

EAW *in absentia* Trial: The Perspective of the Defence

→ Right to be present at trial

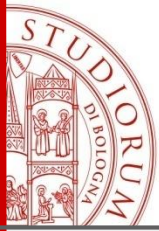
(Recommendation n. 20: add a part?)

→ Right to a retrial

(Additional recommendation to the Member States)

→ Suspensive effect of retrial?

(Additional recommendation to the European Union)



Right to be present at trial

Recommendation n. 20:

“Do the utmost to ensure that the accused have an effective opportunity to exercise the right to be present at the trial”.

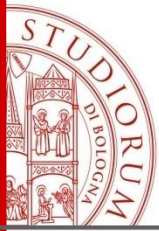
Do the legal presumptions comply with EU standards?

➤ Strong presumptions

(Being aware of scheduled trial, the accused has given a mandate to a legal counsellor)

➤ Weak presumptions

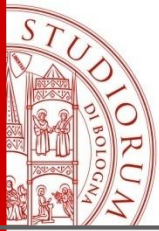
(art. 420 bis c.p.p., italian code of criminal procedure): "*the judge shall also proceed (...) in the case in which it results, however, with certainty that the defendant is **aware of the proceedings***" (the address for service with a legal counsellor assigned by the State).



Right to be present at trial

Recommendation n. 20:
(Add a part?)

“Do the utmost to ensure that the accused have an effective opportunity to exercise the right to be present at the trial. **States are recommended to ban legal presumptions that do not unequivocally establish that the accused was aware of the scheduled trial.**”.



Right to a retrial

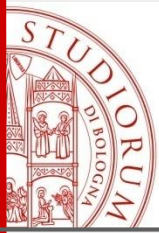
Does art. 4a(1)d) undermine all other cases?

Art. 4a(1)d) concerns situations in which:

- The accused did not receive summon in person (art. 4a(1)a) nor he/she had given a mandate to a legal counsellor (art. 4a(1)b)
- He has not received personal notification of the decision (art. 4a(1)c)

Nevertheless..

EAW may not refuse if issuing authorities give a number of assurances (the person concerned: *a*) will be personally served with the decision after surrender; *b*) will be informed of his/her right to a retrial or an appeal; *c*) will be informed of the time frame concerning retrial/appeal)

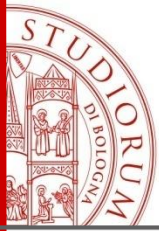


Right to a retrial

Is the right to retrial an unconditional right?

Two strands of thought:

- › Possibility to ask for a retrial
- › Right that the requested person has to exercise within the applicable time frame and in the manner prescribed by national law



Right to a retrial

Italy:

Until 2014 there was no *ad hoc* means to ensure the retrial (ECHR, Colozza; Sejdovic)

Member States (Germany, Netherlands) refuse to execute EAW *in absentia* Judgments:

District Court of Amsterdam, 5 April 2018, Case n. 18/169;

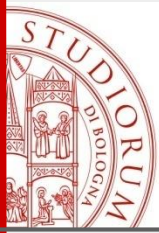
German Federal Constitutional Court, 12 December 2015, Case n. 2 BvR 2735/14

Art. 625 *ter* c.p.p. (“*Rescissione del giudicato*”)

The defendant has to demonstrate:

1. the lack of knowledge of the trial throughout its duration
2. that this lacuna is not attributable to defendant's fault

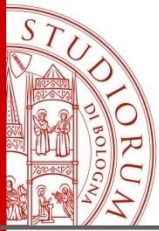
Do these conditions comply with the right to a retrial (art. 4a(1)d, FD 2009/299/JHA)?



Right to a retrial

Additional recommendation to the Member States:

Regulate the right to retrial as an unconditional right



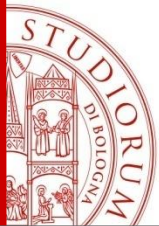
Suspensive effect of retrial?

Can the right to retrial be considered an effective guarantee if, during the course of the remedy, the sentence is enforced?

Suspension of EAW in cases where a serious violation of the rights of the defence is evident

Additional recommendation to the European Union

Regulate the case referred to in Article 4a(1)d as a case of "suspended" execution of the EAW or, whatever, regulate cases where the existence of a serious breach of the rights of the defence must lead to a suspension of the surrender of the accused person



Thank you!

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