



CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

Carretera de Vallvidrera, 43-45
Tel. +34 93 406 73 00
BARCELONA 08017



Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

TOWARDS COMMON MINIMUM RULES ON PROCEDURAL RIGHTS FOR SUSPECTED AND ACCUSED PERSONS

INTRODUCTION

Directives 2010/64 of 20 October (relating to the right to interpretation and translation in criminal proceedings), 2012/13 of 22 May (relating to the right to information in criminal proceedings) and 2013/48 of 22 October (on the right to be assisted by a lawyer in criminal proceedings and in proceedings regarding the European arrest warrant, and on the right to inform a third party upon deprivation of liberty and to communicate with third parties and with consular authorities during deprivation of liberty) set out in their initial recitals:

"The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point (33) thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights. Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), "judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions". 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. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition."





CONSEJO GENERAL DEL PODER JUDICIAL
ESCUELA JUDICIAL

Carretera de Vallvidrera, 43-45
Tel. +34 93 406 73 00
BARCELONA 08017



Red Europea de Formación Judicial (REFJ)
European Judicial Training Network (EJTN)
Réseau Européen de Formation Judiciaire (REFJ)

DEVELOPMENT OF THE COURSE

The course project, entitled "*Towards a basic common regulation on procedural safeguards for accused or suspected persons*", was presented by the Judicial School of the General Council of the Judiciary, within the framework of the European Commission Project JUST/2013/ACTION GRANTS.

The main objective of the course, in the context of the aforementioned Stockholm Programme in the Introduction, was to broaden knowledge of the various European regulations on safeguards for the suspected or accused individual, in order to be able to reach common regulations concerning them, going further into and advancing in the protection of the defendants referred to in the aforementioned Directives.

The course was held at the Judicial School in Barcelona on 7, 8 and 9 May in accordance with the adjoined programme.

The result of the talks and various workshops concerning the aim of the course have produced the following:

CONCLUSIONS

1. Concerning access of the suspected/accused to information during the investigation:

a) Access to the file:

Access to material in the investigation must be ensured with proper safeguards so that the defendant has full opportunities of defence, though in ways that would not thwart the aims of the investigation.

However, this last plea should be absolutely exceptional, being controlled *per casum* by the judicial authority, given that the norm should be free access to the proceedings to fully ensure the right to defence.

Consequently, precise legal regulations should be implemented to such effect, revaluing the proceedings in which secrecy can legitimately be declared, as well as a clearly defined deadline for the duration of the aforementioned secrecy, particularly when the defendant is arrested.





b) The right to translation and an interpreter:

Translation of the main documents in the investigation should be guaranteed for the same purpose of ensuring the right to defence, and these should be legally valued, notwithstanding the fact that any further relevant documents may be translated depending on the circumstances. This same counselling requires the intervention of an interpreter in all oral proceedings.

2. Concerning intervention in communications:

a) Time limit:

It is necessary to establish strict time limits for interventions, which are judicially extendable as long as the extension is justified in each particular case.

b) EU-wide legal projection:

All EU members should have the same legal framework concerning intervention in all forms of communications and the use of video surveillance systems.

c) Adaptation to jurisprudence:

It is essential that all EU member states incorporate into their national legislations the conclusions of the Judgment of 8 April 2014, issued by the European Court of Justice and which declared invalid Directive 2006/24/EC of the European Parliament and of the Council, of 15 March 2006.

d) Proportionality and stating reasons:

The rulings that order interventions in communications should be proportional and reasoned; a necessity that is especially imperative at present, taking into account the new telephonic and particularly telematic means of communication, and the ease with which they can be intercepted.

The obligation to state the reasons should be projected in two directions. Firstly, the adequacy of the factual data - and not mere hypotheses - offered by the police in charge of the investigation should be weighed up to support the act of interference. Secondly, the opportune *ad hoc* justification is necessary regarding the degree of intensity of the violation of the right to secrecy in communications and the right to





privacy, adapting the aforementioned justification and intensity to the pace of technological advance of these means. The purpose is to respect due proportionality of the interventions, so as not to violate unnecessarily essential human rights in a democratic society.

3. Concerning access by the media during the examination stage:

a) Access to information about the investigation:

The need to establish safeguards of the freedom of information which respect the privacy, honour and presumption of innocence of the defendant, in addition to judicial independence and impartiality. This issue has not been dealt with properly by national legislations, requiring a specific Community regulation with the general principles of respect and balance of the aforementioned fundamental rights.

b) Creation of specialised press offices:

It is considered convenient to create press/information offices in the courts. The aforementioned offices should be composed of magistrates, state prosecutors, police officers and journalists with the ability to order the dissemination of the information, guaranteeing the correct exposure during the investigation in newsworthy situations, though in a way that does not compromise the investigation.

Express authorisation by the judge or prosecutor in charge of the examination is understood to be imperative in media issues.

c) Disclosable information:

It will always be possible to provide the press with information concerning the following details, as it does not affect the result of the investigation:

- Number and identity of the defendants.
- Grounds for the arrest.
- Personal freedom situation ordered with regard to the above.





- Decisions about the procedural advance of the investigation (case dismissal or conclusion and opening of an oral trial).

The disclosure of these details must respect, in all cases, the right to the presumption of innocence of the defendant, avoiding the disclosure of any information - images in particular - that might affect the honour and image of the individuals involved.

In certain cases, the issue of temporarily hiding the defendant's identity may arise, as long as it is at the request of the defendant and the purposes of the investigation are not affected.

d) Taking pictures of the defendant:

It is essential that the image of the defendants is safeguarded, notwithstanding the fact that in cases of significant public interest, particularly due to the defendant's public service or position, and that the disclosing of the image is justified by the general public interest in obtaining the proper information.

To preserve the dignity, honour, privacy and right to self-image of individuals, measures will be taken to avoid ordering arrest in social events or public or professional places, unless the risk of fleeing exists which means it is advisable to act in this manner.

During the transfer of detainees, the appropriate precautionary measures shall be adopted to protect the individuals transferred from public inquisitiveness or harassment, as well as any form of publicity, avoiding, to the extent possible, their appearance hand-cuffed or in custody in the face of photographers and television cameras (Order 3/2009 of the General State Prosecutor's Office [FGE]).

4. Concerning lawyer's assistance to the detainee

The detainee should be assisted by a lawyer at all times. Self-defence should be completely ruled out. In any event, the situations in which the waiving of assistance by a lawyer is allowed should be exceptional and assessed.





It is necessary to strengthen the safeguard of assistance by a lawyer in those cases in which particularly vulnerable groups, such as persons with disabilities or adolescents, are implicated.

As long as *Directive 2013/48 of 22 October* has not been transposed, *on the right to be assisted by a lawyer in criminal proceedings and in proceedings regarding the European arrest warrant, and on the right to inform a third party upon deprivation of liberty and to communicate with third parties and with consular authorities during deprivation of liberty*, it should be ensured that the direct effect of the aforementioned Directive should be complied with by all public operators, in accordance with the doctrine of the European Court of Justice concerning the principle of "conforming interpretation" (Judgment of 16 June 2005, Pupino Case, Judgment of 26 February 2013, Melloni Case), thus ensuring the primacy of European Union law.

Likewise, safeguards that allow the defendant complete freedom to appoint his/her defence lawyer should be introduced.

5. Concerning the detainee, suspect or accused individual's right to remain silent:

The right to remain silent must be guaranteed to the very end.

It is therefore recommendable to review the Murray standard established by the ECHR. The silence may be partial and be equally legitimate, in the sense that the defendant can freely refuse to answer the questions put to him/her solely by the accusation and only respond to those put to him/her by his/her lawyer.

In any case, this selective refusal to reply should not be the object of any inculpatory interpretation, either directly or indirectly. Silence merely means silence.

Consequently, it should never be possible to validate statements made previously in police stations or during investigations, taking into account the defendant's precarious psychological condition in which these statements are always made, since they take place shortly after the arrest or when remanded in custody; psychological conditions which are totally incompatible with the respect necessary for the right to defence.

