Place and Function of Confrontation in the European Union countries

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This paper is aimed at presenting the different solutions provided by the national regulations of more EU countries with respect to confrontation, as well as their recommendation and practice on criminal tactics.

Based on the data he has gathered, the author makes a distinction between two groups: the legal systems based on the anglo-saxon model, that do not have this institution and apply other means to solve the case or to convince the judges/jury, and those based on the continental traditions, most of which know this institution and apply it both in the framework of criminal procedure law and as an investigatory (truth-seeking) tool.

The author concludes that, despite its modest efficiency, the present existence and practicality or future of the institution is not to be doubted. On the other hand, in the countries that do not have the institution, the question regarding the necessity of applying it has yet to arise, although there has been no will or urge to introduce it.

1. Review of different national regulations

During the research I have made over the last 5 years, I gathered data on numerous EU countries' national regulations regarding confrontation as well as their recommendation and practice on criminal tactics. Above all, I aimed at answering the following questions, by the means of questionnaires, personal interviews with law enforcement bodies (judges, prosecutors, barristers, police officers) and by legal analysis:

a) Does the respective institution exist in the country?

b) What are the means of regulation? (laws, or recommendations)

c) If it is a law, what is its name, number, source and text?

d) Is there a face-to-face confrontation institution within criminal procedure and if yes, with what recommendations?

e) If it exists within the criminal procedure, in which stage is it applied; in the investigatory or the judicial phase?

f) If the institution of confrontation exists, how efficiently is it applied, and what was the law enforcers' opinion?

Based on the answers, one can make distinction between two groups. Those countries that don't have or use the institution form the minority. Most

countries, however, have it, and it is applied both in the framework of criminal procedure law and as an investigatory (truth-seeking) tool.

I shall begin my analysis with the latter (in alphabetical order). Regarding this group, the answers to the above raised questions are the following.

2. Member states of the European Union that have the institution

AUSTRIA

The institution was introduced to the Austrian Code of Criminal Procedure: Die Strafprozessordung (StPO) 1975, BGBI. Nr. 631/1975, on the 1st of October, 2002. It is interesting that it is applied in the same phase as the other confrontation institution, i.e. identification parade.

168.§ (1) In case the confrontation between witnesses and people or items becomes necessary, the confrontation must be ordered. But before the confrontation takes place, the witnesses must give an exact description of the person or item, furthermore the witness must refer to the person's /item's distinguishing marks.

(2) In case the testimonies differ in regards to significant facts or conditions, the investigatory judge may order the confrontation of the witnesses.

(3) Confrontation may only involve 2 people simultaneously. The participants must be questioned regarding all the differences, and their answers given to each other must be placed on record.

According to one of the law's gloss, the law mentions confrontation in the (2nd) and (3rd) section of paragraph 188§ and paragraph 205§ as to be applied if the testimonies of two trialled significantly differ - it is irrelevant in what subject or matter - they are to be simultaneously trialled again. Many people incorrectly confuse identification parade, when the witness must identify a person. (Paragraph 168§ section (1.)) The larger number of persons or items with similar characteristics are presented to the witness, the more weight identification parade bears.

205.§ If the testimony of the accused differs from the testimony of a witness or from that of any other participant's in a significant question, the accused may only be confronted with the above mentioned if the investigatory judge believes it is necessary in order to reresolve the contradiction. In this case, the process of contradiction will proceed in accordance with paragraph 168§ section (3).

248§ (1) The trial judge must, during the hearings of the witnesses and expert witnesses, ensure that the investigatory judge is in accordance with the rules of the investigatory phase, provided, that during the hearing, by definition,

these are not impossible. The trial judgel must also examine the future testimonies of the witnesses and expert witnesses to decide whether or not they differ from those expert reports already provided to the court.

(2) The head judicial may order the confrontation of those witnesses, whose testimonies differ from each other.

(3) The witnesses and expert witnesses may not leave the trial until the trial judge grants them a leave, or doesn't order their removal. Witnesses cannot challenge each other's testimonies.

(4) After the testimonies of all the witnesses, expert witnesses and other accused, the accused must declare if he wishes to deny any of the above mentioned.

The gloss adds: paragraphs 150-151§ regarding witness evidence and paragraphs 116-117§ regarding expert witness hearing refer first of all to the trial. Only the chief counsel determines the means of witness hearing, until the prosecutor or the defence does not make a different proposal.

The violation of paragraph 248§ is not a vacating cause. During the trial, all those must be heard as witnesses who are only present by chance.

BULGARIA

Bulgaria also applies this institution; it is regarded as a method of getting evidence as a special form of hearing. We may find the regulations regarding confrontation in paragraph 143§ of the Bulgarian Code of Criminal Procedure: the Nakazatelno-protsesualen Kodeks, which took effect on the 29th of April, 2006, but was published on the 28th of 2005.

143.§ Confrontation

(1) Confrontation must take place if there is a significant controversy between the testimonies of the accused or between the testimonies of the accused and the witness, excluding the case of section (2) of paragraph 123§.

(2) The participants of the confrontation must be questioned before the hearing, whether they are known to each other and, if so, what their relationship is.

(3) The participants may ask each other questions if the conductor of the confrontation permits.

(4) If significant differences occur in the witnesses' testimonies, then sections (1-3) are applicable, excluding the case of section (2) of paragraph 123§.

Otherwise, confrontation is applied both in the investigatory and the judicial phase.

According to law enforcers, it is highly effective in revealing the truth, and the fact that the institution has deep roots in Bulgaria, makes it even more efficient.

CZECH REPUBLIC

According to the Czech concept, confrontation is both a legal term and one of criminalistics. It is regarded as a special case of hearing, and is applied when the available testimonies are contradictory. In this case, the witness or the accused sits in front of another witness or accused. Thus a conflict evolves, hence it can be considered both an individual and a special method of criminalistics, as well.

The regulations regarding confrontation are to be found in paragraph 104/A § of the Czech Code of Criminal Procedure:

(1) Confrontation takes place if the testimony of the accused does not concur with that of the witnes, or another accused.

(2) Confrontation takes place also when the witness' testimony does not concur with that of another witness or of the accused.

(3) Confrontation may only take place following a preceding hearing. In the course of confrontation, the participants must directly foreshow their statements to one another, the controversies must be highlighted, and the participants may also question each other directly.

(4) The regulations that apply to the hearing of the accused and the witness also apply to the confrontation.

(5) A juvenile under the age of 15 may only be confronted if it is utmost necessary and reasonable. The regulations of this paragraph do not apply to those witnesses whose identity is kept secret.

(6) If, following the confrontation, the hearing of the participants is still necessary, they must be heard separately.

(7) Confrontation is only possible in the course of the judicial process, however, exceptionally it may be applied before the arraignmen, if it is foreseeable that this would, in fac,t consent to resolving the case.

Tactical recommendations, and terms that apply to the enforcement of confrontations:

- the preliminary, separate hearings of the participants of the future confrontation,
- controversy of significant circumstances between the testimonies,
- no other option to reresolve the conflict of testimonies.

Preparing the confrontation:

- The first step is considering applicability,
- determining goals, selecting questions,

- determining who will be heard first,
- preparing the victim for the meeting with the accused,
- appropriate timing,
- placing the participants face to face,
- restricting the number of people participating in the confrontation (usually two).

The process of confrontation:

- informing the parties in accordance with their status in the procedure,
- clarifying whether the participants are acquainted, and if so what their relationship is,
- beginning the confrontation,
- the answers must be given to the other participant directly,
- after one of the participants has answered, the other may react, if he denies, he must reason this; in this case, the first mentioned may also react,
- if permit is granted the participants may ask each other questions and they may answer these,
- if any of the participants distracts the procedure, it has to be stopped,
- the whole procedure must be systematically registered word by word, furthermore all non-verbal expressions are to be registered, as well.

Fundamental principles:

- confrontation may only take place if the parties request it,
- continous supervision during the confrontation must be ensured,
- it is conducted under the active lead of a questioner, while continuously observing the parties.

As a general rule, confrontation is only possible in the course of the judicial process; however, exceptionally it may be applied before the trial, if it is indispensable in resolving the case.

According to the law enforcers it is seldom applied, but no exact statistical figures are known (analyses, studies).

Despite the fact, that it is seldom used during the proofing proceeding, the enforcements regard it as a valueable tool in reresolving conflicts between testimonies and for gaining new evidence.

The reason behind this relatively infrequent use of the institution may be, according to some law enforcers, that it requires complicated preparations, and furthermore it is venturesome due to certain psychological reasons. The very same law enforcers debate whether confrontation is a special type of hearing or rather a specific, separate method of criminalistics.

ESTONIA

The institution exists in the Baltic state, and it is called: „v*astastamine", in the Estonian Code of Criminal Procedure: the Kriminaalmenetluse Seadustik.*

According to paragraph 77§ confrontation:

(1) May be applied when there are no other means of reresolving the controversy in a statement.

(2) During the confrontation, the relation between the participants must be determined, and they must be questioned regarding the controversial facts in turns.

(3) During the confrontation the participants' previous statements may be unveiled, thus fresh evidence may also be submitted.

(4) With the permit of the examiner, the participants of the confrontation may also question each other (by use of a functionary) in regards to the controversies. If necessary, the examiners may alter the questions raised.

Paragraph 78§ is dedicated to the regulations related to registering the process of confrontation:

(1) The questions and answers must be registered in the way (in the same form and order; furthermore with the result determined), as they truly happened.

(2) The parties of the confrontation must certify with their signatures, that what the records hold is equal to the truth.

(3) If the answers provided by the participants concur, simplified answers must be registered.

(4) If the confronted person's previous statements are reveiled or other evidence is presented, these reveiled statements or submitted evidence have to be apparent in the recorded question's wording.

Criminal tactical recommendations are to be applied to the preparation of the confrontation, to the conduct, and to the evaluation of results. These are tought at the Estonian Police Academy.

The institution's efficiency, as all investigatory proceedings, is case sensitive. It mainly depends on the investigator's qualifications and expertise, as well as, on the cases themselves. Otherwise in practice, the Estonians have long been applying confrontation. It is regarded by law enforcers, based on my personal research, as a conventional and important part of the investigatory process.

FINLAND

The word confrontation has two meanings in Finland. In a common everyday situation it is used in regards to hearings, otherwise it is used in the legal lingo as anywhere else.

The Finnish law on investigation (number: 11.7.1997/692) in regards to confrontation says the following:

The law determines under what conditions confrontation may be applied in the investigatory phase. According to paragraph 32§: the investigator may permit one of the parties to be present, or to be represented by his advocate, during the other parties' hearing, but only if this doesn't hinder resolving the case. However, witnesses may not be confronted based on this paragraph.

Confrontation is regulated by paragraph 33/A§, of the 17th chapter of the Finnish Code of Criminal Procedure.

According to it: if the testimonies of the witnesses's are controversial, or if there is any other special reason to do so, the parties may be confronted. This must happen at the trial, thus the court's evaluation of the testimonies may follow immediately. These testimonies are treated as evidence.

For this reason is it important, that the Finnish law on investigation doesn't allow confrontation in the investigatory phase, because if it did, the parties could influence each other, thus the court wouldn't be able to gain an impression of the witnesses' independent testimonies.

This way, however, those who decide the fate of the trial, obtain a "straight", personal, verbal testimony, thus the court may immediately evaluate the inherent truth. In Finland, veracity plays an exceptionally important role both in the investigational phase and in the trial. Whoever does not comply with this rule in any phases of the process or in any given situation is to face serious punishment.

Since it is is very seldom applied in Finland, the investigators, judges, prosecutors, and attorneys do not possess considerable experience regarding confrontation. This basically also means, that it is very hard to tell how operable, in fact, the system is.

FRANCE

In France, confrontation is an institution that has been functioning for centuries, since the Ordonnance Criminelle Du mois d'aout dedicated a separate part - (Titre XV) with the title: „Des Récolements et Confrontations des témoins" - to its regulation in 1670, by Louis the 14th. The regulations regarding confrontation also became a part of the Napoleonic Code d'intstruction criminelle from 1808. The French Code of Criminal Procedure currently in force, the Code de procédure Pénal (Loi du 31 décembre, 1957 et Ordonnance du 23 décember 1958 - Titre III.) contains regulations regarding the execution of confrontation and hearings (interrogatoires et confrontations) in paragraphs 114-121§, as well.

114§ On the accused's first appearance, the investigatory judge determines the identity of the accused, informs him/her on the charges brought up against him/her, and also, that he/she doesn't have to testify. Word by word registration of this notice must be taken in the records.

If the accused decides to testify, the investigating judge must record it immediately.

The investigating judge must brief the accused regarding his right to choose an advocate from the register, or request one to be appointed by the court. The later is, provided that the bar's charter contains regulations regarding this matter, appointed by the head of the bar, in absence of such, by the head of court.

Word by word registration of this notice must be taken in the records.

From the first intervewing, the victim, acting as a civil suitor, may also have legal representation.

Following the first hearing, the accused may be released, or the court may take him/her in tow, but the accused must, however, provide his/her address to the inquisitor. Besides, the accused may give another address, to where, if he/she wishes, the desired documents will be sent. If the investigation is taking place in the mother county, the address may only be of one that is within the mother country's administrative border. In case of the investigation is taking place overseas, a local address may also be chosen.

The accused must be warned to inform the investigatory judge on all changes of addresses before the end of the investigational phase, verbally or via certified mail. The accused also must be admonished, that all notes and records sent to the address are to be considered delivered.

The occurrence of the above mentioned notice and the provision of the addresses must be registered in the records.

115§ Excluding the regulations of the previous paragraph, the investigatory judge may, in urgent cases, take actions immediately to conduct the hearing of the witnesses and the confrontations. Urgent cases are the following: if the witnesses' life is in danger, if certain evidence may disappear, and those that are mentioned in paragraph 72 §.

116§ From the first appearance, as the latest, the accused may freely consult with his advocate.

The investigatory judge may prohibit the accused from consulting his advocate for a period of ten days. This may be prolonged, for another ten days.

The communication of the accused and the advocate may in no other case be prohibited.

117§ The accused and the private prosecutor may inform the investigatory judge about the name of their respective defence counsel or legal representative any time from the commencement of the investigation. In case they hire more

than one defence counsel or legal representative, they have to name that defence counsel or legal representative to whom the official notes and summonings must be addressed, furthermore they also have to state if the second counsel or representative is not member of the same law office.

118.§ To question or to confront the accused and the private prosecutor, a definite consenting statement is required from them in the presence of the previously informed defense or the legal representative.

The defense must be summoned at least four days pior to the hearing by registered mail or notice with delivery certificate.

The proceedings have to be taken for the initiative of the defense as well, if the defense initiated it on the second day, as the latest, prior to the interrogation. The same applies if the legal representative of the private prosecutor initiated it.

In case the proceedings have been initiated by, according to the above rules, the defense or the legal representative of the private prosecutor, he/she is authorized to take copies of the entire proceeding or a part of it for his/her own use, but he/she cannot make further copies of them.

However, he/she can any time make copies of the records of those hearings, interrogations and/or confrontations he/she has attended.

119§ The public prosecutor is free to attend the interrogations and the confrontations of the accused anf the hearings of the private prosecutor.

According to paragraph 338§, confrontation may also be held before the presiding judge, on request of the prosecutor, civil suitor (the plaintiff) or the accused, however, one might state that it is principally a typical action of the preparation phase.

GREECE

According to a Greek law enforcer, the Greek system of criminal law is the most liberal in the world. The accused stands in the centre of the whole criminal procedure, and the most important principle to be considered is the presumption of innocence. A fundamental principle: “better to have acquitted a murderer, than to have sentenced an innocent”.

The criminal procedure has two main phases: the investigational and the judicial. Police officers conduct the first; the second is done by the most experienced judges. Both are in writing but the trial itself is oral.

Another important principle is that judges and police officers may do anything, within the boundaries set by the constitution and criminal law, in order to resolve the case.

Thus, they may apply confrontation which exists both as a legal term and as one of criminalistics.

It was placed in chapter 4 (paragraphs 209-232§) of the Greek Code of Criminal Procedure, called: „Kóthikas Pinikis Thikonomias" No. 1493/1950, amended by laws No. 3327/2005. and No. 3346/2005.

According to the most relevant paragraph, 225§ on the hearing and identification of the witnesses during confrontation:

(1) The witnesses must be heard separately, however, if necessary, they may be confronted with the accused or with another witness.

(2) If there is a chance that the witness may identify some object or person, the witness must previously be required to give a decription.

Confrontation is applied in both the investigational and the judicial phase, however, it is more frequently applied in the judicial phase.

In theory, it could prove to be an efficient tool in the hands of police officers, judges and prosecutors, but since it is only used if it is utmost necessary, if there are no other means of resolving the case, it's efficieny cannot be measured, and there are no studies regarding this subject

Law enforcements do not really have experience regarding its efficiency, mostly due to the reason, that it is seldom used, only in the extremest cases. The reason of this is probably that it takes a lot of time, requires massive experience and above all it may lead the investigation astray. Mostly, the advocates of the accused try to force the use of this institution.

POLAND

The institution is both present in the criminal procedure and in criminalistics. According to he 172th paragraph of the The Polish Code of Crimnal Procedure (6 June, 1997, Kodeks Postepowania Karnego) :

„The examined persons may be submitted to a confrontation in order to clarify contradictions. The confrontation is not allowed in the case specified under Article 184.§"

Confrontation may be applied if two people present facts differently regarding the same event. Its aim is to resolve the contradiction, but the differences in question have to be significant. Thus, when the two versions only differ in minor questions, confrontation is not necessary. It is only applicable, when the two people are completely sure in what they claim. It does not have to be applied when one of them, or both are uncertain or do not remember certain circumstances.

Who may be confronted? All participants of the process, with the exception of the unnamed witnesses.

A few possible combinations: two accused; two witnesses; two expert witnesses, the accused and a witness. In theory, a witness or the accused may also be confronted with an expert witness.

How does it work in practice? As the first step, the agencies determine, based on previous witness testimonies, or on one of the accused, whether or not there is a controvery. Therefore, the accused must testify or give explanation to all that is in question at least twice, or in case of an expert witness, must give expert evidence twice. In other words, confrontation may not be applied if those in question have not yet been examined in accordance with the general rules. In the course of confrontation, a member of the agency reads out to both parties present all previous testimonies. Additional rule is that the testimony of the person supposed to be more trustworthy by the investigator/judge is to be read first. Then the person carrying the confrontation into effect, questions both participants regarding the controversies.

During the confrontational process, the participant's role is merely answering the questions unlike during the 'general' examination. The participants are not provided with an opportunity to express themselves freely, or to testify in the same manner. The reason is to be found in the aim of the confrontation. In case of a general investigation/ examination the aim is to gather information regarding the case. The aim of the confrontation is however to resolve the controversies.

Because resolving the controversies is in itself a type of examination, the provisions that apply to the examinations in general should otherwise be kept in mind during the confrontation. These regulations are located in articles (1-7) of paragraph 171§.

(1) The examined person shall be granted the opportunity to express himself freely within the framework designated by the purpose of the action in question, and only afterward may he be examined in order to complete, elucidate, or verify the statement presented.

(2) Apart from the agency which conducts the examination, the parties, defence counsel, legal representatives, experts and those listed in paragraph 416 § also have the right to examine. Questions are presented directly to the person under examination unless otherwise ordered by the agency.

(3) If the person confronted has not yet reached age 15, all procedural actions that he may take part in, should take place in the presence of his legal representative or guardian unless that is against the interest of the whole procedure.

(4) Questions suggesting an answer to the examined person shall not be allowed.

(5) It shall be inadmissible:

- *to influence the statement of the examined person through coercion or unlawful threat,*
- *to apply hypnosis or chemical or technical means affecting the psychological processes of the examined person or aimed at*

influencing unconscious reactions of his organism in connection with the examination.

(6) The agency which conducts examination shall dismiss questions specified in section (4) as well as any questions which it finds irrelevant.

(7) Explanations of the accused, testimony or statements given or made under conditions precluding the possibility of free expressions, or obtained against the prohibitions specified in section (5), cannot constitute proof.

Confrontation may be applied both in the preliminary and judicial processes, but it is more frequently applied in the former one. According to the 5th point of article (1) of paragraph 143§, the prequisite of the conduct of a confrontation is a record.

Besides, according to section (1) of paragraph 147§:

„the conduct of actions recorded may be transcribed by means of equipment recording pictures or sound, however, the persons participating in the action should be warned before such equipment is activated".

According to Polish practising lawyers, it seldom happens that during confrontation or afterwards, participants would change their testimonies. This is especially true in the case of witnesses - in their case criminal liability would also be questioned. The most significant advantage of confrontation is that it helps in evaluating the evidence: the agency, which observes the partcipants' behaviour, will probably be able to judge the truthfulness of the testimonies. In case of the accused, it is more useful since they cannot be held accountable for not testifying truthfully, so changing it bears no such consequences. Accordingly, confrontation is applicable as a kind of tactical manoeuvre, when one of the accused has already pleaded guilty and has confessed in his testimony, while the other is still in denial.

LITHUANIA

Confrontation is both present in criminalistics as an investigational action and in the criminal procedure as a type of hearing.

The Lithuanian Code of Criminal Procedure (law number IX-785, which came into effect on the 14th of March, 2002) provides the respective regulation and and offer recommendations on methodology.

According to paragraph 190§ of the Lithuanian Code of Criminal Procedure: in order to reveal, clear and resolve the contradictions between the testimonies given by the two previously heard, identification via confrontation may be required.

The provisions regarding the hearing of the participants of the confrontation - the accused and the witnesses - are the following:

When hearing the participants of the confrontation, first it must be determined whether the participants are acquainted, and if so, what their relationship is. Subsequently, the participants must be heard one after the other regarding all in question that made the confrontation necessary. After the testimonies, the participants may ask questions. If the confrontational testimony of one of the participant's differs from the same participant's previously given testimony, the reason of this must be made clear.

After recording the testimonies followed by the registration of these, may the records, video and sound recordings of all the participants' previous testimonies be shown.

Confrontations most often take place during the investigational phase, thus it is mostly applied preceding the judicial phase, however, it is also applied in the judicial phase of the criminal procedure.

Its efficiency is inconsistent. This is the case even in the confrontation of married couples. It is seldom applied by law enforcements.

GERMANY

German Criminal Procedure contains the institution of confrontation, however, it does not only mean resolving the controversies, but also identification parade which is part of the hearing, where concealed or not, the victim(s), witnesses, or other participants of the examinatory procedure, in order to identify, are confronted with the accused.

The German name: *„Gegenüberstellung"* means two types of confrontations: one is to identify and the other is to resolve all contradictions by hearings (which in exact translation rather means opposing).

The type of confrontation that aims to resolve the possible contradictions - which my research is based on - in the German concept is: the simultaneous re-hearing of two persons, whom already have been heard and whose statements have significantly contradicted. It aims at resolving the contradiction that occurred, by confronting the simultaneously heard participants with each other's respective statements.

This type of confrontation is regulated by section (2) of paragraph 58§ of the German Code of Criminal Procedure, which, unlike the Hungarian provisions, does not highlight the fact that it only has to be applied in case of a significant contradiction.

This legal basis provides for all in regards to the conduct. If it is necessary, confrontation of the accused with other witnesses may be applied in the preliminary phase.

The preliminary phase conducted by the prosecutor, is not formal or public. At the crest of the criminal procedure stands not the trial, but the phase

preceding it, which means, that all mistakes made during the investigation are partially or totally irremediable during the trial, since investigation has the utmost siginificance.

The fact, that both confrontational hearings and identification parade have highly developed rules, and their detailed, elaborated and immense literature in criminology refers to the significance of these institutions.

The confrontational hearings form a special type of hearings where, in most cases, confrontation is applied to pairs (witness-witness, witness-accused, accused-accused). Its most important aim is to resolve and explain the controversies. Before the confrontational hearing may take place, the records of the police interrogation must be evaluated.

In the preliminary phase the following questions have to be determined:

- Which controversies need to be resolved?
- In what order should this happen?
- What forms of questioning are to be applied?
- What organisational arrangements are to be made (choosing the room and the sitting orders)?
- The evidence that should be presented during the hearings and the order in it should be presented
- The time most desirable for the conduct
- The human and social bounds that may have an influence on the process of confrontation (for instance: fear, social dependency).

The controversies are to be recorded in a separate record or résumé. Often the opportunity is given for a typist and two police officers to be present during the confrontation. The investigator who has dealt with the case conducts the hearing; the other police officer is bestowed with the task of monitoring and supervising, taking into account the regulations of conduct (suitable distance, possible ways of escape).

The participants are to be seated in a manner that prevents any assault, collusion or exchange of signals. The questions drafted in advance and asked in a manner that suits the goal of the process, are asked only after the participants have received suitable warnings, according to their status in the criminal procedure, and comments are to be registered in the records word by word. This, of course, also applies to the answers given. In case the problems are not resolved, they must be raised again.

A résumé of the method, the conduct (including the participants' behaviour) and the result must be prepared. Confrontational hearing cannot be conducted if the witness is uncertain or scared.

The police may not summon anyone who is unarrested to confront against his/her will. The prosecutors, however, have the authority to confront a witness

or the accused, and if necessary, they may issue a warrant of apprehension to do so.

Inspite of so many studies dealing with the topic, among the ranks of the German lawyers specializing in criminal procedure, it is also a widespread view that in the practice of criminalistics not all controversies can be resolved by confrontation. Often it is sufficient to order a rehearing or to analyze the given material evidence to solve the problem in question.

ITALY

Confrontation in Italy (confronti in Italian), is regulated by the Italian Code of Criminal Procedure, promulgated on the 22nd of September 1988, law number: 447 (Codice di Procedura Penale, 22 settembre 1988, n. 447). It contains the relevant provisions in the chapter named: ”Proving”, under the title of: “Instruments”, in the 3rd chapter, paragraphs 211-212§.

211§ The prerequisits of confrontation:

(l) Confrontation is only allowed among parties who have previously been heard or questioned, and only if there is a difference between their testimonies regarding significant facts or circumstances.

212.§ The method of confrontation:

(1) The judge, after reading out the parties’ previous testimonies, asks them whether they confirm or wish to amend it and, if necessary, requests them to mutually talk it over.

(2) All questions asked by the judge, the testimonies of the participants and everything else said in the course of confrontation must be registered in the record.

PORTUGAL

In Portugal, confrontation is regulated by the Portuguese Code of Criminal Procedure that came into force on the 17th of February, 1987 (Decreto-lei no.78/87 de 17 de Fevereiro). Paragraph 146§ regulates when and how confrontation may/should be applied during the criminal investigation:

„Confrontation may be applied between the accused, the witnesses, and between the accused and witnesses if, in the given case, there is a significant controversy between the presented versions. Confrontation may only be applied, if at the end of the procedure, it is required to have the contoversion resolved.”

According to investigators of the „Portugal Judiciary Police” most confrontations (more than 95% of them) do not lead to the goals set.

They believe, that only in the judicial phase it is possible to determine which party is truthful if any of them are truthful at all.

In practice, due to its low efficiency, in most cases the police does not apply confrontation, because, in order to determine who is telling the truth, it seems more efficient to gather evidence.

Confrontation is not regarded as a useful method for revealing the true facts and the real story, since in most cases, according to the investigators, for obvious reasons, those affected by the process, have their own interests which they do not wish to reveal.

ROMANIA

Confrontation (*„confruntarea")* in the Romanian Code of Criminal Procedure (1969) – RCPC – is regulated in article 87-88, /"Evidence"/ in the following way:

87§ The subject of confrontation: *If there are controversial facts in the statements of those heard in the same case, if it is necessary to resolve the case, the respective persons are to be confronted.*

88§ The rules of the procedure:

(1) The participants of the confrontation are to be heard regarding all facts and circumstances that their previous statements contradict with.

(2) The judges may allow the parties to ask questions from each other.

(3) *The statements of the confronted parties must be registered in the official records.*

According to the gloss of the Code of Criminal Procedure:

A) In spite of confrontation being located in the chapter "means of evidence", the Romanian concept unanimously concurs regarding its legal nature: confrontation is a special action of procedure, a supplemental means of evidence, and does not aim at gathering evidence. In this aspect, confrontation has similar effects to that of fact-finding or crime scene investigation.

A fundamental principle of the Code is that all hearings of the participants are conducted separately. This means, that confrontation is a rehearing (reinterrogation of reviewing) of the same persons, but at another occasion in other circumstances, for instance: simultaneously.

Only those may be confronted, who have previously been heard as a witness, suspect, accused, victim, expert witness, etc. and only regarding those statements, or partial statements that held relevant controversies.

Due to the inquisitional nature of the Code, only judges have the authority to conduct confrontations both during the investigational phase and the hearing (principally on the first trial). This is the reason why, to ensure a successful confrontation, section (3) of paragraph 88§ makes certain restraints applicable.

Confrontation may be initiated ex officio, or on request from any of the participants (parties), or the prosecutor.

In case confrontation has no result, for example none of those confronted change their previous statements, the judges, if possible, will utilize some other evidence, thus ruling out the contradiction. In extreme cases, the presumption of innocence is applied.

B) Advice on tactics of criminalistics:

Rules:

- Only those who are acquainted may be confronted.

- Confrontation must focus only on the relevant contradictions. If there is more than one in the main facts for instance, it is recommended to have more confrontations.

- It is important, right from the beginning, to have knowledge of the relationship the participants have.

- Confrontation may only be applied after discussing it with the person whose testimony seems to be truthful, and this person consents. The reason of this is that a testimony may be amended voluntarily as well, which, in fact, makes confrontation unnecessary. Furthermore, it is possible that a testimony is not amended, because confrontation posed a threat to one of the participants, compels a withdrawal, or does so in respect or for friendship, etc.

- It is advised to discuss it also with the person whose testimony seems insincere; this may cause him to change his statements. If he does not, confrontation is ordered, without notifying this person. The reason of this is to profit from the element of surprise and to prevent any type of preparation.

- Confrontation as an ultimate possibility for legel remedy can be taken into account in order to sustain the secrecy of the procedure, e.g. at the end of the investigation.

- Confrontation may be applied in the courtroom, or if one of the participants cannot appear there, at this participants' place of residence for example: hospital, prison, etc.

- The legal representatives of the parties' must be present at the confrontation

- At least two judges are required (one conducts, the other supervises it) for the confrontation and only a maximum of two people may be confronted. If more are to be confronted, it is practical to arrange more confrontations on the same day, especially in cases where the same person has to be confronted with more.

- The hearing always begins with questioning the person who is regarded to have testified truthfully. In order to allow him to be accustomed to the atmosphere and to be more confident, this person is lead into the courtroom before the other person is introduced.

- The parties of the confrontation are seated before the judges, in front of each other.

- During the confrontation it is essencially important to observe the reactions of the party whose testimony is regarded insincere, and it is to be taken into consideration if this person tries to obstruct the process by intimidating or influencing others.

What should not be done:

- It is not advisable to confront the victim with the accused.
- It is not advisable to initiate a confrontation if it is foreseeable that it will have no result. For instance, if the accused has knowledge of the lack of evidence, he may easily assume a state of denial. The initiation of confrontation highly depends on what result the discussion, with the person regarded as truthful, was.
- It is not advisable to confront an arrested person with an unarrested one if their appearance or status differs greatly, for example in clothing, personal hygiene etc.
- The process of confrontation may not begin with questions regarding the previous status the participants had in the case.
- The parties may not speak to each other, unless the judges give such permit.

SLOVAKIA

Paragraph 125§ of the Slovakian Code of Criminal Procedure (301/2005) has the provisions regarding confrontation:

(1) If the testimony of the accused differs in important facts from the testimony of a witness or a co-accused and there is no other explanation for the disparity, a face-to-face confrontation of the accused with these persons may be held.

(2) In a face-to-face confrontation, the participants may question each other if the interrogator permits it.

(3) Provisions of section (1) and (2) shall not apply to the agents, protected witnesses and to witnesses whose identity is to be kept confidential.

The fundamental rules of tactics are presented in recommendations on criminalistics.

Prequisites of executing a confrontation, for instance, are:

- Confrontation may only be applied if both participants have previously been heard.
- There are significant contradictions between the preliminary testimonies.
- These controversies cannot be resolved by other means
- Before the confrontation takes place, certain measures must be taken to prevent the parties from meeting each other.

- Immediately after arriving to the place of confrontation, the parties are to be placed in separate rooms, and later, are to be summoned simultaneously. Thus, negotiation of the parties' and the influencing of each other is ruled out.

Tactical recommendations regarding the execution of the confrontation:

- At the beginning of the confrontation, the participants are to be informed of their rights, obligations and duties according to their status in the procedure.

- It also is necessary to inform the parties on the course of confrontation, especially that they only may ask questions if the interrogator permits them to do so.

- They also have to be informed to restrain themselves appropriately from all behaviour that would disturb the process of confrontation, especially verbal or physical assault.

- After informing, the questions should refer to the controversial issues. First, the questions should refer to the relationship the parties have. For instance, if they are acquinted, when and how they got acquinted. It is important whether or not they were acquinted before, or they got so only due to the criminal offence.

- After determining the relationship, may the important questions follow.

- In regards to the previous testimony, the confronted person has not to be requestioned.

- The aim of the confrontation may even be accomplished by simply repeating the major features of one's testimony in the presence of the other party.

- The questions asked from both parties are aimed at resolving the contradictions and the parties may answer these. After dealing with one contradiction, even if resolving it has failed, it is followed by dealing with another one.

- The most important part of confrontation is when the parties, being questioned, answer these. The record of this is regarded as evidence.

The main phase of executing the confrontation is the investigation. During the trial, the recordings is taken into account, however, confrontation may be repeated, or reexecuted at the court.

According to the law enforcements, its efficiency is around 10-15%. In the rest of the cases, the parties uphold their previous statements regardless of the evidence and of the other party's statements. Due to the above, depite its traditions, the institution is regarded to be quite inefficient.

SLOVENIA

In Slovenia confrontation is a technical term for both criminal procedure and criminology

The Slovenian Code of Criminal Procedure (Zakon O Kazenskem Postopku - 1994) has the provisions regarding confrontation as an evidentiary action. The theory of criminology, yet, provides tactical advice on the conduct of confrontation.

The Slovenian textbooks on criminology draft different tactical advice regarding the conduct of confrontation. These are primarily:

- Before the confrontation, there is a short hearing of the witness/accused regarding if they maintain their previous respective testimonies; later they are to be informed that they will be confronted,
- The identity of the person who is to be confronted with a participant of the procedure should not be revealed before the confrontation,
- Confrontation should be by surprise,
- Confrontation should be cautiously prepared: who, when, where; the facts that need to be clarified, the order of the hearing, the method of questioning.
- The accused must first be confronted with the less important witnesses, then with the others, gradually ascending in importance (this puts an increasing pressure on the accused).
- If possible, the opportunity for the accused to communicate with another co-accused should be prevented; some even recommend that the accused persons should not encounter.
- Try to reduce the influence the accused might have on the witness.
- When recording the confrontation, all answers given should be registered word by word; the witnesse/accused should answer in turns; the confrontation should not be spontaneous.

The provisions of confrontation in the Slovenian Code of Criminal Procedure are to be found among the regulations regarding the hearing of the accused and the witnesses. By law, these provisions are in the sphere of judicial examination, however, the very same rules apply to the main interrogations of the investigation, where confrontation is also applicable.

Confrontation, as an act of gathering evidence, is not applicable in the so-called preliminary process, which practically speaking is an informal police investigation. However, since the preliminary process is not formal, there is no obstacle in applying informal confrontation. The result of this may not be considered evidence, however.

In those cases, where judicial investigation is obligatory in the phase preceding the trial, confrontation is usually applied in that phase (as an investigatory action and gathering evidence). This, however, does not rule out the possibility for the judge to repeat the confrontation; on the contrary, the judge has to, since the verdict may only be based upon evidence present at the main hearing/trial. If repeating the confrontation is not possible (for instance,

the witness refuses to testify), the record of the previous confrontation, that was conducted by the investigatory judge, is to be read out on the hearing

Recently no research has been made on the efficiency of confrontation; authors in professional literature emphasise that confrontation is a very important and efficient tool in clarifying the facts of the case. So it seems, that there are no special problems related to this.

The Slovenian law enforrcements, I questioned during my research, did not experience any special reaction related to confrontation. According to them, confrontation is a proofing method that is applied by the courts if it seems necessary; it is regarded as an efficient tool in revealing the true facts. Based on their experience, the judges are able to cautiously observe and evaluate the reactions/behaviour of the witnesses/the accused.

3. The Member States that don't have the institution

ENGLAND-SCOTLAND

Neither the English, nor the Scottish law have any such process. Instead, they have "traditional" methods of investigation and of hearing the witnesses, as in some cases at the meeting of the victim and the accused. But it is nothing similar to Continental confrontation. In the anglo-saxon legal system, the judge does not investigate, unlike for instance in France, where there are investigatory judges.

It may occur sometimes in cases of civil law, but only during arbitration, that the arranging phase is conducted outside of the courtrooms.

The system has provision for hearing of the witnesses, which is called the questioning of the witnesses, or cross-examination. During the hearing of the witness, the examiner links the witness' testimony to the case.

(Note, that due to the previous anglo-saxon legal and historical impact, the legal system of Cyprus does not have the institution either.)

IRELAND

The Irish legal system is a common law system, which is derived from the English legal system, and thus it is an 'adversarial' and not inquisitorial system. The criminal justice system is affected in the sense that this 'adversarial' approach confronts the prosecution viewpoint with the defence viewpoint. The judge does not take part in the investigation, only exception when they issue a search warrant. The judiciary, taking part, may only occur, at the beginning of the procedure.

The „An Garda Siochana" investigates without any judicial order or supervision. The closed investigation is afterwards forwarded to the Director of Public Prosecutions (D.P.P.), who will decide if there is sufficient evidence to bring an action, or not. The D.P.P. is not a member of the judiciary, he/she is independent, whose office is the extention of the Minister of Justice. Only after negotiating with the D.P.P., may the „Garda Siochana" begin the procedure.

At the beginning of the trial, both the defence and the prosecutor cite their own witnesses. All witnesses are cross-examined by the other party, as well. If there is a contradiction or dispute regarding significant facts, evidence, or testimonies, the judge or the jury lead by the judge is to decide the truth to tell which version is true.

In the adversarial criminal procedure, the burden of proof must be beyond any doubt. This means that the defence, by using its witnesses, will try to introduce evidence that would challenge that of the opponent. If the defence brings evidence in their own interest, it must stand on the 'balance of probability', as well. Putting it simply, the defence has to prove that their version is much more likely. Thus the burden of proof is rather heavier on the prosecution, than on the defence.

In the judicial phase the provisions that apply to taking the evidence into account is a mixture of common law and statutory law. The „statute" provisions are located in the „Criminal Evidence Act" of 1992.

4. The main conclusions drawn from the regulations of EU member states

As an answer to the questions, raised at the beginning of my study, I may give the following conclusions.

The relationship of legal systems, based on the anglo-saxon model and those based on continental traditions, with the institution of confrontation differ noticeably. The former does not have this institution, they apply other means to solve the case or to convince the judges/jury. Most of the later ones, however do apply the institution.

It may also be pointed out, that in the continental legal systems, somewhat referring to its importance, the provisions regarding confrontation are placed in the national Codes of Criminal Procedure. The mostly short, regulations, lacking details, are supplemented by detailed recommendations, advices, methods of criminalistics, including tactics and police technologies. This is especially true in the case of those countries where the emphasis is on the investigational phase. Despite, in the majority of the Member States that have the institution, it is applied in both of the two main phases of the procedure: in the investigational one and in the judicial one as a tool of justice that seems to be an established statement.

The efficiency is diverse, however, it may be stated that generally it is quite low. Based on experience: due to its tradition in Central and Eastern Europe law enforcements regard it more important than in Western Europe, however, it should be noted that this leaves no mark on overall modest efficiency. Note, that what foreign law enforcements refer to as weak efficiency ratings (even in absolute numbers, which means 10-15 percent) are similar to, or the same as the Hungarian figures, found during my research.

Despite its modest efficiency, I felt no significant doubt of the institution in any of the above mentioned countries that could put the institution's present existence and practicality or future in doubt. On the other hand, in the countries that do not have the institution, the question regarding the necessity of applying the institution has yet to arise, also there was no will or urge to introduce.