THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS: FILLING A HUMAN RIGHTS GAP IN THE EUROPEAN UNION LEGAL ORDER

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1. MUTUAL RECOGNITION, HUMAN RIGHTS AND MUTUAL TRUST

The establishment of the principle of mutual recognition of judgments and other decisions of judicial authorities as a cornerstone of judicial cooperation in criminal matters within the Union created a need for strengthening and harmonizing defense rights in EU member states.[1] The application of this principle in national criminal justice systems requires that national authorities consider the decisions of authorities in other member states as equivalent to their own. These include various repressive criminal law measures such as the court, prosecution and police warrants and decisions, results of investigative activities and decisions on coercive measures, that limit or deny basic individual rights.

Even before ensuring the protection of equal defense rights at the EU level, the European Union has already imposed the obligation of mutual recognition on a number of criminal judicial decisions. These are criminal judgments or decisions imposing custodial sentences,[2] financial penalties,[3] probation mea-

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1 Tampere European Council of 15 and 16 October 1999, Presidency conclusions, §33; Article 82(1) of the Treaty on the Function of the European Union.

2 Council Framework decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327 5.12.2008, p. 27).

3 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ L 76, 22.3.2005, p. 16–30, OJ L 159M, 13.6.2006, p. 256–270).

sures and alternative sanctions,[4] arrest warrants,[5] freezing and confiscation orders,[6] protection orders for victims,[7] supervision measures,[8] trial in absentia decisions,[9] in criminal proceedings taking account of convictions in other member states,[10] European evidence warrant,[11] and the forthcoming European Investigation Order.[12]

One of the basic premises for the legitimacy of criminal justice systems and their repressive measures in democratic states which abide by the rule of law is the respect for human rights. Therefore, the recognition of foreign judicial decisions can be considered as equivalent to their own only if there is trust that the other EU member states are respecting human rights on the same level. The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that member states trust in each other's criminal justice systems.[13] The presumption of mutual trust was upgraded by the

4 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337, 16.12.2008, p. 102–122).

5 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision (OJ L 190, 18.7.2002, p. 1–20); amending act Framework Decision 2009/299/JHA (OJ L 81 of 27.3.2009, pp. 24-36).

6 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39–50). 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.)

7 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (OJ L 338, 21.12.2011, p. 2–18).

8 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p. 20–40).

9 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24–36).

10 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ L 220, 15.8.2008, p. 32–34).

11 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.)

12 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, p. 1–36).

13 Preamble (4) 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 Eu-

Court of Justice of the European Union (CJEU) to the constitutional principle of mutual trust, which requires each of the member states, "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law."[14] Furthermore, the CJEU insisted that "when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU."[15] The mutual trust, that in the eyes of the CJEU, is crucial for the autonomy, unity and efficacy of EU law, should even prevent the ECHR from requiring member states of the EU, in their relations with each other governed by EU law, to check that another member state has observed fundamental rights.[16]

Thus the principle of mutual trust introduces a "negative obligation"[17] for the EU member states, not to check whether the other member state has in a specific case respected human rights. Such a "negative obligation" under EU law, will not be in conflict with the "positive obligation" under the European Convention of Human Rights (ECHR) that forbids interstate cooperation in cases of violation of fundamental human rights such as prohibition of torture or fair trial rights, under two conditions. Firstly, that human rights protection under EU law is equal to the human rights protection under the ECHR or other international human rights instruments, and secondly, that member states in all concrete cases respect fundamental human rights. Unfortunately, both of these conditions have proved to be wrong.

2. MUTUAL TRUST: LEGAL CONSTRUCT WITHOUT REFLECTION IN REALITY

The presumption that all EU member states are respecting human rights standards and that therefore the judicial cooperation of the EU member states should be guided by unconditional mutual trust has been shown to have wobbly legs. Here are some reasons why there should not be any implicit trust and

ropean 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, p. 1–12

14 CJEU, Opinion 2/13, 18 December 2014, § 191.

15 Ibid, § 192.

16 Ibid, § 194.

17 About "negative mutual recognition" see Mitsilegas, Valsamis (2012) The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, Yearbook of European Law, Vol. 31, No. 1, pp. 319–372, 321, 334.

confidence in the judicial systems of EU member states that would result in insufficient precautions against possible human rights violations.

The European Court of Human Rights (ECtHR) is continuously and on a day-to-day basis finding violations of human rights by EU member states including prohibition of torture, right to liberty, defense rights and other fair trial rights that are relevant in the area of freedom, security and justice. For example, only in 2014, the ECtHR found one or more violation of fair trial rights by 16 EU member states, without taking into account friendly settlements. Only Cyprus, Denmark and Luxembourg were member states that did not have any violations in 2014.[18] Altogether, in 2014, EU member states committed 111 violations of Article 3 ECHR, 73 violations of Article 5 ECHR, and 183 violations of Article 6 ECHR.[19] If any of these rights were in the field of the application of EU mutual recognition measures the EU "negative obligation" could lead to the double violation of the ECHR by both states engaged in cooperation.

That politics trumps the international human rights treaty obligations even in the European Union was blatantly evident in recent years with regard to abduction and extrajudicial interstate transfer of persons, known as US extraordinary rendition. Although such activities clearly violated international law, almost all requested EU member states (18 of them) facilitated extraordinary rendition by giving permission for the use of their airspace and airports for flights associated with the CIA extraordinary rendition program, some EU member states like Germany, Austria, Italy, Sweden and United Kingdom participated in the abduction/apprehension and/or interrogation of extraordinarily rendered individuals, and some like Poland, Lithuania, and Romania hosted secret CIA prisons on their territories where persons were tortured.[20] The extent of human rights violations have been recognized by the US Senate[21] and legally determined by the ECtHR, which in July 2014 condemned Poland for violation of the right to life, prohibition of torture, right to liberty, right to a fair trial, right to respect for private and family life, right to an effective remedy and abolition of the death penalty.[22] The cases against Italy,[23] Romania[24] and Lithuania[25] are pending be-

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18 See http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf, 174-175.

19 Polakiewicz Jörg (2015) The Future of Fundamental Rights Protection without accession, speech, Maastricht University, 26 June 2015, http://www.coe.int/en/web/dlapil/speeches-of-the-director

20 Globalizing Torture: CIA Secret Detention and Extraordinary Rendition, Open society Foundations, New York, USA, February 2013; https://www.opensocietyfoundations.org/reports /globalizing-torture-cia-secret-detention-and-extraordinary-rendition

21 United States Senate, The Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, declassified on December 9, 2014

22 *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, 24 July 2014

23 *Nasr and Ghali v. Italy* (application no. 44883/09)

24 *Al Nashiri v. Romania* (no. 33234/12)

25 *Abu Zubaydah v. Lithuania* (no. 46454/11)

fore ECtHR. These events have deeply shaken the trust in the rule of law in some EU member states and have had, as was expressly recognized by the European Parliament,[26] a negative impact on the principle of mutual recognition and mutual trust.

Interstate mutual trust should be preceded by the trust of the citizens in their justice system. The level of respect for human rights by the judiciary is firstly tested at the national level, towards its own citizens. The relevance of this criteria stems from the fact that the opinion of the citizens on their domestic judicial systems is not primarily based on high profile judicial cases and their media coverage, but on the personal experience of the citizens with the handling of their judicial cases or their personal involvement in judicial proceedings. Therefore, there is a straightforward question raised as concerns some countries in the EU where their own citizens have a very low level of trust in their own judicial system.[27] The Report of the World Economic Forum, that ranked 144 countries in the world according to perceived judicial independence, detected that even on the global level some of EU countries are very low on the list (Slovak Republic 130, Bulgaria 126, Croatia 100, Spain 97, Slovenia 91, Romania 84, Italy 78).[28] The EU Commission Anti-Corruption Report from 2014 confirmed that Bulgaria, Croatia, the Czech Republic, Greece, Lithuania and Romania are countries where both perceptions and actual experience of corruption are high.[29] The low trust of citizens in their domestic judicial system in some EU member states, like for example Croatia, has been confirmed by national public opinion polls[30] and reports,[31] independent international surveys such as the ones regular-

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26 The results of inquiries into the CIA's program of extraordinary rendition and secret prisons in European states in light of the new legal framework following the Lisbon Treaty, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, 2012.

27 For more on the public trust in judicial authorities in European countries see Peršak, Nina and Štrus, Jože (2014) Legitimacy and Trust-Related Issues of Judiciary: New Challenges for Europe, in: Peršak, Nina (ed.) Legitimacy and Trust in Criminal Law, Policy and Justice, Ashgate, 89-110.

28 The Global Competitiveness Report 2014–2015, http://reports.weforum.org/global-competitiveness-report-2014-2015/

29 In these countries, between 6% and 29% of respondents indicated that they were asked or expected to pay a bribe in the past 12 months, while 84 % up to 99 % think that corruption is widespread in their country. Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report, Brussels, 3.2.2014 COM(2014) 38 final

30 The survey conducted by the agency Ipsos Puls on Collecting initial information on quality of judicial system services in the Republic of Croatia in 2013 shows that: 60 percent of the general population have a negative opinion of the work, and do not express confidence in the work, of courts and prosecutors and that the judiciary is at the bottom of the scale of the state authorities and services evaluated by the survey. (pravosudje.gov.hr/UserDocsImages/dokumenti/JSSP/Izvjestaj_WB_JSSP_v7.pdf)

31 See Croatian Ombudsman's report for 2014, Zagreb, 31 March, 2015, pages 14-16. (www.ombudsman.hr/attachments/article/517/Izvješće%20pučke%20pravobraniteljice%20za%202014.%20godinu.pdf)

ly published by Transparency International[32] and the World Economic Forum, and Council of Europe bodies such as GRECO.[33] If the citizens of EU countries do not trust their own judicial system, how it can be presumed that the authorities or citizens of other EU countries can have trust in them.

All these examples clearly show that the introduction of the principle of mutual trust that resulted in doing away with human rights guarantees before setting up a system of harmonized and effective human rights protection in all EU member states meant putting the cart before the horse.

3. THE DECONSTRUCTION OF MUTUAL TRUST

The dismantling of the EU mutual trust based system that required member states to automatically recognize other member states' decisions without checking or requesting human rights guarantees occurred in two instances. One is related to the jurisprudence of the European courts on EU asylum law and the other to the relativisation of that principle in EU legislation in the case of the Directive on the European Investigation Order.

3.1. EUROPEAN UNION ASYLUM LAW

The ECtHR for the first time, in the case *M.S.S. v. Belgium and Greece* in 2011, found a violation of the ECHR by a state that was applying EU law in the Area of Freedom, Security and Justice (AFSJ). In this case, besides Greece who was found in violation of Article 3 ECHR for putting an asylum seeker in degrading living conditions, the ECtHR found that Belgium also violated Article 3 ECHR by transferring that asylum seeker to Greece in accordance with the Dublin Regulation on transfers of asylum seekers within the EU.[34] The Dublin Regulation from 2003 establishes the criterion that the member state of an irregular entry into the Union is responsible for examining the asylum application, and other EU member states may automatically transfer an asylum seeker to the member state of first entry into EU territory.[35]

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[32] For example, the research carried out by Transparency International called Global corruption barometer revealed that in 2013 70% of respondents in Croatia felt that the judiciary was corrupt/extremely corrupt (www.transparency.org/gcb2013/country/?country=croatia).

[33] Croatian citizens perceive corruption to be a major problem. This negative perception is particularly troublesome with respect to the judiciary and politicians. Executive summary, Greco Eval IV Rep(2013) 7E, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation report, Croatia, 25 June 2014, 4.

[34] ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011.

[35] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Article 10 and 19.

However, the ECtHR did not, either in this case nor in subsequent ones,[36] rebut the Bosphorus presumption of equivalent protection of fundamental rights by EU law to that of the Convention system[37] and did not find the Dublin Regulation "manifestly deficient" to protect Convention rights and contrary to the ECtHR. The Court used the so-called "sovereignty" clause from Article 3 § 2 of the Dublin Regulation, which authorizes each member state to examine an application for asylum and decided that Belgium, under the Dublin Regulation, could have refrained from transferring the applicant,[38] and therefore the measure of transfer did not strictly fall within Belgium's EU legal obligations that would trigger the application of the Bosphorus presumption.[39]

Despite this approach of avoiding explicit condemnation of the Dublin system, the ECtHR has clearly stated that the automatic transfer of an asylum seeker to another member state without verifying whether s/he is faced with a real and individual risk of being subject to conditions violating Article 3 is contrary to the Convention. The member state should not have merely assumed that the asylum seeker would be treated in conformity with Convention standards but should have verified how the other member state applied their legislation on asylum in practice.[40]

In an attempt to reconcile the principle of mutual trust and the violation of the Convention by a transfer under the Dublin Regulation, the CJEU, in the judgment *N.S. and M.E.* from 2011[41], declared that the presumption of compliance with fundamental rights is rebuttable and therefore introduced the obligation of member states to exercise limited checks on compliance before carrying out a transfer of an asylum seeker. The limitations on verifying compliance with human rights are very strict, as checks cannot be exercised for "any infringement of a fundamental right by the Member State",[42] for "the slightest infringement of Directives"[43] or for "minor infringements"[44] but only where a member state "cannot be unaware that systemic deficiencies in the

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36 Polakiewicz Jörg, 2015, supra 19.

37 In Bosphorus decision the ECtHR established that the protection of fundamental rights by Community law can be considered to be "equivalent" to that of the Convention system (§ 165), and therefore "the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." § 156. ECtHR, *Bosphorus Hava Yollari Turism ve Ticaret Anonim* Şirketi *v. Ireland*, 30 June 2005.

38 ECtHR, *M.S.S. v. Belgium and Greece*, 21 January 2011. § 339.

39 Ibid. § 340.

40 Ibid. § 359.

41 N.S. (C-411/10) and M.E. (C-493/10), CJEU, 21 December 2011.

42 Ibid. § 82.

43 Ibid. § 84.

44 Ibid. § 85.

asylum procedure and in the reception conditions of an asylum seeker amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment."[45] Despite the disappointing compromise with human rights protection,[46] this CJEU decision denoted the end of automaticity in interstate cooperation in asylum law[47] and was the starting point for the deconstruction of the system of blind mutual trust in EU law.

The reply to the new lower standards for violation of Article 3 of ECHR set out by the CJEU in the *N.S. case*,[48] came from the Supreme Court of the United Kingdom and from the ECtHR in two further judgments (*Sharifi* and *Tarakhel*) establishing the violation of the ECHR by the Dublin transfers in 2014. The UK Supreme Court held that a violation of Article 3 of the ECHR is not intrinsically dependent on the failure of a system, that it can occur without there being any systemic failure whatsoever and relieved asylum seekers in the U.K. of the additional burden of proving "systemic deficiencies" in a destination State.[49] In the case of *Sharifi and Others v. Italy and Greece* from 2014, the ECtHR said that it was for the State transferring asylum seekers to ensure, even in the context of the Dublin system, that the destination country offered sufficient guarantees that asylum seekers will not be deported without an assessment of the risk faced in the country of deportation.[50] The ECtHR found that Italy violated Article 3 for transferring four Afghan migrants to Greece without verifying Greek asylum practices or getting sufficient guarantees from Greek authorities with regard to the asylum seekers' return to their country of origin where they were likely to be subjected to inhuman and degrading treatment. The case *Tarakhel v. Switzerland* continued to water down the CJEU concept of "systemic deficiency" requiring a thorough and individualized ex-

45 Ibid. § 94 and 86. Decision was codified in III Dublin Regulation 604/2013 of 26 June 2013 in Article 3(2).

46 There is an interpretation which says that the CJEU was not calling into question the well-established test applied in human rights law, as the CJEU's focus was not on the sort of breach that had to be established, but rather on EU member state awareness of such a breach. Morano-Foadi, Sonia (2015) Migration and Human Rights: The European Approach, in Morano-Foadi / Vickers (ed) Fundamental Rights in the EU: A Matter for Two Courts, Hart Publishing, 115.

47 Mitsilegas, Valsamis (2012) The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, Yearbook of European Law, Vol. 31, No. 1, 319-372, 358.

48 The CJEU has confirmed its concept of "systemic deficiencies" in *Abdullahi* (C-394/12), 10 December 2013. For a harsh critique see Peers, Steve (2014) EU Law Analysis: Tarakhel v Switzerland: Another nail in the coffin of the Dublin system? http://eulawanalysis.blogspot.com/2014/11/tarakhel-v-switzerland-another-nail-in.html

49 R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department (Respondent), The Supreme Court of the United Kingdom judgment of 19 February 2014, § 48, 67.

50 CEDH, Affaire Sharifi et autres c. Italie et Grèce, 21 octobre 2014, § 232.

amination of the specific situation of the person concerned that should be included in the detailed and reliable assurances from the country of transfer.

These decisions of the ECtHR have demonstrated that both conditions that can justify the "negative obligation" based on the principle of mutual trust have proven to be wrong. Firstly, they have repeatedly proven that member states do not always respect fundamental human rights in the area of EU law, and secondly that EU legislation *per se* is not necessarily sufficient to safeguard fundamental rights[51] and consequently is not equal to the human rights protection under the ECHR.

3.2. THE DIRECTIVE ON THE EUROPEAN INVESTIGATION ORDER

By adopting the Directive on the European Investigation Order in April 2014,[52] the newest EU directive on criminal law measures, a reservation based upon fundamental rights in the application of the principle of mutual trust introduced in EU asylum law has been transferred to the field of cooperation in criminal matters. The European Investigation Order (EIO) is a mutual recognition instrument for the transnational gathering of evidence in criminal proceedings between EU member states. Due to its broad scope, which includes almost all investigative measures,[53] it will replace all previous mutual recognition and mutual legal assistance instruments for transferring evidence between EU member states.[54]

At the end of five years of negotiations on the EIO directive, the European Parliament took the stance for a long time advocated by NGOs, academia and some national courts, and introduced a fundamental rights reservation into the mutual trust concept. For the first time, an EU directive in AFSJ has provided for non-compliance with fundamental rights as a ground for refusal. In the Preamble to the Directive it is reconfirmed that the creation of an AFSJ is

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51 Mitsilegas, Valsamis, 2012, 367.

52 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, p. 1–36.

53 Excluded are the setting up of a joint investigation team and the gathering of evidence within such a team (Article 3) and Schengen cross-border surveillance as referred to in the Schengen Convention (§ 9).

54 According to Article 34 it will replace in entirety the Council Framework Decision 2008/978/JHA on the European evidence warrant, and the corresponding provisions of (a) European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 20 April 1959, as well as its two additional protocols; (b) Convention implementing the Schengen Agreement; (c) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its protocol; d) Framework Decision 2003/577/JHA on orders freezing property or evidence, as regards freezing of evidence.

based on mutual confidence and a presumption of compliance of other member states with fundamental rights, but that presumption is declared rebuttable (§ 19). According to Article 11(1)(f), recognition or execution of an EIO may be refused in the executing State where there are substantial grounds for believing that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 of the Treaty on European Union (TEU) and the Charter, meaning a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognized in the Charter. It is apparent that the wording of this Article has been transplanted from the N.S. judgment of the CJEU.[55] However, the retreat from CJEU case law is also clear as the Directive does not mention a CJEU requirement of "systemic deficiency".[56] Adding this systemic element for establishing substantial grounds for believing that the execution of a concrete investigative measure would result in a breach of a fundamental right of a person concerned could lead to the ineffective enforcement of EU procedural rights and a violation of the ECHR. On the contrary, the Directive links its implementation with the three EU directives on procedural rights of defendants (§ 15).

4. THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS: STRENGTHENING MUTUAL TRUST

4.1. SIGNIFICANCE OF THE DIRECTIVE

The Directive on the right of access to a lawyer in criminal proceedings was the third measure (C) that was adopted at the EU level implementing the plan set out by the Roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.[57] The European Parliament and the Council adopted the Directive[58] on 22 October 2013 and obliged EU member states to transpose its provisions in national criminal procedural law by 27 November 2016. After the expiry of that date, the right of access to a lawyer as defined by the Directive will become enforceable supranational EU law that

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55 Capitani, Emilio De / Peers, Steve (2014) The European Investigation Order: A new approach to mutual recognition in criminal matters, http://eulawanalysis.blogspot.com/2014/05/the-european-investigation-order-new.html

56 Ibid.

57 Resolution of the Council of 30 November 2009, O.J. C 295, 4.12. 2009., p. 1.

58 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, p. 1–12 (further on: The Directive).

could be directly applied by the courts in EU member states. Likewise, the European Commission would be empowered to initiate infringement proceedings against member state that did not transpose, completely and correctly, the provisions of the Directive. According to the non-regression clause, the Directive lays down only minimum rules or minimum standards for the rights of suspects and accused person, and the states are authorized to ensure higher protection and thus not to lower the existing international or national procedural protection.

Among five measures envisaged in the Roadmap for strengthening the procedural rights of defendants, this measure is considered to be the most significant one. The reason for its importance is that the right of access to a lawyer facilitates other defense rights such as the right to have adequate facilities for the preparation of a defense, the right to actively participate in the trial, the right to competent and effective legal advice, the right to have examination of witnesses on his/her behalf and so on. Additionally, effective legal advice from a defense lawyer protects the defendant from self-incrimination, which is one of the crucial fair trial rights, and thus it generally ensures a fair trial and proper administration of justice. Moreover, the right of access to a lawyer protects one of the fundamental values of democratic societies, the prohibition of torture or inhuman or degrading treatment or punishment, as was clearly stated in the case law of the ECtHR and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[59] The presence of the defense lawyer during police custody has the protective function of safeguarding the defendants' dignity and physical integrity, preventing states from subjecting them to ill-treatment, and thus it preserves one of the non-derogable rights laid down in the peremptory norms of international law.[60]

Despite certain controversies in its interpretation, dilemmas in implementation and separation from the key issue of legal aid, there is consensual agreement that the Directive on the right of access to a lawyer in criminal

[59] The task of a lawyer is, "among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seeks to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In this connection, the Court also notes the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in which the CPT repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment." ECtHR, *Salduz v. Turkey*, 27 November 2008, § 54.

[60] Prohibited by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights of the European Union

proceedings enforcement will enhance defense rights in criminal proceedings throughout the EU.[61] Comparative analysis of EU member states' criminal procedural law have demonstrated uneven and in some states low protection of defense rights in the early stage of criminal proceedings.[62] Therefore, on the one hand, it will harmonize defense rights in EU member states thereby facilitating mutual recognition, and on the other it will enforce defense rights standards required by the ECtHR and introduce new ones.

4.2. WHY THE CASE LAW OF THE STRASBOURG COURT IS NOT ENOUGH?

The Directive to a great extent codifies the existing case law of the Strasbourg court that has from 2008 developed the so-called "Salduz doctrine" regulating primarily a right of access to a lawyer and other fair trial rights in the pre-trial phase of criminal proceedings. The Strasbourg court, more than three decades ago, decided that fair trial rights and Article 6(3) ECHR providing for minimum defense rights for everyone charged with a criminal offence, are applicable also in pre-trial proceedings. In the 1982 *Foti v. Italy* judgment the ECtHR decided that the moment when a person is

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61 Bachmaier Winter, Lorena (2015) The EU Directive on the Right to Access to a Lawyer: a Critical Assessment, in Ruggeri (ed) Human Rights in European Criminal Law, 111-131, 129; Cras, Steven (2014) The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, EUCRIM, 32-44, 44; Elisavet Symeonidou-Kastanidou (2015) The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation, EuCLR European Criminal Law Review no 1, Seite 68 – 85; Anagnostopoulos, Ilias (2014) The right of access to a lawyer in Europe: A long road to travel?, EuCLR European Criminal Law Review, 3-18; Shaeffer, R / Heard, C. (2011) Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice, The New Journal of European Criminal law, no 3, 270-281; Hodgson, Jacqueline / Cape, Edward (2014) The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice, New Journal of European Criminal Law, Vol. 5, Issue 4, 450-479; Longridge, Corri (2013/14) In Defence of Defence Rights: The Need for Common Rules of Criminal Procedure in the European Union, European Journal of Legal Studies, no. 2, 136-156.

62 E.g. The comparative analysis of defense rights in nine EU states results with the conclusion: "Our research demonstrates that whilst, of course, there is significant variation across the nine jurisdictions in the study, there are important limitations on access to effective criminal defence in all countries that we have examined." Ed Cape / Zaza Namoradze / Roger Smith / Taru Spronken (2010) Effective Criminal Defence in Europe, Executive Summary and Recommendations, Intersentia, 13; "It can be concluded that comparative analysis confirms that the rules on deprivation of liberty in criminal proceedings are considerably variable in the Member States as concern requirements, duration, competent authorities, defence rights and judicial review." Đurđević, Zlata (2016) Comparative analysis - Arrest and pre-trial detention: Towards a prosecutor for the European Union, in Ligeti, Katalin (ed.), Toward a Prosecutor for the European Union, Volume 2, Oxford: Hart Publishing (in press).

charged with the criminal offence as a trigger for the application of guaranties from Article 6(3) ECHR is the official notification of an allegation that he has committed a criminal offence, the application of coercive measures or other measures which substantially affect the situation of the suspect.[63] However, most of the states have as a rule limited defense rights in pre-trial proceedings.[64] The Strasbourg court has for a long time tolerated the deficient application of defense rights in the pre-trial phase and particularly did not maintain that Article 6(3) required the presence of a lawyer during police interrogation. After the milestone *Salduz v. Turkey* judgment, that a person charged with a criminal offence has a right of access to a lawyer from the first interrogation of a suspect by the police,[65] the ECtHR has constantly raised standards of defense rights in pre-trial proceedings.

Despite a casuistic approach, the Strasbourg court is developing general rules and its judgments are according to Article 46 ECHR obligatory for the member states of the Council of Europe. They are obliged not only to put an end to the violation but to avoid repeating it, which can only be done by a change of legislation, case law, legal doctrine or administrative practice.[66] Therefore, it is clear that the payment of a low amount of just satisfaction (damages) to the individual whose fundamental rights have been violated does not fulfill the obligation of a convicted state. The negative assessment of execution of the ECtHR judgments by the Committee of Ministers as the supervisory body of the Council of Europe may result only in political pressure, which usually does not have a particular impact.[67] Because the ECtHR is very thinly politically backed there are no effective enforcement mechanisms for Strasbourg jurisprudence. The long process of enforcement or resistance to implementation of the ECtHR Salduz case law was another reason why there was a need for the enforcement of defense rights in pre-trial proceedings by the EU directive. Besides the direct effect and primacy of the EU directive over national law, the EU has much stronger mechanisms for the supervision of its enforcement. The fine that can be ordered by the Luxemburg court in infringement proceedings initiated by the European Commission cannot in any way be compared with the tiny compensations that the Strasbourg court can impose on a state which violated the ECHR.

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63 ECtHR, *Foti v. Italy*, 10 December 1982, § 52.

64 On the deficience of defense rights in investigative phase see Summers, Sarah (2007) Fair Trial, Hart Publishing.

65 ECtHR *Salduz v. Turkey*, 27 November 2008, § 55.

66 See Supervision of the execution of judgments, annual reports, Council of Europe Committee of Ministers of the European Court of Human Rights, http://www.coe.int/t/dghl/monitoring/execution/Documents/Publications_en.asp; also http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp

67 The only alternative sanctions are expulsion from the Council and suspension of voting rights in Committee, which can have only negative effects on human rights protection in the expelled state.

The need for the Directive, despite the development in the last decade of ECtHR case law on defense rights in the earliest phase of criminal proceedings, is apparent also from the recent ECtHR judgment *A.T. v Luxembourg,* from April 2015, where the Strasbourg court for the first time refers to one of the EU directives on procedural rights. Without paying lip service, the ECtHR stated 'many suspects encounter serious difficulties in the exercise of this right, in particular due to legal or practical restrictions on the right of access to a lawyer, a prevalence of supposed 'waivers' of the right whose reliability is questionable, and ineffective remedial action by the courts to repair violations'.[68]

4.3. SCOPE AND NEW STANDARDS IN DEFENSE RIGHTS

The Directive applies in two types of proceedings: in criminal proceedings and in European arrest warrant proceedings (Art. 1). The separation of European arrest warrant proceedings from criminal proceedings was necessary as European arrest warrant proceedings are not considered to be the part of criminal proceedings and as such are not subject to the same legal principles and legal protections.[69] Besides the right of access to a lawyer, the Directive regulates two other defense rights, the right to have a third party informed upon deprivation of liberty and the right to communicate with a third person and with consular authorities while deprived of liberty.

The rights that can be considered as groundbreaking for the unification and enhancing of the defense rights of suspects are the application of the Directive to suspects or accused persons irrespective of whether they are deprived of liberty (Art. 2) as the right of access to a lawyer in the early stage of proceedings was by the ECtHR guaranteed only to arrested persons, and the confidentiality of defendant lawyer communication (Art. 4). The Directive also makes clear that suspects shall have access to a lawyer before questioning by the police (Art. 3(2.a)) and that a lawyer can participate effectively at questioning (Art. 3(3.b)). In some states, the existing practice of differentiating between formal and informal police questioning depending on recognition of defense rights has undoubtedly run contrary to the Directive as it does not apply only to preliminary questioning by the police aimed at personal identification, safety issues or before the suspect has been identified (Preamble 20). As soon as a person becomes a suspect, even in the course of questioning by the police (Art. 2(3)) the Directive applies. Seeing that defense rights are not absolute rights,

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68 ECtHR, *A.T. v Luxembourg*, 17 May 2015, § 59.

69 As was recognized by the ECtHR, the European arrest warrant proceedings are a special type of extradition proceedings that do not have to comply with the fair trial guarantees required by Article 6 of the European Convention of Human Rights. ECtHR Maaouia v. France, 5 October 2000, § 40; *Penafiel Salgado v. Spain,* 65964/01, 16 April 2002.; *Sardinas Albo v. Italy,* 56271/00, 8 January 2004.

the Directive prescribes requirements for limitations of the rights it guarantees, narrowing the space for the discretion of the member states.

5. CONCLUSION

The development of the relationship between mutual trust and fundamental rights in the AFSJ in the last several years has shown that the period of automatic recognition of foreign judicial decisions without verifying compliance with fundamental rights has ended. Compliance checks have not invalidated the principle of mutual trust, but have made it rebuttable in each individual case against fundamental rights and in criminal matters particularly against defense rights. As the most important measure for strengthening the procedural rights of defendants, the Directive on the Right of Access to a Lawyer in Criminal Proceedings has particular significance. Its aim is not only to harmonize the level of defense rights protection, thereby achieving common minimum standards necessary to facilitate the application of mutual recognition, but in most EU countries will improve existing standards. As long as member states have correctly implemented the Directive and are respecting procedural guarantees in transnational cooperation there will be no need for refusal of recognition or execution of a foreign judicial order and cooperation will be operating in line with the principle of mutual trust.