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PROF DR. LORENA BACHMAIER WINTER KEYNOTE SPEECH

Ladies and gentlemen, dear colleagues, dear friends,

Words of gratitude to organisers and ECBA, and ICAB and introduction

"I have come this evening to talk with you on one of the greatest issues of our time-that is the preservation of human freedom. I have chosen to discuss this issue in Europe because this has been the scene of the greatest historic battles between freedom and tyranny. The basic problem confronting the world today, as I said in the beginning, is the preservation of human freedom for the individual and consequently for the society of which he is a part. We are fighting this battle again today as it was fought at the time of the French Revolution and at the time of the American Revolution".

I have decided to start today quoting the words of Eleanor Roosevelt at her speech at the Sorbonne in Paris on 28 September 1948. Today, this message is at least as important as it was in the aftermath of the Second World War. The fight for freedom is equally relevant as it was then when Europe is facing major challenges in the struggle against the attacks to the rule of law and the constant need to fight for our rights and freedoms.

And you lawyers are key actors in the fight for freedom in democratic societies, not only in defending the parties –your client– in criminal proceedings, but also in preserving the rule of law.

Europe is currently under important changes; some say that Europe is at the brink of a monumental fall where gigantic economic, social, political and strategic challenges threaten to crack our Union. We could say that this pessimistic view (or perhaps is it plainly realistic?) is not new, and that history shows that there are indeed no grounds to see the future of Europe with optimism. Indeed, history is an unpleasant witness, reminding us that we Europeans have been fighting among ourselves ever since. But history also teaches us that pessimism does not help overcome the hurdles of a changing reality we are confronted with. I am optimistic by nature, but also from pragmatic point of view it can be said that optimism should help us to be willing to take action. In any event, rather than discussing the political challenges that Europe is currently facing, this morning in less than fifteen minutes, I would like to share some reflections with you as European lawyers, acting mainly in the criminal justice arena: the challenges for the European Area of Freedom, Security and Justice (AFSJ).

The AFSJ is based upon the principle of mutual recognition, and the first very simple thought is to approach this principle criticizing its very premise, namely the principle of mutual trust. The diversity of cultures and legal systems does not always work for creating mutual trust, and this might be seen as the major flaw of the principle of mutual trust as set out in the TFEU. But, instead of criticising the European legislator, we might be focusing on trying to find better solutions. What would be the alternative to the principle of mutual recognition? Is this not the best possible approach for creating a common area for the judicial cooperation in civil and criminal matters?

Of course, this area cannot be built at the cost of the defence rights. While increased cooperation at the side of law enforcement and prosecuting authorities is essential to ensure security and fight effectively transnational organised crime, the right balance needs to be found to preserve the long fought procedural safeguards of every citizen facing a criminal charge in our liberal societies.

In this context, we have to aware that the criminal action as well as the criminal defence takes place more and more at the cross-border level: digital world has blurred the physical state frontiers, the free movement of persons has allowed criminals to cross borders without major controls and while we are facing new threats, the technology is also providing for new drivers in detecting and prosecuting cross-border criminality.

Again, this, being crucial, cannot be done at the cost of the principle of equality of arms. Every actor in the criminal justice system, needs to keep up with the current challenges, understanding that in the procedure the parties are adversaries, not enemies. Public prosecutors, judges and law enforcement agents, all have to respect the role of the defence lawyers, as they are exercising and ensuring a fundamental right of the person under suspicion, charges or indictment. All of them have to work under the umbrella of the law and following the principle of defending human rights: indeed the claim of lawyers regarding the procedural safeguards, their numerous judicial remedies filed against the decisions of the prosecutors or judges, as annoying they might be, it is still required to preserve the adversarial principle, it works as the oxygen of the rule of law principle and allows, among other institutions and actors, the democracies to breath.

Recently the so called “Encrochat case”, indeed the countless proceedings that the information gathered by the de-encryption of the electronic messages platform and the judgment of the CJEU of 30 April 2024 has shown how difficult it is to ensure the adequate balance between prosecution and defence in complex cross-border setting and the risks that these digital investigations pose for the principle of equality of arms.

The list of questions to be addressed in the protection of rights in cross-border criminal proceedings is long, something which is really exciting for any researcher. Let me mention only some of them:

First, where is the probable cause protection left in such cases? Under the 4th Amendment of the USA Constitution, probable cause has ever since interpreted not only as a procedural safeguard, but a rule of law principle, defining the limits of the state against the individual in encroaching their right to property, their rights against search and seizure of property and body without "probable cause".

Is the lex loci principle enough to ensure the protection of the rights of defence in cross-border gathering of evidence?

Should the adjudicating court check the way the evidence was obtained abroad? The traditional explanation for applying the principle of non-inquiry to the evidence gathered abroad, was based on the assumption that the foreign law was unknown to the adjudicating judge. In practice, it meant that unless the objecting party presented evidence that the evidence collected abroad was unlawful, the court would admit it. This situation leads to what, after Joseph Heller, we understand by a "catch-22" situation: the evidence will be admitted unless the defence presents evidence that the gathering was unlawful, but the defence is not given access to the evidence and the file abroad, because this is not foreseen in the European Investigation Order mechanism. The problem gets worse if the evidence has been obtained with intervention by intelligence forces, who act under stricter confidentiality rules on their procedures –especially the software used to crack an encrypted platform–, and also if the evidence was gathered by a joint investigation team, where the defence is unable to figure out what is the role played by each of the parts intervening in the joint investigation team.

Finally, a topic that has been in my mind and in my research for several years already: how to ensure the protection of the lawyer-client privilege or legal professional privilege (LPP) in digital investigations in cross-border settings? Whose rules should apply for the filtering of privileged communications and/or materials?

The CJEU has already warned that digital evidence obtained by way of an European Investigation Order is to be rendered inadmissible if the parties did not have the chance "to comment effectively" on the way the evidence was collected. The question here is how to face the "confidentiality of the technology"?

In this complex and rapidly changing scenario, it is the more relevant that the criminal investigation standards are more harmonised, precisely when it comes to electronic evidence. In this context, it is not enough to rely upon common protocols or ISO standards, there is a need for a clear law,

preferably at the supranational level, that provides for a sufficient, foreseeable legal basis, as set out in the landmark case of the European Court of Human Rights in the case *Särgava v. Estonia* of 16 November 2021.

Against this background, many actors ask themselves what is the European Commission doing? Believe me, the EU is working intensely currently to provide an adequate protection of the defence rights, not only listening to Academia and other projects in this regard, but also to the ECBA. However, the legislative machine of the EU moves very slowly, and sometimes it is the member states that are not willing to be subject to more European rules, which always means losing another bit of sovereignty.

The evolution from an automated mutual recognition principle to a limited one might be the only possible way out at the present context, but again, criticizing is always easier than building systems and rethink the needed balances.

The problems in the defence rights in cross border criminal proceedings in the AFSJ illustrate how difficult it is the process of building "the unity in diversity": in varietate concordia.

Keywords in this process should be: cooperation with checks to ensure the defence rights, the "right to comment effectively" on the evidence presented by the prosecution. How? The answer is not easy. But the path is worth to be walked.
And we still have to address the question of how the AI impact will the mutual trust and the mutual recognition principle. Shall we already be working on a single area of data in the EU? Should we work to "lower" the diversity in order to improve the "unity", meaning the effectiveness of the fair trial rights? And also, our own common security?

I finish this introductory keynote speech with more questions than answers, but if we want to preserve the European culture lowering diversity might be acceptable but lowering right not.