



Training of Lawyers on EU Instruments on procedural rights in Criminal proceedings (CRIMILAW)

**The application of the three procedural rights directives and of the
European Arrest Warrant in Greece**

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The project is co-financed with the support of the European Union's Justice programme

Application of the 3 procedural rights Directives and of the EAW in Greece

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I. Introduction

COMMON
MINIMUM
STANDARDS
INTEGRATED IN
NATIONAL LAW



MUTUAL TRUST



MUTUAL
RECOGNITION OF
DECISIONS

The right course to mutual recognition of judgements and other decisions of judicial authorities in criminal matters

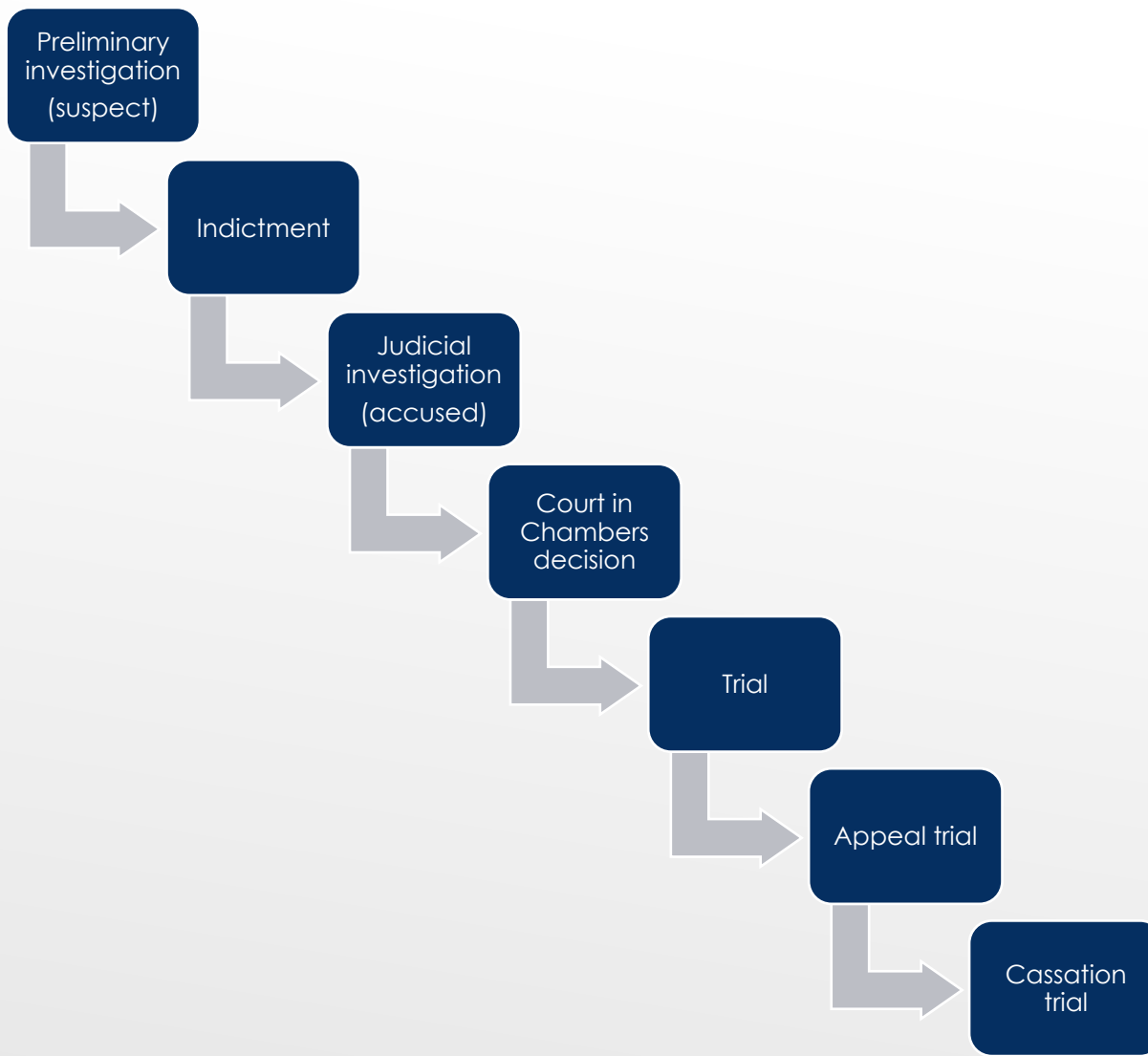


The reverse course followed by the E.U. in order to restore the lost procedural balance between the accused person and the prosecution in EAW proceedings, and the lost trust between MS

- ▶ “This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights.”
- ▶ F.ex. there are no derogations concerning the right of access to a lawyer in Greece

Key concept of the procedural Directives: MS must reach the minimum standards, not drop below their (above minimum) standards

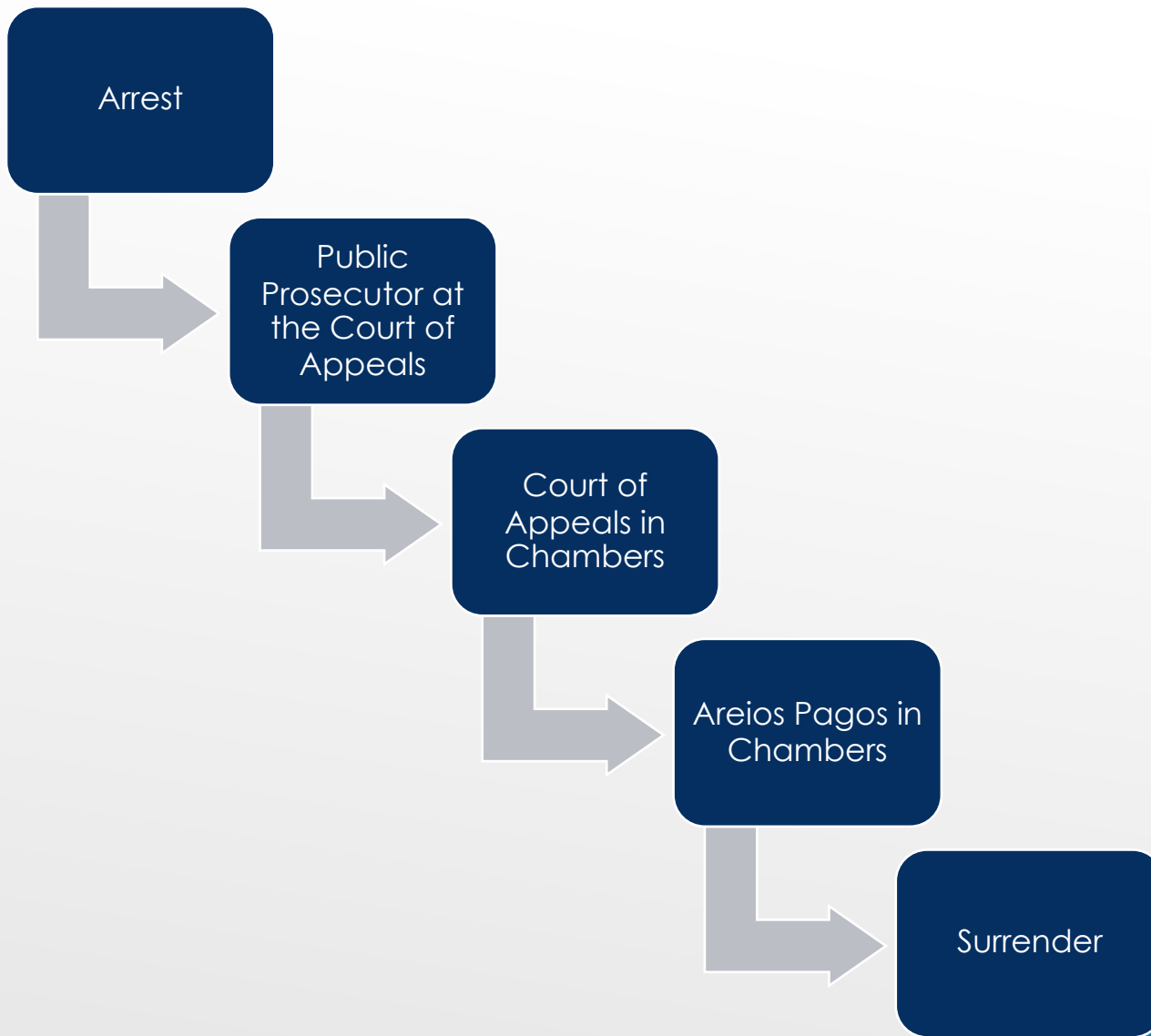
II. The milestones of the Greek criminal procedure



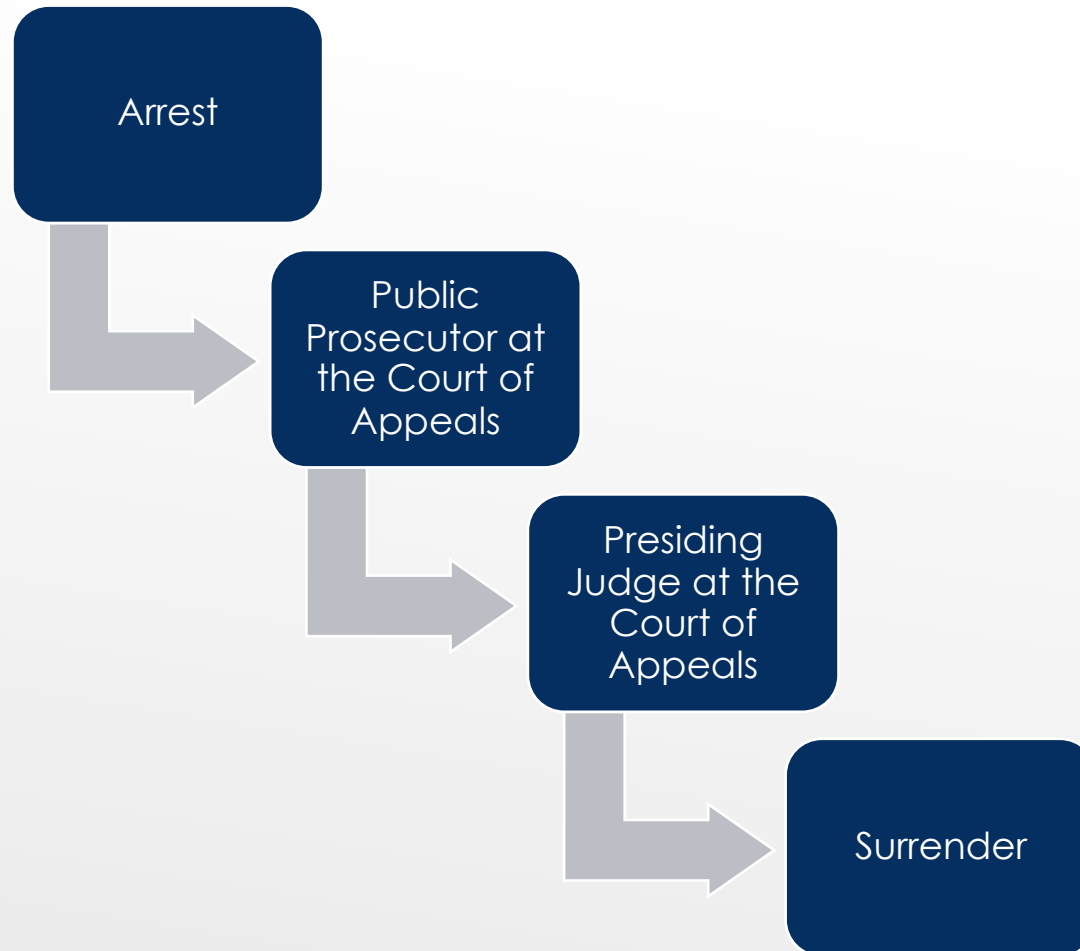
Milestones of the Greek criminal procedure in felonies



Milestones of the Greek criminal procedure in misdemeanors



Milestones of the proceedings concerning the execution of EAW in Greece (without consent)



Milestones of the proceedings concerning the execution of EAW in Greece (with consent)

Adversarial legal system

- a competitive process to determine the facts and application of the law accurately between the public prosecutor (a party!) and the defendant
- Fair trial (fair competition!)
- PP is a party and Judge is a referee!

Inquisitorial legal system

- The judicial authorities are actively involved in investigating the facts of the case and apply the law without prejudice
- Just trial
- The PP is an impartial judicial authority and the Judge does not only hold the balance between the parties but protects the innocent and convicts the guilty!

The Greek legal system is an inquisitorial legal system, and the transposition and application of procedural rights directives cannot be the same with adversarial legal systems

III. Transposition and application in Greece of Directive 2013/48/EU 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

- ▶ Transposition of Directive 2013/48/EU took place in the old criminal procedure code of 1950 by Law 4478/2017
- ▶ These provisions were then integrated in the new criminal procedure code of 2019
- ▶ Greek legislature had a long tradition and a high standard concerning the right of access to a lawyer; the problem was always the effectiveness, when exercising that right
- ▶ Therefore, there were only minor interventions concerning the preliminary investigation and the confidentiality of the communication with the appointed lawyer, which was always taken for granted in Greece
- ▶ Thus, there were no provisions in the Greek criminal procedure code concerning 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
- ▶ These provisions of Directive 2013/48/EU are fast mot à mot integrated in the Greek criminal procedure code

Transposition and Integration in the Greek criminal procedure

- ▶ Art. 89 CPC: The suspect or accused person has the right to appoint up to 2 lawyers in pretrial proceedings and up to 3 lawyers in trial proceedings; the duly appointed lawyer represents his client in all aspects
- ▶ Art. 92 CPC: The suspect or accused person has the right to be present with his lawyer upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act except for witness or other suspect or accused persons statements; detained persons must be transferred to the location, where such an investigative or other evidence-gathering act takes place and only if the transfer is difficult, they can be represented by the appointed lawyer
- ▶ Art. 99 CPC: The suspect or accused person has the right to give his/her statement in pretrial proceedings with his duly appointed lawyer being present, therefore he/she must be summoned at least 24 hours before
- ▶ Art. 340 CPC: The accused person has the right to appoint (up to 3) lawyers in trial proceedings

Right of access to a lawyer in criminal proceedings

- ▶ No time limit to appoint a lawyer!
- ▶ A lawyer can be appointed since a person is accused according to Art. 72 CPC (formal indictment or any other investigative act against a person during a judicial investigation)
- ▶ A lawyer can be appointed since a person is a suspect according to Art. 70 and 244 CPC (criminal lawsuit filed against the person or any other investigative act against the person during a preliminary investigation)
- ▶ There are no derogations from the application of the right of access to a lawyer in criminal proceedings like the ones allowed for in Art. 3 par. 5 or par. 6 of the Directive

When does the right of access to a lawyer in criminal proceedings apply ?

- ▶ Problem in preliminary investigations initiated by the police without a request from the PP
- ▶ Art. 105 par. 2 CPC: The person required to give a statement before police or other judicial authorities (usually already detained!) has the right of access to a lawyer without undue delay and always before giving the statement
- ▶ Art. 99 par. 4, 105 par. 2 CPC: During every pretrial proceedings (judicial or non judicial, including the pretrial investigation of police authorities without a request from PP) the communication of the suspect or accused person cannot be prohibited and is strictly confidential (reiteration of Art. 4 of the Directive)
- ▶ The police practice of “bringing in” (“Prosagogi”) and prohibiting lawyers to contact the person “brought in” because “he is not yet arrested, simply brought in and we have not decided yet if he is a suspect / accused or not” is against the law and the Directive
- ▶ “Bringing in” is a form of detention and communication with a lawyer cannot be prohibited, even if later the police authority decides the person is to be questioned as a witness

What about effectiveness?

- ▶ The Commission has decided to open infringement proceedings against Estonia, Greece, Hungary, Lithuania, Luxembourg and Portugal by sending letters of formal notice for failing to correctly transpose EU rules on access to a lawyer and the right to communicate upon arrest (Directive (EU) 2013/48).
- ▶ The six Member States now have two months to reply and take the necessary measures to address the shortcomings identified by the Commission. Failing this, the Commission may decide to go to the next stage of infringement proceedings by sending a reasoned opinion
- ▶ As far as Greece is concerned the shortcomings identified focus on the malpractice of “bringing people in” and not letting lawyers communicate immediately with them under the false pretense, that it is not decided yet, if they are considered suspects, while in fact an unofficial intimidating interrogation is conducted

Letter of formal notice (October 2021)

- ▶ Art. 90 CPC reiterates the provision of Art. 9 of the Directive about the Waiver
- ▶ Exception: Proceedings where the representation by a lawyer is obligatory
- ▶ Exception applies mainly to filing a cassation and appearing in a cassation trial before Areios Pagos
- ▶ Cassation is an appeal for legal reasons only and legal matters must be left in the hands of duly certified legal professionals

Waiver (or the right to represent oneself)

- ▶ Art. 97 and 98 CPC reiterate without any deviation the provisions of Art. 5,6,7,8 of the Directive

The right to have a third person informed of the deprivation of liberty, the right to communicate, while deprived of liberty, with third persons and the right to communicate with consular authorities

- ▶ Art. 15 par. 1 of Law 3251/2004 (Transposition of EAW FD, as amended by L. 4478/2017): The arrested person in Greece shall receive information in writing about his right to have a lawyer and a translator in the issuing MS and in Greece as the executing MS
- ▶ Art. 15 par. 2 of Law 3251/2004 (Transposition of EAW FD, as amended by L. 4478/2017): The arrested Person or his appointed Lawyer has full access to the file at his/her own expenses
- ▶ Art. 15 par. 5 of Law 3251/2004 (Transposition of EAW FD, as amended by L. 4478/2017): The arrested person has the rights of Art. 99B and 99C CPC 1950 = 97 and 98 CPC 2019, when Greece is the executing MS

Access to a lawyer in EAW Proceedings

IV. Transposition and application in Greece of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings

- ▶ Insider's insight: Making Law is not left to professionals; it (sadly) involves politicians too!
- ▶ When judges, lawyers and public prosecutors are involved in the legislative procedure the outcome is the result of a compromise
- ▶ Transposing EU Directives about procedural rights is not easy; the outcome can be a complete disaster if you do not recognize the points where national law provisions supersede the minimum standards set by the Directive
- ▶ F. ex.: There were never restrictions concerning full access to the file by the suspect or accused person in Greece until somebody transposed Directive 2012/13/EU by simply translating its provisions (of course the new CPC restored the above European minimum standard of the Greek criminal procedure)
- ▶ Since it is a codification of ECHR case law the transposition is based on the court's decisions against Greece

**An insight to the legislative procedure of
transposing Directive 2016/343**

- ▶ Art. 4 par. 3 Directive => Art. 2 sec. b of Law 2472/1997 and Art. 8 Law 3090/2002
 - PP can order the public dissemination of the image and identity of the suspect or accused person for reasons of public interest, during a restricted time frame (f. ex. call for further victims of sex offenders to come forth, manhunt against terrorists or dangerous perpetrators of organized crime)
 - Transmitting images of the detained suspect or accused person being transferred from or to police or judicial authorities is absolutely forbidden and a criminal offence
 - Recording and transmitting the trial proceedings in TV is allowed only, if all parties consent and the court decides it is in the public interest
- ▶ Art. 5 Directive => Art. 278 par. 2 of both CPC 1950 and 2019, 339 par. 2 of both CPC 1950 and 2019 και Art. 119 και 120 P.D. 141/1991
 - Police authorities shall abstain from measures of physical restraint during and after the arrest and while detained, if there is no resistance or suspicion of absconding
 - In court the accused person remains during the proceedings without physical restraint and is only guarded, when necessary
- ▶ Art. 9 Directive => Art. 341, 430-431, 435, 501 par. 1 in fine of both CPC 1950 and 2019
 - CPC has an extensive regulation on legal remedies to overturn a decision in absentia and the right to a retrial in felonies and misdemeanors, if the accused person was not properly summoned or he could not be present or represented by a lawyer at his/her trial for reasons of force majeure

Provisions of the Directive already fully covered by Greek national law (minimum standards met by Greek national law)

- ▶ Art. 7 of the Directive (Right to remain silent and right not to incriminate oneself)
 - Art. 223 par. 4, 273 par. 2, 357 par. 4 of both CPC 1950 and 2019 and Art. 366 par. 3 CPC 1950 = 365 par. 3 CPC 2019 declared the right to remain silent and not to incriminate oneself during all statements, notwithstanding the status of the person as a witness or as a suspect or as an accused person
 - The justice ministry decided to introduce a new provision that reiterates Art. 7 of the Directive (Art. 103A of CPC 1950 = Art. 104 of CPC 2019), although the experts committee thought that, given the above, it was not necessary
 - That the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned, was established long ago in the law doctrine as the very essence of the right

**Provisions of the Directive doubtfully covered
by Greek national law (minimum standards
doubtfully met by Greek national law)**

- ▶ Art. 3 of the Directive (Presumption of innocence) => Art. 72A CPC 1950 = 71 CPC 2019
 - Until then a self - evident principle of the just trial doctrine, established in transposed international law, meaning Art. 6 ECHR (supersedes every national law provision according to Art. 28 par. 1 Greek Constitution)
 - Reiteration of Art. 3 of the Directive is merely a declaration, which adds nothing essential to national criminal procedure law (Germans thought the same!)
 - Every breach of Art. 6 ECHR is a reason for an absolute invalidity of the procedure (Art. 171 par. 1 sec. d CPC)
- ▶ Art. 4, 10 par. 1 of the Directive (Public references to guilt) => Art. 7 of Law 4596/2019
 - A political decision for a fictitious transposition by not following the suggestion of the experts committee
- ▶ Art. 6 of the Directive (Burden of proof) => Art. 177A CPC 1950 = 178 par. 2,3 CPC 2019
 - There is no "burden of proof" in the inquisitorial criminal procedure!
 - This adversarial remnant needs an adjustment to fit in the inquisitorial criminal procedure
- ▶ Art. 8 of the Directive (Right to be present at the trial) => Art. 155 par. 2 CPC 1950, further elaborated in Art. 157 par. 1 CPC 2019, and Art. 340 par. 3 CPC 1950, further elaborated in 340 par. 4 CPC 2019
 - Perfect opportunity to revise our out-of-date system of summoning the suspects or accused persons to attend criminal proceedings and close an open wound in our criminal justice system

New provisions introduced in Greek national law based on the Provisions of the Directive

- ▶ CASE OF KONSTAS v. GREECE (ECHR):
 - “... statements made by the public authorities should not encourage the public to believe the accused guilty, or prejudge the assessment of the facts by the competent judicial authority”
- ▶ The rapporteur suggested and the experts committee accepted the German “Vollstreckungsmodell”, seconded by a claim for pecuniary compensation
- ▶ When the balance of a criminal procedure is struck by public references of public officials which prejudge the accused person and present him/her to the public as guilty, the procedural balance must be restored in the same proceedings by awarding the defendant some form of “compensation”
- ▶ According to this German model used for violations of Art. 6 ECHR concerning the overlong duration of the proceedings, in case of an infringement of the just character of the trial, the defendant is compensated by a discount in his final sentence in order to restore procedural balance
- ▶ General idea behind the suggestion: Prevent the politicians from talking about open criminal cases by turning the public against them; put the blame on them for any reduced sentence!
- ▶ The justice ministry did not follow the suggestion: A claim against the state for a pecuniary compensation filed before the administrative courts according to Art. 7 Law 4596/2019 is not an effective remedy in the meaning of Art. 10 par. 1 of the Directive
 - Prime minister proved that in Parliament a few months later by prejudging the facts of the “Richard case”
 - Mr. Richard proved later to be an innocent man involved in a Police fiasco!

Public references to guilt

- ▶ Since there is no “burden of proof” in the inquisitorial criminal procedure, there were made some adjustments in order to fight judicial practices, which had the effect to burden the defendant with proving his innocence; a burden to prove innocence is an alien notion to the inquisitorial trial
- ▶ Art. 178 par. 2 CPC: All judicial authorities, including PP, are obliged to find and assess all evidence both in favor and against the defendant impartially; the defendant is not compelled to present evidence in order to support his allegations, but the judicial authorities are obliged to investigate and find any evidence the defendant invoked in his favor
- ▶ In dubio pro reo was never in issue in Greece; the provision of Art. 178 par. 3 CPC is a declaration of the self-evident

Burden of proof

- ▶ CASE OF POPOVITSI v. GREECE, CASE OF ELYASIN v. GREECE followed by a plenary decision (2/2014) and other decisions of Areios Pagos, which formed criteria for a proper search of the whereabouts of the suspect or accused person in order to be properly summoned
- ▶ A search in the data base of the tax authority was made obligatory by the introduction of the new par. 2 of Art. 155 CPC 1950, due to the transposition of the Directive as the minimum standard
- ▶ The criteria were further elaborated in Art. 157 par. 1 CPC 2019 (search in phone books, databases of judicial and tax authorities, through family and professional affiliations)
- ▶ The legislator integrated the criteria formed in Areios Pagos case law
- ▶ If these criteria are not met, the summon is invalid, the trial is void and the person has the established right to a retrial
- ▶ The Directive gave Greece the necessary push to solve properly a problem of the last decades

Right to be present at the trial

V. Transposition and application in Greece of Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings

- ▶ Art. 99 par. 3 CPC (pretrial legal aid): Before providing every statement, the judge of investigations is obliged to appoint a lawyer for the accused person from the list prepared by the Bar Association, when the offence is a felony, and he is obliged to appoint a lawyer, if the accused person asks for one, in (the rare case the judicial investigation is conducted for) a misdemeanor; if the accused person is not of legal age, the judge of investigations is obliged to appoint a lawyer in both felonies and a misdemeanors and the accused person cannot waive this right
- ▶ Art. 200 par. 1 CPC (pretrial legal aid): Before pretrial detention for psychological evaluation is ordered, the judge of investigations is obliged to appoint a lawyer, if the accused person has not already appointed one
- ▶ Art. 340 par. 1, 376 par. 3 CPC (trial legal aid): In a felony trial the presiding judge is obliged to appoint a lawyer for the accused person from the list prepared by the Bar Association and a recess of up to 30 days is obligatory in order to give the appointed lawyer sufficient time to prepare; after L. 4855/2021 the same applies in a misdemeanor trial, if the crime is punishable by a minimum term of imprisonment of at least five years
- ▶ Art. 340 par. 2 CPC (trial legal aid): If a felony trial is expected to last a long time, the presiding judge appoints 2 or 3 lawyers for the accused person from the list prepared by the Bar Association
- ▶ Art. 423 CPC (trial legal aid): In a misdemeanor trial, where the special fast track procedure for offences caught in the act is applied, the court is obliged to appoint a lawyer, if the accused person asks for one

Tradition of obligatory legal aid in CPC

- ▶ The new CPC 2019 reiterates these provisions for the obligatory trial legal aid established in the old Art. 340 CPC 1950 since 2015
- ▶ Before 2015 there was always an obligation of the presiding judge to appoint a lawyer in trials for felonies, but the appointed lawyer had insufficient time for preparation and the list prepared by the Bar was ignored in favor of certain colleagues, who passed their time in court rooms waiting to get appointed in order to collect the relevant fee from the state
- ▶ This exploitation of the legal aid provisions has always been a serious issue in the Athens Bar Association and the strict application of the list prepared by the Bar has been successfully imposed to the presiding judges in order to avoid the abuse of legal aid in favor of the financial interests of certain colleagues
- ▶ The judge cannot choose freely from the list, there are certain colleagues from the list “stand-by” every day
- ▶ Quality of legal aid is always an open question: Can indifferent, inexperienced and unqualified lawyers provide efficient legal aid in criminal proceedings, let alone EAW proceedings?

Traditional issues of the obligatory legal aid in CPC

- ▶ Right to legal aid established in the new CPC in Art. 91 CPC 2019: The suspect or accused person has a right to legal aid “according to the relevant provisions”
- ▶ Two kinds of relevant provisions: of the CPC and of the special legal aid legislature
- ▶ The above mentioned obligatory legal aid provisions in the CPC establish the right of the accused person to legal aid without any restriction or derogation, arising f. ex. from his financial status (even the richest man in the world is entitled to free of charge legal aid from an appointed lawyer in felonies proceedings)
- ▶ The rest “relevant provisions” for criminal proceedings can be found in Art. 6 and 7 of Law 3226/2004, as amended by Art. 45 of Law 4689/2020, which transposed the Directive
 - The right to legal aid is here subject to restrictions and derogations

Two kinds of legal aid

- ▶ Right to legal aid in criminal proceedings is the right to have a lawyer appointed (Art. 6 par. 1 L. 3226/2004)
- ▶ Apart from the above-mentioned occasions regulated in CPC, a right to legal aid has according to Art. 6 L. 3226/2004 every suspect or accused person if he meets the following conditions
 - Income of the last 3 years not over 6.000 €, if the person is single (increased by 1000 € for every supported child up to 4 children), or 8.000 €, if the person is married or living in a partnership (increased by 1000 € for every supported child up to 4 children)
 - Object of the preliminary or judicial investigation is an offence with maximum sentence of up to 2 years (f. ex. there is no right to legal aid for an insult offence [Art. 361 CC])
 - Object of the trial is an offence with maximum sentence of more than 2 years
 - Object of the appeal trial is an offence with maximum sentence of more than 2 years, or the accused was convicted in the first instance to a prison sentence of at least 6 months
- ▶ Right to legal aid in EAW proceedings is provided under the same conditions from the moment of the arrest until the decision about the surrender is final
- ▶ Victims have a right to legal aid under the same conditions, but only in trial proceedings
- ▶ Appointment lasts until the end of the national criminal proceedings or the end of the EAW proceedings

Conditions and restrictions in nonobligatory legal aid (L. 3226/2004)

- ▶ The application filed is reviewed by a special appointed judge
- ▶ The application must be filed along with the documents that prove the financial status of the applicant a) within 48 hours from receiving information about the right to legal aid in preliminary or judicial investigations, b) 1 month before the trial date, c) within the necessary time to file an appeal
- ▶ There is no time limit for the judge's decision!
- ▶ In preliminary investigations initiated by the police without a request from the Public Prosecutor the detained person can apply for legal aid after being informed of his right directly to the investigating police authority, by simply declaring in writing his financial status; if he meets the above financial conditions, there is an obligation of the police authority to appoint a lawyer from the list prepared by the Bar Association
- ▶ The same in EAW proceedings: PP grants the request for legal aid, if the arrested person applies for it after being informed of his right and declares that he meets the financial conditions

Legal aid application procedure in nonobligatory legal aid (L. 3226/2004)

VI. Closing remarks

- ▶ Brexit is the perfect opportunity to push for a common European Criminal Procedure based on the good old inquisitorial procedure model
- ▶ With UK in the EU there could never be a further unification of criminal law and criminal procedure
- ▶ We are now done with the British “opt outs”, which derived from their failure to understand and adapt to the mainland procedure models
- ▶ A criminal trial is not a fair competition between parties, but a quest for justice and this quest can only demanded to be just!

**BREXIT: A great opportunity for
European Criminal Law**