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The Podcast that Follows Dirty Money

EP. 4 - Criminal Lawyer's Take on Protecting Fundamental Procedural Rights

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- Speaker 2 : Amedeo Barletta, Criminal Lawyer and Vice Chair of the ECBA - European Criminal Bar Association

INTRO. The violation of fundamental right is explicitly recognized in Regulation (EU) 2018/1805 as a ground for refusing the mutual recognition of freezing or confiscation orders issuing abroad. This rule contained in Article 19, letter h) codify the case law of the European Court of Justice that has been established since Aranyosi and Caldararu concerning the European Arrest Warrant. As a result of political compromise during the negotiation, the presence of this article gives rise to a series of interpretative doubts. Firstly, neither the Regulation nor the case law of the European Court of Justice specify which fundamental rights violations explicitly allow the executing state to refuse the request for mutual recognition. The only reference is to the right to an effective remedy, an impartial tribunal and the right to defense. Secondly, the parameters for assessing whether a fundamental right has been compromised during the issuing of the national proceeding are not known.

Regarding the scope of the protection of procedural rights of the individual concerned, European lawyer associations advocate for the enforcement of the principle of Dual Defense. This principle entails the presence of defense lawyer both in the requesting and executing states for the individual whose assets are to be seized or confiscated. In other words, in cases of judicial cooperation in criminal matters, a dual-phase control should always be ensured: a substantive review by the issuing state and a formal review by the executing state. A partially similar issue has arisen in relation to the EPPO Regulation has been subjected to a recent judgment of the Grand Chamber of the European Court of Justice (Case C-281/22).

Certainly, judicial cooperation instruments serve to enhance state's ability to prosecute economic crimes; however, it is crucial to strike a balance with the rights and guarantees of individuals. It is worth remembering that respect for individual guarantees is fundamental to strengthening mutual trust between states, a prerequisite for the effective implementation of the principle of mutual recognition of orders within the European framework.

In this podcast episode, the discussion will be led by Caterina Scialla, PhD in Criminal Law and Researcher at the University of Campania Luigi Vanvitelli, along with Amedeo Barletta, Criminal Lawyer and Vice Chair of the ECBA - European Criminal Bar Association.

[00:03:21] QUESTION 1

For the first time in an EU Regulation on judicial cooperation in criminal matters, explicit emphasis is placed on the violation of fundamental rights as a reason for refusing mutual recognition. Specifically, Regulation (EU) 2018/1805, Article 19 letter h) codifies robust jurisprudence concerning the European Arrest Warrant, starting with the 2015 judgment of the Court of Justice in the Aranyosi and Caldararu case. The ECtHR's judges acknowledge that the prohibition of torture and inhuman or degrading treatment is a fundamental value of the European Union. If there is a real and concrete risk that the person sought might face such treatment, the executing state may refuse to surrender them to the requesting state. Turning to asset confiscation measures, which affect the right to property rather than personal freedom, how do you perceive the European legislator's decision to explicitly include this as a ground for non-recognition? What are the practical implications, as well as the theoretical ones, of this provision for the defense of the individual concerned? Lastly, could you discuss your opinion on the current state of substantial and procedural fundamental rights that should be guaranteed concerning asset confiscation measures?

[00:04:58] ANSWER 1

The question highlights some of the most important issues in the establishment of a Common European Judicial Space. Firstly, the European Judicial Space is inherently a continuous process rather than a static goal or a mere starting point. European integration process entails ongoing efforts to harmonise different legal systems effectively. It is a process grounded in law, with fundamental rights and general principles of law serving as guiding principles. These principles ultimately align with fundamental rights and guarantees enshrined in a legal text originating from a different legal framework outside the European Union, such as the European Convention on Human Rights.

Therefore, the process of European integration and the building of a Common European Judicial Space must have as its pillars the respect for fundamental principles and rights. However, this alignment is not always optimally executed. Choosing to pursue the construction of this Common Judicial Space through the principle of mutual recognition rather than more aggressive integration methods, mirrors a fairly unique approach, borrowed from the creation of the European Common Market. Yet, this approach brings many challenges as it relies on different legal systems working together in criminal matters, each legal system trusting the others and assuming that all EU Member States uphold high standards of rights protection and procedural guarantees. While ambitious, this mutual trust is not always reflected in practice. Thus, the cooperation process based on mutual trust began with the most well-known instrument, the European Arrest Warrant. The underlying idea was to presume mutual trust and then build mutual recognition in the simplest and most effective manner possible.

However, adhesion to the principles of the European Convention on Human Rights was not clearly reflected in these legislations, if at all as a general assumption. At a certain point, even the European Court of Justice had to acknowledge the need for greater attention to fundamental rights. Examining early instruments of judicial cooperation, they did not include clauses directly based on the protection of fundamental rights, although such protection was always referenced in the recitals. It was through jurisprudence – initially with Aranyosi and Caldararu, and later with the Dorobantu case – that the protection of fundamental rights became grounds for refusing judicial cooperation.

This process clearly illustrates the growing recognition of fundamental rights as a limitation on judicial cooperation, thereby making mutual recognition a significant achievement for those who believe that the European integration process finds strength in guaranteeing high standards of fundamental rights protection.

If we aim to ensure the acceptance of this integration process, we must ensure the highest standards of fundamental rights protection, which will also help improve each national systems. Therefore, the European Union, through its cooperation instruments, becomes a catalyst for raising national safeguards as well.

We welcomed the inclusion of this clause protecting fundamental rights in Regulation (EU) 2018/1805. However, our satisfaction remains partial because the current level of guarantees falls short of our needs. The tools for harmonising procedural safeguards are still too vague and lacking in effectivity. The European Commission has not sufficiently enforced compliance with these rules among Member States; for instance, infringement procedures related to the implementation of directives on procedural rights are infrequent. Above all, additional guarantees and regulatory interventions are needed to achieve the rights that are proclaimed.

[00:11:04] QUESTION 2

Mutual trust is the cornerstone of judicial cooperation in criminal matters. According to this principle, judicial decisions issued in one Member State must be automatically recognised by the executing state without further checks. However, strict adherence to this principle could paradoxically lower the level of protection of fundamental rights, especially when the executing authority is not allowed to verify compliance with fundamental principles.

The clause in Article 19 letter h) regarding the refusal of mutual recognition due to violations of fundamental rights, was introduced into Regulation (EU) 2018/1805 after lengthy discussions aimed at balancing the broadening scope of Regulation to include Italian asset prevention measures. Given the still undefined guarantees framework, do you believe that italian prevention measures based on asset confiscation could realistically pose a threat to fundamental rights and, therefore, might not be recognised by the executing state under Article 19 letter h?

[00:12:33] ANSWER 2

This question addresses a central point of criticism from lawyers. It is not assumed that preventive confiscation measures fall within the scope of Regulation (EU) 2018/1805. First and foremost, the

Regulation, adopted based on Article 82 of the Treaty on the Functioning of the European Union, pertains to criminal matters. The concept of criminal matters is an autonomous concept within European Union law, developed through the case-law of the Court of Justice. Criminal matters should concern the criminal process as such, specifically the determination of the commission of criminal acts. Furthermore, the Regulation itself identifies the correlation between measures that fall within the scope of mutual recognition and the criminal act. Indeed, as is the case with other judicial cooperation instruments based on mutual recognition, the principle of double criminality is even surpassed.

Therefore, from this perspective, I believe it is not a given that the Regulation can or should be applied to preventive confiscation measures. It is also well known that Italian preventive confiscation measures, as well as personal ones, have been the subject of significant criticism by the European Court of Human Rights. The Court has repeatedly emphasized that these preventive measures, as regulated by Italian law, do not always conform to the minimum standards of guarantees set by the Convention for criminal matters. There has been no consensus on exporting the Italian model of preventive measures to the European level. Clear and precise positions have been taken against the excessive use of these instruments, also due to deep legal and cultural issues.

These measures often have a punitive nature even in the absence of a prior conviction. Currently, there is a trend to extend the scope of preventive measures, which may likely create significant issues concerning the principle of proportionality. Therefore, this remains an unresolved issue that will surely catch the attention of legal scholars and, more importantly, the judiciary, starting with the European Court of Human Rights. I believe that eventually, there will be rulings from the European Court of Justice as well. It is in the interest of lawyers to promote as many preliminary references to the Court of Justice as possible to ensure a uniform interpretation of these measures. It is essential that the Court of Justice is given the opportunity to fully perform its role in ensuring consistent legal interpretation, providing common direction, and developing a coherent interpretation of European law concepts related to judicial cooperation in criminal matters, something we all greatly need.

[00:16:54] QUESTION 3

In judicial cooperation proceedings in criminal matters involving authorities from different jurisdictions, the rights of the defense may suffer from a loss of effectiveness. The fragmentation of procedures, the multiplication of legal frameworks and the variety of applicable remedies can negatively affect the balance between prosecution and defense. It is the role of EU law to provide specific measures to compensate for this imbalance. One useful tool is the principle of Dual or Multiple Defense, which, however, is not included in the specific rights applicable to cases of mutual recognition. This principle is not included in the Regulation, yet lawyers dealing with European criminal matters are advocating for its respect. Could you briefly explain what this mechanism entails and how it would apply to the mutual recognition of asset confiscation orders? Wouldn't this paradoxically risk making the cooperation process slower and more complex?

[00:19:17] ANSWER 3

The Dual or Multiple Defense is a longstanding demand of criminal defense lawyers because, in practice, we often see problems arising when access to a lawyer who is knowledgeable about European instruments is not allowed in both the requesting and executing states. Although some progress has been made regarding the European Arrest Warrant, it is not enough. This additional guarantee need to be ensured for all judicial cooperation instruments in criminal matters. For instance, in proceedings under the competence of the European Public Prosecutor's Office (EPPO) that involve multiple jurisdictions, it is crucial to guarantee access to a well-informed and knowledgeable defense in all the states involved in the proceedings.

Traditionally, access to a lawyer is guaranteed only in the state where the proceedings take place (requesting state). However, it is crucial that the accused or suspected person is also assisted by a lawyer in the state where the measure is to be executed. If it is not allowed to challenge a freezing or confiscation order also in the executing state, the right to defense is weakened, and the accused or suspected person is not put in a position to fully defend themselves. There may be specific legal provisions in the executing state that are not within the knowledge of the requesting state's defense lawyer, and they do not need to be. This provision could be of primary importance for the protection of the fundamental rights of the accused or suspected person.

Whether this might slow down or complicate the proceedings, I do not know, and it is not necessarily the case. In fact, by ensuring and enforcing immediate compliance with higher standards of guarantees, greater efficiency in the legal process is often assured in the end. Evidence gathered or confiscation measures carried out without adequate guarantees are more likely to be overturned in subsequent stages of the trial. I believe that ultimately, guaranteeing rights is a win-win situation where everyone benefits: the accused or defendant wins, the defense wins, but in the end, justice and fair process prevail.

[00:22:09] QUESTION 4

It seems, therefore, that the principle of mutual trust is indeed a foundation of judicial cooperation in criminal matters, but it is a principle under construction, gradually taking a more defined shape through the practical application of mutual recognition instruments. It also appears that we are optimistic about the development of the European Area of Freedom, Security, and Justice.

[00:22:42] ANSWER 4

We are concerned but also open to the future. We understand that the road ahead is complex, with many pressures often driven by a seek for efficiency that prioritises results over the fairness. However, as defense lawyers, we must be optimistic and believe in legality; otherwise, there would be no point in fighting from the very beginning for our clients' rights. Paying attention to the demands of lawyers means fostering the judicial cooperation system in the right direction, ensuring high standards, and helping citizens view the creation of a Common Judicial Space as something positive.

[00:23:34] QUESTION 5

During the initial phase of our research project Rinse, it became evident that the implementation of Regulation (EU) 2018/1805 is progressing too slow and unevenly in Italy and across Europe. One of the main reasons for this is the limited understanding among legal practitioners of this instrument, along with uncertainties regarding the mutual recognition procedure and difficulties in completing the required certification enclosed to the Regulation. What initiatives is the ECBA undertaking regarding the mutual recognition of freezing and confiscation orders for lawyers handling the defense of individuals affected by these measures, particularly when their assets are located in other EU Member States? Has there been any change in terms of defense compared to the situation prior to the adoption of the Regulation?

[00:24:34] ANSWER 5

To enhance mutual recognition in this area and broaden its application, it is essential to improve the training of judges, making them aware of the importance of these tools in their daily practice. Regarding lawyers, at the Union of Criminal Chambers (Unione Camere Penali), we strive to provide comprehensive training for criminal defense lawyers, highlighting the crucial role that mechanisms of judicial cooperation in criminal matters play. Regarding issues concerning defense across multiple states, the right to full access to the materials of the case is the primary defense tool. However, it is not uniformly guaranteed across Europe due to significant disparities in national regulations. Unfortunately, the European Commission has not been sufficiently forceful in ensuring compliance with the Directive on access to documents[1], despite its existence, resulting in relatively low implementation rate.

Therefore, we have tried to gather all national regulations to ensure that defense lawyers have a basic understanding of how individual national systems regulate access to the materials of the case. This would simplify the process of submitting appeals and reviews of freezing and confiscation orders. Additionally, the principle of Dual Defense is crucial because, while I may understand how seizure procedures work in Luxembourg or Malta, I need local assistance to access the relevant documents and operate effectively.

The language issue is equally critical and must be taken seriously. We have strongly advocated for this; in cross-border proceedings, it is essential to always guarantee translation and interpretation. Both the accused parties and their defense lawyers must have full access to case materials to work effectively, which includes ensuring the right to translation of case documents, which unfortunately is not always adequately provided.

This is one of the main issues in Italy, and I believe that adopting more consolidated practices could greatly address these matters. Therefore, regarding access to the materials of the case, we have also worked to encourage the EPPO to develop common practices.

[00:28:47] QUESTION 6

[1] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

I would like to ask if you have any recommendations for further study this topic and if you could guide us to case law from national courts or European Courts that have addressed this issue and are considered crucial to understand.

[00:29:14] ANSWER 6

Firstly, I recommend visiting the websites of European lawyer associations such as ECBA or, for Italy, Unione Camere Penali. In this field, we organise a series of conferences and online events open to members, providing a platform to exchange real-time experiences from various national legal systems. Additionally, we have working groups focused on extradition, mutual recognition, seizures, confiscations, and other related topics. These groups regularly host meetings where colleagues share their specific professional experiences, highlighting the challenges and complexities encountered in individual cases.

For further exploration of this topic, my advice is to follow the evolution of case law starting from the judgments of the Court of Justice of the European Union, which are easily accessible through the website curia.europa.eu. There have been numerous rulings in recent years concerning judicial cooperation instruments. It will be particularly interesting to see how case law develops regarding the gathering of evidence through encrypted communication systems like Sky ECC or EncroChat. I can also highlight a significant judgment from the Grand Chamber of the Court of Justice of the European Union dated December 8, 2020, concerning the European Investigation Order, case C-584/19, a preliminary ruling request from the Landesgericht für Strafsachen Wien. Many aspects still required to be clarified, so we will need to await further developments.

HIGHLIGHT

The development of the European Area of Freedom, Security and Justice aims at integrating different legal systems as harmoniously as possible. This process is founded on the rule of law and is inspired by the fundamental rights enshrined in the European Convention on Human Rights. The cornerstone of this space is the principle of mutual recognition, which implies the collaboration of different legal systems based on the presumption that each upholds high standards of respect for fundamental rights and procedural guarantees. Early instruments of judicial cooperation in criminal matters, such as the European Arrest Warrant, merely acknowledged the need to guarantee fundamental rights without specifically designed clauses. With Regulation (EU) 2018/1805, a significant step forward was taken to ensure effective mechanisms that safeguard mutual trust. Therefore, today, the violation of fundamental rights by the state issuing a decision to freeze or confiscate assets constitutes explicit grounds for refusing mutual recognition (art. 19, let. h).

Respect for fundamental rights as a limit to judicial cooperation in criminal matters has evolved through a long maturation process in the case law of the European Court of Justice. This ground for refusing also plays a significant role in defining the scope of the principle of mutual recognition, as it could hinder the circulation of Italian asset prevention measures within the European common legal space. These measures, even according to judgments of the European Court of Human Rights, raise compatibility issues with certain fundamental principles of criminal matters. It is by no means

guaranteed that such measures will be reciprocally recognised by other Member States, and there is no consensus on exporting this confiscation model to Europe. The issue of crime prevention prompts complex and necessary reflections, including the proportionality control requested regarding criminal property to be confiscated. Indeed, these instruments have a significant burdensome nature and do not provide the typical guarantees of criminal proceedings, as they can be enacted even in the absence of a prior criminal conviction.

European criminal defense lawyers have long advocated for greater attention to defense rights in cross-jurisdictional criminal proceedings. It is essential to ensure that the accused has access to full defense counsel, not only in the state where the order was requested but also in the state where the measure must be executed. Otherwise, the individual's right to defense could be limited. By guaranteeing respect for high standards of protection, greater efficiency in criminal proceedings is also ensured, as judicial decisions will be more stable.

Ensuring rights is always a win-win situation: justice prevails. The road to building a European Area of Freedom, Security, and Justice is long, but maintaining optimism is crucial. While concerns for ensuring a high level of efficiency drive European legislative decisions, the importance of effectively guaranteeing defense rights is becoming increasingly clear and widespread in the European criminal policy debate.

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