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Spring Conference Report

The ECBA is going places and this time we hit the wonderful „diamond“ city of Antwerp. Indeed we started our conference at the Diamant-museum next to the Antwerp Zoo.

On Saturday our main theme was “How to bring justice into evidence gathering?” and our chairman Holger Matt opened the event by giving a short overview about the current developments as well as the future perspective regarding procedural safeguards on the European level.

We then had the opportunity to listen to a video speech by Mrs. Reding, the Vice-President of the European Commission, who gave us real hope regarding procedural rights and claimed that we should all try to rebuild citizens’ trust in such

instruments. She also pointed out that it is simply unacceptable that the ECtHR had to declare about 6.000 infringements of Art 6 ECHR in 2009 alone. This might be the best incentive to promote procedural rights.

Peter Csonka, Head of Unit Criminal Justice at the European Commission then gave an insight on “EU legislation on obtaining evidence from another Member State and ensuring its admissibility as well as the issue of legal privileges”. He pointed out that the Stockholm Programme of 2009 obliges the Commission to produce a legislative proposal for a comprehensive regime on obtaining evidence in criminal matters based on the principle of mutual recognition and covering all types of evidence as well as a legislative proposal to introduce common standards for gathering evidence. The Commission is therefore working at the moment to achieve this. Mr. Csonka went through all the existing legislative acts in this field and showed ways in which they would have to be transformed according to Stockholm. He furthermore made it clear that at the moment there is no EU-legislation on the admissibility of evidence in criminal matters and that accordingly there are no common standards in this field, which is an obstacle to cooperation between Member States. As a future perspective Csonka announced that the Commission will present a proposal on evidence gathering starting in 2011, which – once it comes into force – should replace all existing instruments in this field.

The next speaker was Mr. E. Francis, Second President of the Court of Appeals in Belgium, who presented

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the “Belgian Central Office for seizure and confiscation”, which has existed since 2003. The tasks of this unit are to handle freezing orders regarding bank accounts as well as all other yields that result out of criminal activities, seizure orders and advising the police forces in this field. As soon as valuable objects have been seized the unit carries on with the administration for them so they do not rot as they sometimes did in the past. The unit even has the right to sell some of these objects (e.g. cars) and put money in an account, so that they do not lose their value during the course of the procedure. Francis pointed out that there is still a problem in coping with all this work within the reasonable time limit of Art 6 1 ECHR. He quoted the case of Jouan vs. Belgium.

Vania Costa Ramos then presented the ECBA view on evidence and legal privileges. She made it clear that the ECBA rejects the idea of the Commission abolishing all existing instruments in the field of evidence gathering and replacing them by one single instrument. The reasons are that there are still no procedural safeguards for the accused, as well as feasibility issues and the main question remains as to whether this change is really necessary. The ECBA therefore supports a step-by-step approach. Csonka reassured us that the concerns of the ECBA will definitely be taken into consideration.

Later on Caroline Morgan, Criminal Justice Unit of the European Commission, gave us once more a short overview on the *status quo* of the procedural safeguards issue and the works of the Commission in this field. She has hope that the political climate in this matter has become

milder after the Lisbon Treaty as the European Parliament gets more involved in this field. Experience teaches her that at least the idea of procedural safeguards has sunk in and she also approves the step-by-step approach. The three steps that the Commission is working on right now are a.) the right to interpretation of lawyer-client conversations, b.) right to information (letter of rights) and c.) access to legal advice/legal aid.

After our colleagues Peter Engels (Cross Border Financial Crime) and Scott Crosby (Anti-Trust) had given an update on the working groups, Jodie Blackstock gave an insight on best practice in EAW cases and Liese Katschinka presented the new cooperation between the ECBA and EULITA.

Later on Stefan Schumann talked about the “Pre-trial emergency Defence” project that is being undertaken by the ECBA, together with the Austrian Criminal Bar Association as well as the Universities of Graz and Ljubljana. The final results of this project will be presented at the ECBA autumn conference this year in Ljubljana.

In the afternoon a panel of four lawyers from different jurisdictions went through a case concerning pre-trial proceedings that was presented by Louise Hodges. They gave their national expertise on the structure of proceedings, the protection of the lawyer-client relationship and possible legal measures taken by prosecution and defence.

The conference was closed by our “classic”, the national reports on recent developments and ended in a reception at the town hall and an

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exceptional dinner at the Antwerp Zoo.

You will find most of the speeches and presentations on our [website](#).

Meeting of the Council of Europe under the Slovenian Chairmanship

Round Table Discussion on the Application of Criminal Procedural Rights of the European Convention on Human Rights in European Union Law

Portoroz (Slovenia), 12-13th October 2009

Jonathan Mitchell attended on behalf of the ECBA to speak under the heading "Efficient protection of criminal procedural rights before the ECHR and the ECJ". The Explanatory document provided by the Meeting invited the Speakers to consider the following proposition: That the efficient protection of criminal procedural rights envisages the enforcement of those rights. "While the ECHR has extensive jurisprudence in relation to procedural safeguards, the ECJ is only starting to exercise some competences in the field of criminal law. In view of the different origins of the two Courts, the different scope, and different procedures, please pursue the following discussion: can two Courts be more efficient than one?"

A summary of Jonathan's answers is as follows:

1. Seen from the perspective of a Criminal Defence Lawyer in Europe the answer is "No". There must be one strong Court in Europe that deals with all Criminal cases that are

either ECHR cases, other criminal cases, or Environmental criminal cases. It is high time that EU member States took the issue of Convention Rights seriously and understood that Judgements in criminal cases go to the very heart of community life throughout the EU.

2. Such a unified single Court would command universal respect and would prevent countries like the UK from absenting itself from the ECJ. It is because the present two-court system exists that there is a "split personality" allowing Member States to take advantage and deny both Courts the respect they deserve. A single Court possessing all the powers with full authority as Europe's Central Court would prevent this.

3. A unified Court should be able to hold Interlocutory Hearings before which parties can make Applications to obtain a legal Ruling on Jurisdiction. Such important matters as the appropriate member state in which the trial should be held, taking into account any difficulties that the defendant or defendants, the victims, and the witnesses may have, should be dealt with by a Judge. At a European Court Interlocutory Hearing any preliminary points of law on Human Rights issues or other matters such as Disclosure could be dealt with at the outset, rather than at the end of the trial and Appeal process.

4. There is a need to reinforce the Rule of Law and the supremacy of the Courts throughout the EU. The EU has set its face against using Courts to resolve important cases arising under the Criminal Law. Two examples:

(a) European Arrest Warrants. What the EU failed to make clear to the public when this innovation was brought in was that, in addition to scrapping the political input to Extradition cases, it also largely took the Court's role out of the extradition process too.

Now Magistrates or Judges have no real or meaningful discretion in EAW cases, but are essentially a rubber stamp for the warrant to go through relatively unchecked. As a result an increasingly large number of miscarriages of Justice are building up where trivial or minor cases are being brought by Prosecutors who are abusing the system. In addition, because the Defence are almost always allowed no or insufficient time to properly investigate the nature of the Warrant, the Courts are being deprived of the evidence and a proper judicial opportunity to decide whether an EAW should be granted or not;

(b) On the 30th June 2009 the Council of the EU began the process to set up a Transfer system for criminal cases. The Council wants a political body to decide in which state a person should be tried, whose main aim is "efficiency". No Court proceedings or Judges will be involved, and defendants and others involved in criminal proceedings seem to have no say in any of this, nor their lawyers. As if to underline the absence of Courts in the process the Explanatory Report states that the "Council decision on Eurojust....aims to resolve conflicts of jurisdiction and coordination of criminal proceedings. Eurojust may ask the competent authorities of a member state to undertake an investigation or to accept that one of

them may be in a better position to undertake an investigation.....on how a conflict of jurisdiction could be solved".

Since there is no unified or Central European Court to take control of such investigations or proceedings, this fraught process will be conducted by "delegated authorities" or prosecution authorities.

If ever there was a need for a single European Court to deal with such cases it is now.

5. A minority of EU states have prevented even a minimum of criminal law procedural rights from becoming part of the law in Europe. There is no EU-wide legal aid funding in cross-border cases. Up until recently the ECHR case-law was not of a sufficiently high standard. No Codes of Practice for Police or Customs Officers have become part of the best practice in Europe, and as a result the case-law lacks strength and meaning.

What is required is a strong focused single-minded Central European Court developing a recognised Rule of Law in criminal cases. Only in this way may remedies be found to the present abuses that undermine the Criminal Procedure Rights of residents in EU Member States.

For more information about this Meeting, please contact Ms Helena Jaklitsch at the Ministry of Justice of the Republic of Slovenia, by mobile: 00 386 51 390 386; or by email: helena.jaklitsch@gov.s

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EULITA conference, Antwerp, Belgium, 26-28 November 2009

“Aspects of legal interpreting and translation; launch of EULITA”

1. Summary of the foundation meeting

Different key players involved in the foundation of EULITA gave an overview of the history, present status and future of the work that has been done on legal interpreting and translation. The first speaker was Prof. Erik Hertog, who has been involved in this matter for many years in his capacity as professor at the Lessius University College (Antwerp, Belgium) and also as an expert for the European Commission in different projects. Prof. Hertog pointed out that the new organization will accept as full members all professional associations of legal translators and spoken or sign language legal interpreters in the EU Member States as well as the general associations that include legal translators and spoken or sign language legal interpreters among their membership. Therefore the organization will not accept individual memberships but will solely be an association of associations. The condition for becoming an associate member of EULITA is that the joining organization is committed to improve the quality in legal interpreting and translation.

Since the European Commission, Directorate General for Justice, Freedom and Security, is the financial partner of the newborn, Commissioner Jacques Barrot (Vice-president of the European Commission and commissioner for

JLS) sent his appraisal via video mail. He emphasised that access to justice is a basic right in the European Union and with 8 million EU citizens living in different member state, adequate translation is essential to safeguard this basic right. The Swedish presidency made the rights of defendants one of its key topics which resulted in the publication of a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. Worth mentioning is that translation and interpretation is listed as the first measure in this roadmap.

The project officer at DG JLS, Ms. Caroline Morgan, emphasised that it is the wish of the Commission that EULITA becomes the spokesperson for all legal interpreters and translators and thus will be the privileged contact point for the European Commission when it comes to issues on legal interpreting and translation.

To conclude this first session, representatives from different organizations shared their congratulations and expectations. Different organizations already active in the field of translation also expressed their willingness to start close collaboration with EULITA, some as associated members. The following organisations were present: CIUTI (International Permanent Conference of University Institutes of Translators and Interpreters), FIT (International Federation of Translators), DG Interpretation (EU Commission), EFSLI (European Forum of Sign Language Interpreters), AIIC (International Association of Conference Interpreters) and NAJIT (National Association of Judiciary

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Interpreters and Translators-United States of America).

The official launch of EULITA took place in the magnificent new Antwerp Court house. Participants were welcomed by the president of the court of first instance, Mr. Mahieu. Peter Engels gave a speech on behalf of the ECBA and representatives of the CCBE and the Belgian Minister of Justice also shortly addressed the audience.

2. Summary of the session "Translation and interpreting for the courts"

This session focussed, from a very practical point of view, on the issues that arise when interpreting or translation needs to be done in court. Speakers from Spain and Portugal explained, based on real examples, the strengths, weaknesses and opportunities for court interpreters. Subsequently a more academic part was devoted to the right to free access to interpretation and translation in criminal proceedings in the Spanish criminal legal system. Last but not least the results of a case study were presented on the question "Who can monitor the court interpreter's performance?".

The 2004 Madrid train bomb attacks were not only a milestone for the Spanish judicial system but also for Spanish court interpreters. For this high profile case the Spanish judiciary provided simultaneous interpreting and specific care was given to the selection of experienced and trained interpreting professionals. Nevertheless practical problems appeared and a lot of confusion (sometimes suspicion)

between interpreters, the court and the lawyers existed. The question was raised what the exact place of the interpreter in the court is. Is he really a part of the proceedings or only a practical side-effect to the fact that multiple languages are spoken in the proceeding?

The last part of the session was particularly interesting for criminal defence lawyers. Ms. Bodil Martinsen from Denmark presented the results of a case study on the evaluation of the court's interpreter's performance. It goes without saying that, in most of the cases when an interpreter is needed, neither the lawyers, nor the judge speak the language of the accused. Therefore the parties need to rely on the interpreter to correctly translate the words of the court and other speakers. But it is also of great importance that the answer given by the defendant is correctly translated so the court can understand exactly what the defendant wants to say. The case study was the result of an unusual interpreting event in a Danish courtroom setting where the interpreter's unusual performance was explicitly criticised by the audience and questions were raised about her competence. This is of course a major point of concern since the the quality of the work of an interpreter is very difficult to verify by outsiders. Nevertheless it is recognised that bad translation can result in misunderstandings between the court and the defendant. It is clear that such misunderstandings/misinterpretation can have a negative influence on the decision of the court.

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3. How lawyers and legal translators and interpreters can work together

It is clear that a good cooperation between judges and lawyers on the one hand and legal interpreters and translators on the other hand is of great importance. In this respect memoranda of understanding and best practice documents have been published in Austria and the US. These documents try to give the legal profession a better understanding of what to do and what to expect when confronted with legal interpreting/translation. Topics vary from: "How to choose a legal interpreter?" over "How to talk to somebody via an interpreter" to "What background do you have as an interpreter before starting his job?".

Bearing in mind these essentials can save a lot of time and energy during the procedures and afterwards when questions are raised concerning the interpretation and translation.

4. Conclusion

The ECBA supports EULITA. Both organisations are complementary and a regular follow up on common issues is advisable in order to, if necessary, issue a common position to policy makers and the outside world in general.

Ms. Katschinka suggested drafting a best practice memorandum addressing such issues as: "How to select interpreters"; "How to brief/de-brief interpreters"; "What lawyers and legal interpreters can expect from each other". This document will be published soon and will be published on the ECBA website. In the US as well as in

Austria initiatives already have been taken in this respect.

A presentation by Mrs. Katschinka given at the ECBA Antwerp conference is available on our [website](#).

Spanish Presidency Conference, Madrid, March 1-2, 2010

Jonathan Mitchell on behalf of the ECBA attended this Conference entitled "Common Criminal Procedural Standards: a legislative programme to strengthen mutual trust".

The topic chosen for the Group to which Jonathan was attached was: "Legal Advice and Legal Aid in criminal proceedings: prospects for an harmonisation".

There were no prospects for harmonisation in relation to legal advice and legal aid in criminal proceedings, Jonathan stated, because there were no "Common Standards", and no system on an EU-wide basis for Legal Aid. There was no adequate delivery of legal aid in Europe in criminal cases, so hopes for an "improvement of outcome on delivery" were empty words without meaning. Nothing was happening, so there was no chance of any legislative programme on this issue.

In order to understand how bad things were, we needed to look at the main theme of this Conference "to strengthen mutual trust", an impossible concept in the light of the failures of EU states to do anything about an improvement in criminal procedural standards. In fact there had been a marked decline in those standards, and the task of the Conference really ought to have been

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to grapple with the existing problems: what has weakened Mutual Trust?

Jonathan listed the factors that had weakened mutual trust:

1. The torture of suspects in Guantanamo and other centres of torture after the illegal rendition of prisoners to such centres, and the abject failure of Governments to do anything about it;
2. The conduct of illegal wars without any proper UN mandate, and afterwards no adequate steps to assist in the restructuring of the invaded countries, nor the adequate alleviation of suffering;
3. The deliberate blocking of the 2004 Framework Decision on procedural Rights from becoming law by a minority of EU states, and the further delays and blocks placed on any subsequent moves to improve these Rights;
4. The lack of any attempts by EU states within their own jurisdictions to improve criminal procedure e.g. by using tape recorders for police interviews, or improving the right of access to a lawyer before any questioning has begun;
5. The rushing out of a Transfer of Criminal Proceedings procedural device which gave suspects and defendants and their lawyers no effective Rights, and which was designed to side-line the use of the Courts to decide important procedural issues, thus further eroding the Rule of Law;
6. A widespread failure by EU states to abide by the Rulings of the ECHR, and in particular some of the important recent decisions concerning access to a lawyer.

Specifically on legal advice and legal aid there were huge and unnecessary difficulties amongst Member States:

(i) the right to contact a legal adviser as part of the general right to legal assistance under Article 6(3)[b and c] under ECHR law arises immediately upon arrest, and this right exists in most states. There is a great divergence amongst Member States, however, as to the moment at which this right to contact a lawyer can be effected .

In a considerable number of states it is not possible to exercise this right immediately after arrest, but only "at a given stage of the proceedings". This leads to the position where (a) the right to consult a lawyer before questioning is not guaranteed, and (b) there is no right for a lawyer to be present at police interviews;

(ii) there are considerable differences amongst the Member States as to the moment when there is an obligation to inform the suspect of his right to have a lawyer present;

(iii) several states have no possibility for there to be a private consultation with a lawyer during questioning;

(iv) legal assistance free of charge

There is a margin of appreciation leaving each state to choose its own system. Germany has none. There is a considerable difference in the implementation of this right in many other states:

A. a striking variety in the merits or means tests that are applied;

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B. some states have no legal obligation to inform the suspect of this right;

C. where the right exists there is a considerable variation of its scope;

D. there are wide differences in the legal framework governing the right to legal assistance free of charge;

E. there are enormous and unacceptable differences in the resources that are available for legal aid across Europe. The almost universally low budgets for legal aid show that despite the "guarantee" of this right, it is questionable if it is possible to give effect to it in everyday practice. It is certainly the case that as a result in Europe it is not possible to give effect to this Right "whenever the interests of justice demand it".

(v) quality of legal assistance

A. the regular failure by Member States to ensure that lawyers are up to a good standard and are appropriately qualified to do criminal cases is at odds with their obligation under Article 13 to provide an "effective remedy";

B. in a considerable number of states there is no quality control or monitoring mechanisms. Where there are, the controls vary widely and the divergence is substantial;

C. the "special circumstances" in which a lawyer is asked to provide free legal aid are of too general a nature, and often are not limited to providing free legal aid;

D. in most states the expertise or specialisation of the lawyer, and his

or her availability, are not taken into account.

What would strengthen mutual trust?

Jonathan suggested the following:

1. Legal Aid for a lawyer to be present right from the start of the proceedings;

2. A two- lawyer rule for cross-border cases where a suspect needs a lawyer both in the requested state (where the suspect is), and in the requesting state (where they want to take the suspect);

3. The "equality of arms" principle to be applied on every occasion;

4. The "best evidence" rule, designed to ensure that the Court of trial has the best evidence before it to arrive at the fairest and best decision, is applied. This means that there must be e.g. appropriate adults available for appropriate cases, tape recorded interviews, the best standard of translation and interpretation, and set timetables for reviews of detention (amongst other measures);

5. More investigations by the police and prosecutorial bodies, and less investigations by the Courts or judicial bodies;

6. Codes of Practice for the granting of legal aid in EU criminal cases;

7. A halt to all present attempts by the EU states to politicise the law by taking cases out of the Courts to ill-managed and ill-defined institutions, thereby undermining the Rule of Law and destroying the rights of suspects and defendants;

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8. A Single Central European Court to deal with all EU criminal law cases, with the ability to deal with Interlocutory Hearings.

Those young and attentive members of the audience were appreciative and understanding of these propositions. Those civil servants, prosecutors and Judges who were present seemed unimpressed. A real gulf now seems to be emerging between "the old guard" and young lawyers and professionals. The "old guard" wanted the absolute minimum of progress at this Conference. The young wanted an immediate sea-change in the provision of common criminal procedural standards, and immediate steps to transform the Rights of suspects and defendants across Europe. The intention of "the old guard" was that everyone would leave the Conference with no or little change to the legal landscape, and a miserly "de minimis" result. Happily Jonathan sensed a real prospect and an understanding of the need for substantial change in the audience and amongst the participants, that promises some tough fights ahead on these issues, but with a real opportunity to get some progress at last.

Report on the Sub-group meeting of the Justice Forum Victims of Crime in Brussels, 14 April 2010

Anke Mueller-Jacobsen joined the meeting on behalf of the ECBA to discuss the legal situation of victims in Europe, especially the proposals in the 2001 Framework Decision and in the Compensation Directive (2004/80/EC Directive). The Commission is prepared to initiate a new legislative proposal, which

combines both proposals in a package of practical measures to achieve European standards. Peter Csonka, Head of the European Commission's Criminal Justice Unit, ECBA guest in our recent Antwerp Conference, chaired the meeting. He underlined the fact that since December 2009, under the Lisbon Treaty, the Council and the European Parliament are co-legislators and that the Commission now - with the instrument of directives - has gained more legislative influence on the Member States. The new legislative proposal is scheduled for the second half of 2011.

In this Newsletter we will only report on the subjects which are of special interest to the defence. Surprisingly only few participants seemed to recognize that the definition of what a Victim is could still be a delicate issue both regarding the rights of the accused and for criminal procedure law in general. In most of the statements - also in the written papers - the accused person is constantly named as "the offender" as if a criminal procedure and conviction would not be necessary to discover the truth. Some of the victim requirements under discussion might contradict essential rights of the accused person, for example the right of a victim to get complete access to the record before the investigation is completed. Anke had the impression that very few of the participants were willing to accept the position of a defence lawyer.

Most of the discussed issues: access to information for victims, legal remedies, legal aid, financial compensation (by the State or the convicted person) are a reality, for example in Germany, but this is not

the case in many other Member States. Therefore – despite the above mentioned preoccupations – the Commission’s initiative generally deserves support, but only if the fundamental procedural safeguards for suspected or accused persons are to be implemented as well.

Key Dates

ECBA Autumn conference
1 and 2 October 2010
Ljubljana, Slovenia

Joint conference in co-operation with the University of Graz, the University of Ljubljana, the University of Vienna and the University of Zagreb (Pre-trial Emergency Defence - ACBA Research Project)

Your views....

Do you have any questions, remarks or information relating to this newsletter? Please e-mail them to: secretariat@ecba.org

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Executive Committee

Chairman

Prof Dr Holger Matt, Germany
kanzlei@dr-matt.de

Vice Chairman

Louise Hodges, England and Wales
lhodges@kingsleynapley.co.uk

Vice Chairman

Roberto Pisano, Italy
robertopisano@pisanolaw.com

Treasurer

Kevin Roberts, England and Wales
KRoberts@mofo.com

Secretary

Roland Kier, Austria
kier@anwaltsbuero.at

Advisory Board

Vincent Asselineau, France
vasselineau@farthouat.com

Vânia Costa Ramos, Portugal
vcr@advogados.in

Scott Crosby, Belgium

Scott.Crosby@chaps-law.eu

Peter Engels, Belgium

p.engels@elegis.be

Matus Gemes, Slovakia

matusgemes@stonline.sk

Robin Grey QC, England and Wales

robin.grey@qebholliswhiteman.co.uk

Marc Henzelin, Switzerland

mhenzelin@lalive.ch

Jonathan Stuart Mitchell MA, England and Wales

jmitchell@25bedfordrow.com

Jaanus Tehver, Estonia

jaanus@tehver.ee

Cees van Bavel, The Netherlands

vanbavel@vanbaveladvocaten.nl

Secretariat

Marie-Anne Sarlet

secretariat@ecba.org