, since they are all “of particular importance in the context of mutual recognition, since they have a transnational element”⁸². The Commission also recognized the need to undertake further harmonization efforts in the area of rights of the defendant by recognizing that the Proposal with the rights included in it represents only a first step.⁸³ The substance of the rights contained in the Proposal was determined by the case-law of the European Court of Human Rights.⁸⁴ The intention of the drafters of the Proposal was not “to duplicate what is in the ECHR”, but to ensure “higher visibility of standards” which would “improve knowledge of rights on the part of all actors in criminal justice systems and hence facilitate compliance”.⁸⁵

After the Proposal was put forward, a cumbersome political process started, at the end of which should have been the unanimous decision of the Council, which was a prerequisite for the adoption of criminal law measures in the pre-Lisbon third pillar of EU law. The Proposal was opposed by a number of Member States – namely Ireland, Austria, Czech Republic, Slovak Republic, Denmark, and Malta – who argued that the EU lacked a Treaty-based competence for the adoption of harmonization measures in the area of criminal procedural law.⁸⁶ During the negotiation process in the Council, a number of concessions were made in favour of the opposing Member States, including limiting common minimum standards and putting emphasis on general standards rather than on specific details, but even this failed to convince them, which led to a decision made by the Commission to formally withdraw the Proposal.⁸⁷

⁸² *Ibid.*, p. 7. Critically about this justification, see Lööf, *op. cit.* (note 81), p. 427: “But it is nevertheless difficult to see why, if the aim is to facilitate for mutual recognition, the Commission would consider the rights selected for the FDPR to be ‘so fundamental that they should be given priority at this stage’ when the evidence suggests that the real-life failings of the principle have been the result of causes not addressed by it”. See also, in the same sense, Fletcher, Maria; Lööf, Robin; Gilmore, Bill, *EU Criminal Law and Justice*, Edward Elgar Publishing, 2008, p. 128-129.

⁸³ *Ibid.*

⁸⁴ Esser, Robert, *Schutz durch EU-Recht*, in Sieber *et. al.* (eds.), *Europäisches Strafrecht*, Nomos, 2011, p. 833.

⁸⁵ Proposal, *op. cit.* (note 79), p. 3.

⁸⁶ Fletcher/Lööf/Gilmore, *op. cit.* (note 82), p. 128.

⁸⁷ *Ibid.*, p. 129. See also Rafaraci, *op. cit.* (note 75), p. 334, De Bondt, Wendy; Vermeulen, Gert, *Procedural Rights Debate, A Bridge Too Far or Still Not Far Enough?*, eucrim 4(2010), p. 164.

2.2. SUCCESS OF THE ROADMAP

However, the withdrawal of the Proposal for a Framework Decision did not mean the end of the procedural rights agenda at the EU level. A new incentive soon came with the Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings⁸⁸. The Roadmap basically assumed the substance of the Proposal for a Framework Decision, by including the same rights that were the subject of the latter instrument – translation and interpretation, information on rights and information about the charges, legal advice and legal aid, communication with relatives, employers and consular authorities, and special safeguards for suspects and accused persons who are vulnerable. Only one additional measure to the Proposal was present – a Green Paper on pre-trial detention. Although the substance is the same, the Roadmap adopted a different approach to the Proposal. Instead of one instrument to include all the rights listed, the Roadmap calls for the adoption of specific instruments for each measure, thereby promoting a step-by-step approach.⁸⁹ The Roadmap is also characterised by the fact that it does not try to present itself as an instrument which is encompassing all the measures which might be necessary in the procedural rights agenda, by leaving open the possibility to adopt other measures that deal with procedural rights other than those included in the Roadmap.⁹⁰ The Roadmap was later made part of the Stockholm programme, in which the Council invited the Commission to put forward the proposals foreseen in the Roadmap, and to examine whether other procedural rights issues also need to be addressed and mentioned, in particular the presumption of innocence.⁹¹

In December 2009 a group of Member States launched an Initiative for the adoption of the first measure foreseen in the Roadmap which dealt with rights to interpretation and translation in criminal proceedings.⁹² During the negotiation process, the Commission also put forward its own Proposal⁹³, but

⁸⁸ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Brussels, 24 November 2009, 15434/09.

⁸⁹ *Ibid.*, point 11: “Bearing in mind the importance and complexity of these issues, it seems appropriate to address them in a step-by-step approach, whilst ensuring overall consistency. By addressing future actions, one area at a time, focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure”.

⁹⁰ *Ibid.*, point 12: “In view of the non-exhaustive nature of the catalogue of measures laid down in the Annex to this Resolution, the Council should also consider the possibility of addressing the question of protection of procedural rights other than those listed in that catalogue”.

⁹¹ The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4. 5. 2010, point 2. 4. Rights of the individual in criminal proceedings.

⁹² Initiative for a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, Brussels, 11 December 2009, 16801/09.

⁹³ Proposal for a Directive of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings, Brussels, 23 March 2010, 8000/10.

the ensuing negotiation process was based on the Initiative, rather than the Proposal. In October 2010, the first EU measure harmonizing the rights of the defendants in criminal proceedings was adopted – Directive on the right to interpretation and translation in criminal proceedings.⁹⁴ The successful adoption of the first measure was followed by the equally successful adoption of two other measures, covering the right to information in criminal proceedings in October 2010⁹⁵, and the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to communicate upon arrest in October 2013⁹⁶.

Generally, after the adoption of the Roadmap, EU activity in the area of procedural rights significantly intensified and the process of harmonization of national criminal procedural laws is still under way with a number of acts, recommendations, and proposals for legally binding instruments coming to the fore. Some of the measures introduced were foreseen in the Roadmap – like those which concern procedural safeguards for vulnerable persons suspected or accused in criminal proceedings⁹⁷, legal aid⁹⁸, and detention⁹⁹. Others go

Already in July 2009, the Commission put forward a Proposal for the adoption of a *Framework Decision* on the right to interpretation and to translation in criminal proceedings (Brussels, 15 July 2009, 11917/09), but since the Proposal was not adopted before the Lisbon Treaty came into force (1 December 2009), after the Treaty came into force it became obsolete. A new instrument needed to have the form provided for in the new institutional and legal framework introduced by the Lisbon Treaty. Thereby, a Proposal for a *Framework Decision* was replaced with a Proposal for a *Directive*.

⁹⁴ 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, OJ L 280, 26. 10. 2010.

⁹⁵ 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, OJ L 280, 26. 10. 2010.

⁹⁶ 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, OJ L 294, 6. 11. 2013.

⁹⁷ Proposal for a Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings, Brussels, 27.11.2013, COM(2013) 822 final, Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24. 12. 2013.

⁹⁸ Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, Brussels, 27.11.2013, COM(2013) 824 final, Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, OJ C 378, 24. 12. 2013.

⁹⁹ Green Paper - Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, Brussels, 14.6.2011, COM(2011) 327 final.

beyond the scope of the Roadmap, dealing with the presumption of innocence and the right to be present at trial¹⁰⁰.¹⁰¹

Seeing the explosion of EU measures dealing with procedural rights of defendants and thinking about the failure of the Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, one must wonder what happened in the meantime, what led to the change of attitude towards harmonization of procedural rights at the EU level? The main change occurred with the coming into force of the Lisbon Treaty. The Lisbon Treaty had a tremendous impact on the area for two reasons. First, the EU got a clear Treaty-based competence to harmonize the rights of defendants in criminal proceedings. As we have seen before, the main argument raised by the opposing Member States in the process of the adoption of the Proposal for a Framework Decision was the fact that the EU lacked competence to deal with the matter. The Lisbon Treaty outdid this line of opposing argumentation with Article 82(2)(b) on the Functioning of the European Union¹⁰² which enabled the EU to establish minimum rules concerning the rights of individuals in criminal proceedings.¹⁰³ Second, unlike the pre-Lisbon Treaty on European Union which required unanimity in the Council for the adoption of measures in the area of police and judicial cooperation in criminal matters¹⁰⁴, measures for the harmonization of national criminal procedural laws of Member States in the area of rights of individuals in criminal proceedings are now adopted in accordance with the ordinary legislative procedure¹⁰⁵, which presupposes a co-decision of the European Parliament and the Council, and a qualified majority, rather than unanimous decision making in the Council.¹⁰⁶

¹⁰⁰ Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, Brussels, 27.11.2013, COM(2013) 821 final.

¹⁰¹ See also Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions - Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice, Brussels, 27.11.2013, COM(2013) 820 final.

¹⁰² Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26. 10. 2012.

¹⁰³ “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 European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:... (b) the rights of individuals in criminal procedure; ...“

¹⁰⁴ Article 34(2) Treaty on European Union (consolidated version), OJ C 325, 24. 12. 2002.

¹⁰⁵ Article 82(2) Treaty on the Functioning of the European Union (consolidated version) OJ C 326, 26. 10. 2012.

¹⁰⁶ Both aspects, co-decision of the European Parliament and qualified majority decision making in the Council, have made a significant change in the area of EU criminal law. Co-

The importance of these institutional changes for the harmonization of rights of the individual in criminal proceedings can best be shown if we compare the decision making process in the case of the failed Proposal for a Framework Decision on certain procedural rights in criminal proceedings and in the case of the successful Proposal for a Directive on the right of access to a lawyer. In the case of the former, the opposition of six Member States with regard to the questionable legal basis lead to failure of the project. Their initial opposition could not be removed despite significant political engagement by other Member States and EU institutions.¹⁰⁷ In the case of the latter, a group of five Member States expressed their “serious reservations about the Commission’s approach in preparing this proposal which, as published, would present substantial difficulties for the effective conduct of criminal proceedings by their investigating, prosecuting and judicial authorities”¹⁰⁸. In the opinion of these Member States, the Proposal put forward by the Commission disturbed the balance of national criminal justice systems by putting too much weight on the rights of the defendant, and not taking enough account of the interests of the effective prosecution of crime.¹⁰⁹ Furthermore, in many aspects it went beyond the current requirements of the European Convention on Human Rights¹¹⁰, and in its attempt to establish common minimum standards it did not pay proper attention to the differences in national criminal justice systems of Member States¹¹¹. However, unlike in the case of the Proposal for a Framework Decision, in the case of the Proposal for a Directive, these “serious reservations” raised by a group of Member States did not result in a blockade of the legislative process and its ensuing failure. Instead, it lead to an agreement being reached in the Council and the Directive being successfully adopted.

decision of the Parliament removed objections to the provisions of the pre-Lisbon Treaty on European Union, that decisions of the EU in the area of criminal law lack democratic legitimacy, since they are made by an executive body – the Council - while the European Parliament had only an advisory role in the decision making process. On the other hand, a qualified majority instead of unanimity in the Council meant an end to the practice by which individual Member States or a small group of Member States could block a legislative proposal with their opposition. For the decision making process under the Lisbon Treaty and its significance in the area of criminal law, see Đurđević, Zlata, *Lisabonski ugovor – prekretnica u razvoju kaznenog prava u Europi*, Hrvatski ljetopis za kazneno pravo i praksu, 2(2008), p. 1084-1086.

¹⁰⁷ Fletcher/Löf/Gilmore, *op. cit.* (note 82), p. 129.

¹⁰⁸ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – Note by Belgium, France, Ireland, the Netherlands, and the United Kingdom, Brussels, 22 September 2011, 14495/11.

¹⁰⁹ *Ibid.*, p. 3.

¹¹⁰ *Ibid.*, p. 4.

¹¹¹ *Ibid.*, p. 5.

The harmonization of national criminal procedural laws through measures adopted at the EU level in the area of the rights of individuals in criminal proceedings is a fact of political and legal reality. Member States were obliged to implement the provisions of the Directive on the right to interpretation and translation by 27 October 2013.¹¹² By 2 June 2014, they were obliged to implement the provisions of the Directive on the right to information.¹¹³ The period for the implementation of the provisions of the Directive on the right of access to a lawyer expires on 27 November 2016.¹¹⁴ Other proposals are being negotiated at the moment and it is reasonable to expect that they will also, once they are adopted, require significant amendments to national criminal procedural orders of Member States.

With this endeavour, the European Union is not only boosting the foundations of mutual trust, as a necessary precondition for the proper functioning of judicial cooperation based on the principle of mutual recognition¹¹⁵, it is also trying to re-establish the balance in EU criminal law, which has for a long time, ever since the introduction of the principle of mutual recognition, been driven almost exclusively by the motive of effective prosecution of crime. Orientation towards *security*, while losing sight of issues of *freedom*, has been the most voiced criticism of EU criminal law, initially raised by members of the academic community¹¹⁶ and the non-governmental sector¹¹⁷, but soon also

¹¹² Article 9(1) of the Directive. Croatia fulfilled its implementation obligations by introducing amendments in its Criminal Procedure Act (*Zakon o kaznenom postupku*) in May 2013. The Commission was obliged, pursuant to Article 10 of the Directive, to submit a report, by 27 October 2014, “assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals”, but failed to do so.

¹¹³ Article 11(1) of the Directive. Croatia fulfilled its implementation obligations by introducing amendments in its Act on Judicial Cooperation in Criminal Matters with Member States of the European Union (*Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije*) in July 2013 and in its Criminal Procedure Act in December 2013. The Commission was obliged, pursuant to Article 12 of the Directive, to submit a report, by 2 June 2015, “assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals”, but failed to do so.

¹¹⁴ Article 15(1) of the Directive. Croatia has already prepared a draft text of the amendments to its Criminal Procedure Act in order to implement the provisions of the Directive. It is expected that the legislation process will be finished by the end of year 2015.

¹¹⁵ For the secondary role of harmonization in comparison to the dominant role of mutual recognition pursuant to the provisions of the Lisbon Treaty, see Mitsilegas, Valsamis, *EU Criminal Law*, Hart Publishing, 2009, p. 156-157.

¹¹⁶ See, for example, Schönemann, Bernd, *A Programme for European Criminal Justice*, in Schönemann, Bernd (ed.), *A Programme for European Criminal Justice*, Carl Heymanns Verlag, 2006, p. 313-314.

¹¹⁷ Primarily defence attorneys associations (especially the European Criminal Bar Association, ECBA) and organizations for the protection of fundamental rights (especially Fair Trials International and Statewatch).

recognized and acknowledged by EU institutions¹¹⁸. With the adoption of instruments which form part of the Commission's Procedural Rights Agenda, the EU is answering this oft repeated criticism.

However, the question remains – to what extent can the harmonization of national criminal procedural laws help in the re-establishment of the balance between the prosecution and the defence in transnational criminal proceedings? The answer to that question will be given in the following part of the article.

2.3. HARMONIZATION AS (IN)ADEQUATE SOLUTION?

The harmonization efforts that have been undertaken so far and further harmonization efforts that have been announced, although welcome, do not represent a proper solution for the problems that the defence encounters when faced with a transnational European prosecution in the area of freedom, security and justice. Why is this so?

Harmonization is oriented towards *national* criminal procedural laws of Member States. The problems which the defence encounters and which have been identified in previous parts of this article occur at the *transnational* level. Harmonization simply does not act where action is needed in order to improve the position of the defence in EU criminal law. We might say that the harmonization of national criminal procedural laws enhances the abilities of law enforcement authorities to act in a transnational setting.¹¹⁹ In other words, the establishment of common standards in the area of the rights of the individual in criminal proceedings leads to the building of mutual trust, which is a necessary precondition for the proper functioning of judicial cooperation based on the premises of mutual recognition. However, the same can not be said for the position of the defence. On the contrary, the defence which acts in a transnational setting has not benefited from the harmonization of national criminal procedural laws so far, and it is not reasonable to expect it will benefit from future harmonization efforts.

The problem might be the fact that EU action in the area of defence rights so far has been built primarily in the image of rights developed in the jurisprudence of the European Court of Human Rights. However, the rights developed in the jurisprudence of the Strasbourg court can not help in reshaping the relationship between the prosecution and the defence in a transnational setting.¹²⁰ Strasbourg defence rights are developed in a different context and are not adequate for the position of the defence in the area of freedom, security and justice. Strasbourg

¹¹⁸ See, for example, the recently published Communication from the Commission, *op. cit.* (note 31), p. 4: "In the decade before the entry into force of the Lisbon Treaty, EU legislation concentrated on making it easier to fight crime, resulting in an impressive number of instruments for judicial cooperation and mutual recognition aimed at prosecuting offenders".

¹¹⁹ Gleß, *op. cit.* (note 9), p. 322.

¹²⁰ *Ibid.*, p. 322.

rights are oriented towards the position of the defence in *single national criminal proceedings*, and therefore can not solve the *systematic problems* which the defence encounters in *transnational European criminal proceedings*.

However, the claim that harmonization of procedural rights does not tackle the problems which arise at the transnational level is not entirely true. Harmonization measures have, but only to a very limited extent, also dealt with the transnational dimension of EU criminal law. Thus, all the measures which have been adopted so far – interpretation and translation, information, and access to a lawyer – apply not only to national criminal proceedings, but also to proceedings for the execution of the European arrest warrant.¹²¹

However, this does not affect the conclusion which has already been presented – the harmonization efforts which have been undertaken so far do not represent an adequate answer to the weakening of the position of the defence in transnational criminal proceedings. The question remains – what is the appropriate answer? Some possibilities will be presented in the Conclusion.

IV. CONCLUSION

The purpose of this article was to shed new light on the position of the defence in transnational criminal proceedings in EU criminal law. It was structured as a search for answers to two questions: Does the position of the defence change when there is a shift from national criminal proceedings to EU-wide transnational criminal proceedings? If there is a change, did EU law give an adequate response to this by trying to re-establish the balance between the parties in European transnational criminal proceedings?

The analysis of the changes in the position of the defence in a purely national case and in a transnational European case has shown that the position of the defence changes by becoming weaker when the case has a transnational dimension. This weakening of the position of the defence is primarily a result of the fact that its procedural opponent, the prosecutor, has at its disposal a number of mechanisms which are not available to the defence. The national prosecutor turns into a European prosecutor through cooperation with the prosecuting authorities of all other Member States and through the support of EU institutions whose purpose is to help the prosecution case. Besides that, the prosecution also enjoys access to common databases and has the option of *fo-*

¹²¹ See Article 1(1) of the 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, Article 1 of the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, and Article 1 of the 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

rum shopping by taking the indictment to a jurisdiction where the prospects of a successful outcome are best. None of these options are available to the defence, which needs to work alone in the transnational setting, without the support of supranational institutions, with no access to information and with no option to use efficiency-oriented cooperation mechanisms. All this leads to a “shift in power” in European transnational criminal prosecution, where the balance between the parties in criminal proceedings favours the interests of the prosecution.

In search of answers given by EU law to this situation in an endeavour to re-establish balance in European transnational criminal proceedings, we looked at two areas of EU law: transnational evidence gathering and the harmonization of procedural rights. The area of transnational evidence gathering has been strongly dominated by efforts to develop a legal framework for effective cooperation across borders. This orientation has thrown the interests of the defence into the background. However, it is noticeable that an awareness is slowly developing in the direction of recognition of the interests of the defence in the process of transnational evidence gathering. This is best seen in the fact that the ability of the defence to initiate the process of cross-border evidence gathering has found some recognition in the Directive regarding the European investigation order. However, significant efforts still need to be taken to re-establish the balance between the prosecution and the defence in the process of transnational evidence gathering in EU criminal law.

The harmonization of national criminal procedural laws is a process which brings national criminal justice systems of Member States closer together. Harmonization steps that have been undertaken so far show that this process affects the rights of the defence in criminal proceedings in a positive way – by giving these rights a clearer legal recognition and therefore making them more visible. However, all these positive changes are happening at the level of *national* criminal procedural laws. However, besides the improvement of procedural safeguards on the national level, attention also needs to be paid to the position of the defence at the *transnational* level, which was only to a very limited extent taken into account in the harmonization process. Therefore, the harmonization steps that have been undertaken so far and the further harmonization steps that are expected to be undertaken in the near future will not significantly improve the position of the defence in a transnational context.

What could then be an appropriate solution for the position of the defence which faces, as its procedural opponent, a European transnational prosecution? A good start would be to pay more attention to the position of the defence in a transnational context in the process of the adoption of all EU criminal law measures that in the interests of the defence. This process could be named “defence rights mainstreaming”¹²². Such a course of action necessitates the evaluation of every legislative proposal from the viewpoint of its effects on the balance between the parties in European transnational criminal proceedings.

¹²² Gleß, *op. cit.* (note 9), p. 323.