CROSS JUSTICE

Knowledge, Advisory and Capacity Building Information tool

for Criminal Procedural Rights in Judicial Cooperation

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Policy Recommendations Report

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2 Contributors

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Disclaimer: On behalf of the UNIBO Team, the present deliverable has been drafted by Marianna Biral (research fellow), under the scientific supervision of Prof. Michele Caianiello, PI of the CrossJustice Project.

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4 Policy Recommendations

The development of the CrossJustice Project – which has encompassed eleven Member States, namely Bulgaria, Croatia, France, Germany, Italy, Poland, Portugal, Spain, Sweden, Romania and the Netherlands (hereinafter generally referred as 'Member States') – has brought to the surface several critical profiles negatively affecting the implementation of defence rights in criminal proceedings throughout Europe (see D.5.10).

At the same time it has been of help in tracing **a potential way forward towards a higher level of safeguard** and – the two aspects are closely related – **a higher level of harmonization** in this playfield.

In this sense, recommendations have to be addressed to **European institutions** as well as to **national judicial and investigative authorities**, **legal practitioners** and also **members of the Academia.**

In particular, **European institutions** are in the position (and should take advantage of such position in order) to:

- **Reduce** the **vagueness** or **ambiguity** of certain **rights** enshrined in the Directives. In this perspective, for example, a crucial challenge is the concept of **effective remedy** which, explicitly mentioned in all the Directives, is one of the lesser defined aspects of the due process that the Stockholm Programme aimed at ensuring.
- **Give** clear and **unequivocal indications** as to the **parameters upon which defence rights are built**. The research has shown that even where the rights are brightly defined lacunas and flaws in implementation sometimes occur and are due to the absence of a common approach among Member States in defining the constitutive elements of such safeguards. In this sense, the more national authorities receive a clear guidance concerning parameters regulating defence rights the more the risk of different approaches in interpreting them decreases.
- Define a more precise terminology in the Directives. As Member States often give differing interpretations of certain terms and concepts, it should be up to the European legislator to clarify the meaning with precise definitions. For example, evidence

gathering or investigative acts, the ways through which a person can be made aware of his status in the proceedings, the documents that may be deemed essential; such open-ended clauses may cause inconsistencies in national implementations. This may lead to regulations that leave the matter to the discretion of the judge, while others instead introduce additional conditions, changing how and when the provision is applied.
A precise terminological structure could be used to verify the level of harmonization in EU and national instruments through automated means.

- **Harmonize** the **level of safeguard** of those **defence rights established by the Directives which do not find homogeneous protection in other European legal instruments**. For instance, **conditions for trials *in absentia*** as recognized by Directive 2016/343 do not perfectly overlap to those contained in the EAW Framework Decision. However, as violations to the right to be present to the trial represents a common ground for refusing the execution of an European Arrest Warrant, the non-equivalence of the standard of protection has arguably an adverse effect on transnational proceedings. The lack of clear European parameters in this regard, in fact, incentivizes national authorities rather to rely on domestic standards, which do not necessarily ensure the best level of protection to the rights of the accused.
- **Elaborate actions** aimed at **neutralizing** the **political stances** undertaken **by those Member States which are reluctant to fully recognize the impact of the EU over national law** in order to reduce or rebut such an impact.
- **Draw attention and regulate practical and structural contexts**, which at this point remain totally left to national discretion in their concrete implementation. It is the case, for instance, of the **training programmes** provided (by all Directives but for 2013/48 and 2016/343) for all different actors involved of criminal proceedings (judges, prosecutors, law enforcement, defence counsels). The European instruments do not spare wording on how such programmes should be structured, or financed, in order to ensure an acceptable quality threshold. Even though, at a first glance, these aspects might seem to be collateral features, they are indeed crucially important in order to ensure the effectiveness of the related defence rights.

National institutions, on their part, should:

- **Enhance** the level of **knowledge** and **reference** to the **EU legislation**. Despite a legislative apparatus composed of six Directives, in all Member States national courts are reportedly tending not to make explicit reference to EU legislation, and mainly refer to domestic frameworks or, at most, to the jurisprudence of the Court in Strasbourg. On one side, this phenomenon was to be expected due to historical reasons; being the

Directives relatively more recent compared to the Convention, and the case law of the CJEU on the criminal matter still rather limited. Not always, however, the ECtHR case law provides for the highest standards of protection at the European level. In these situations, "overreliance" on the Conventional system may bring to the unintended consequence of "neutralizing" the innovative capacity of the Directives, at least regarding those rights that find in this context a higher protection, for instance the privilege against self-incrimination in criminal proceedings, or the right to interpretation and translation. In order to turn the tide an important step to be taken is increasing the number of preliminary questions lodged to the CJEU which are still low and not equally distributed among Member States (see D.5.10).

- Provide where needed a terminological clarification related to translations. The Member States and the EU should agree on a common ontology and ensure that official translations respect those definitions. An example of the issues that may arise is the case for pre-trial detention, which has been translated in the different national legislations as precautionary, temporary, on remand, as well as being often mixed with sanctions implying forms of deprivation of liberty.

All legal operators, both at national and supra-national levels, and **in particular the members of the Academia** for their prominent role in the legal debate, should:

- **Undertake approaches of analysis** of the implementation of defence rights among Member States which are **capable to assess** not only - and not so much - formal compliance but rather **substantial adaptation to European prescriptions**. To this end – as the present research has shown – comparative and multidisciplinary methodologies are worthwhile instruments.