

Next Steps: The need for further procedural safeguards in the EU

Procedural Rights in the Context of Evidence Gathering



16 April 2021



Vânia Costa Ramos and Gwen Jansen

vaniacostaramos@carlospintodeabreu.com / gwen@jansenadvocatuur.nl



With the support of the Justice Programme 2014-2020 of the European Union



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Agenda 2020 ECBA – a New Roadmap on Procedural Rights

- ▶ Amsterdam Treaty /Tampere Council 1999 → principle of mutual recognition → Lisbon Treaty Art. 67, 82 TFEU.
- ▶ Mutual recognition requires mutual trust.
- ▶ 2009 Roadmap on procedural safeguards.
- ▶ Mission to achieve mutual trust has not been completed; partial distrust still exists (e.g. Measure F 2009 Roadmap - [Detention Green Paper](#) - no follow up)
- ▶ Need to monitor implementation of Procedural Rights' Directives and Directive (EU) 2016/343.
- ▶ Action should continue to be taken at the EU level in order to strengthen the rights of suspected or accused persons in criminal proceedings and thus the principle of mutual recognition and its underlying mutual trust.
- ▶ ECBA Proposal - "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards"

Matt, Holger, 2017 - <https://eucrim.eu/articles/guest-editorial-eucrim-12017/>

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ECBA Agenda 2020

- ▶ Measure A: Pre-Trial-Detention, including the European Arrest Warrant
- ▶ Measure B: Certain Procedural Rights in Trials
- ▶ Measure C: Witnesses' Rights and Confiscatory Bans
- ▶ Measure D: Admissibility and Exclusion of Evidence and other Evidentiary Issues
- ▶ Measure E: Conflicts of Jurisdiction and *ne bis in idem*
- ▶ Measure F: Remedies and Appeal
- ▶ Measure G: Compensation

ECBA Agenda 2020 available at: <http://www.ecba.org/content/index.php/124-featured/751-ecba-roadmap-2020>;
<https://journals.sagepub.com/doi/pdf/10.1177/2032284418788760>

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Measure D of the ECBA Roadmap Agenda 2020 - Procedural rights in the context of evidence-gathering

- ▶ This area has not been regulated, without prejudice to some sparse provisions in the various instruments.
- ▶ For example:
 - ▶ the right of the lawyer to be present at questionings and some evidence gathering acts (Directive 2013/48);
 - ▶ the right to request an EIO (art. 1, no. 3 Directive 2014/41);
 - ▶ European Public Prosecutor's Office - art. 41, no. 3;
 - ▶ Exclusion of evidence / valuation - art. 14, no. 7, Directive 2014/41 and 37 European Public Prosecutor's Office Regulation;
 - ▶ Legal remedies / judicial review (art. 42 EPPPO and art. 14 of Directive 2014/41)
- ▶ However, these are very limited and refer in most cases to national law.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

Problems:

- a) highly divergent interpretation of the various rights at domestic level, which creates relevant differences, for example in the role of legal assistance and access to the file at the pre-trial stage, which creates a very disparate situation between MS, calling into question the uniform guarantee of established rights.
- b) particularly serious situation in the area of cross-border evidence gathering, whether horizontal or in European Public Prosecutor's Office proceedings, as the accused will not have a sufficiently consistent and high minimum level of procedural rights at the investigation (or trial) stage. Even domestic protection and compensation mechanisms lose their effectiveness because of the cross-border combination of legal systems.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

- c) legal fragmentation which makes it very difficult to determine the applicable law and makes the rules of several countries incompatible in the field of measures of gathering evidence, something particularly relevant in the field of special investigative measures, or intrusive measures.
- d) lack of appropriate remedies, either procedural or substantive.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion?

- a) monitoring, and assessing the need for additional legislative measures, defining the role of the lawyer, the rules of access to the file in relation to the different procedures for gathering evidence and exercising means of protection
- b) the establishment of specific cross-border rights, including assistance by a lawyer and special provisions guaranteeing the defendant's right to participate actively in the taking of evidence and the possibility of taking evidence.

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Measure D of the ECBA Roadmap Agenda 2020 - (Pre-Trial) Admissibility of Evidence

What proposals are under discussion? (2)

- c) harmonisation of procedural "guarantees" regarding the gathering of evidence, in particular intrusive measures.
- d) the establishment of European law remedies, access to the CJEU, and sanctions for violations in relation to the taking of evidence.

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Proposals in academic studies / others

ECBA (2020) - European Criminal Bar Association Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World.

- ▶ Proportionality - the use of video-link and other alternatives to EAW §§ 12-43.
 - ▶ ECBA urges the European Union institutions and Member States' institutions and judicial authorities, as well as the Council of Europe and its Member States, to take practical and, if needed, legislative steps to enhance the use of video-conferencing in cross-border cases, namely:
 - ▶ dating the existing data from previous studies and organizing a **comprehensive assessment of the reasons for the under-use of remote video-technology**;
 - ▶ Establishing explicitly the **right of the accused to participate by video-link, at least in the cases in which this is the most proportionate solution**, as referred to above;
 - ▶ Developing **appropriate and compatible legal standards for remote participation** where that is permitted and appropriate (see *Chapter B.4*);
 - ▶ **Promoting the development of appropriate and compatible technical infrastructures and solutions** (which allow for **true-to-life remote participation, and exercising of the procedural rights** in this context - see *Chapter D*).
 - ▶ Considering the issues relating to the **transparency and privacy** in the use of remote technology in criminal trials (see *Chapter E*)

<http://ecba.org/content/index.php/124-featured/783-ecba-statement-on-video-conferencing-in-criminal-cases>

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Proposals in academic studies / others (2)

AAVV, EuCRIM 3/2020 <https://eucrim.eu/issues/2020-03/>

Focus: The Future of EU Criminal Justice – Expert Perspectives

Garamvölgyi / Ligeti / Ondrejová / von Galen

Admissibility of Evidence in Criminal Proceedings in the EU

- ▶ **Legislative option:**
 - ▶ Directive which could include:
 - ▶ “inclusionary rule”
 - ▶ “human rights” + “EU rights” rules of exclusion
 - ▶ Harmonisation of certain types of evidence (e.g. *digital evidence*)
 - ▶ Other aspects of evidence law (e.g. rules on defence rights to gather or request evidence)
- ▶ **Non-legislative option:**
 - ▶ A fresh academic study on admissibility of evidence

Costa Ramos / Luchtman / Munteanu

Improving Defence Rights

- ▶ **Legislative option:**
 - ▶ Cross-border procedures' minimum rules:
 - ▶ Issuing State (full legality and proportionality review, intrusive measures: ex ante court authorisation degree of suspicion, purpose limitation; remedies ex post; right to request investigation measures)
 - ▶ Executing State (A2F, procedural remedies in relation to execution or transfer; notification of violations to the issuing state);
 - ▶ Trial State (which authority / which law / horizontal preliminary ruling / procedural and substantive remedies)
 - ▶ Furthering “ABC” Directives (Directive /) - e.g. A2L in pre-trial stages; A2F; service of documents; right to participate at trial and appeal
 - ▶ EPPO procedural rights (Regulation)
 - ▶ Further rights with specific regulations for cross-border (or only cross-border) (Directive / Regulation)
 - ▶ Remedies
 - ▶ Minimum rules for judicial review (Directive)
 - ▶ Minimum rules for procedural sanctions for breaches of defence rights (Directive)
- ▶ **Non-legislative option:**
 - ▶ EPPO procedural rights - guidelines
 - ▶ Guidelines legal assistance in cross-border / supranational constellations
 - ▶ Funding of legal aid for cross-border, cross-jurisdictional
 - ▶ Handbooks, training, [...]
 - ▶ Remedies
 - ▶ Green Paper on remedies (procedural and substantive)
 - ▶ Focused on certain rights (information on rights, *nemo tenetur*, access to a lawyer, privacy in criminal investigations)
 - ▶ Development of case law

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Thank you !
Obrigada!
Dank je wel!

Check out www.ecba.org