

Procedure and criteria for the acceptance and selection of the volumes.

The manuscripts are selected for publication in the present series having regard to the relevance of the topic, the rigorous scientific methodology, the depth of the analysis, the richness of the bibliography and the originality of the results achieved through the research.

In order to guarantee the highest quality standards, each volume is submitted to peer review and accepted by the scientific committee of the series, which may base its decision on the evaluation carried out by external reviewers according to an anonymous procedure.

The criteria are the following:

- The scientific manuscripts sent to the editor or to the individual directors are submitted for selection to the scientific committee.
- The scientific committee appoints among its members a *rapporteur* and one or more external reviewers, who are distinguished Italian or international scholars selected by the scientific committee. The committee ensures that the identities of the reviewer and the author(s) are not disclosed to each other.
- The reviewer is asked to provide, within a limited time frame, an analytical assessment of the work, paying special attention to the relevance of the topic, the rigorous scientific methodology applied, the depth of the analysis, the richness of the bibliography and the originality of the results achieved through the research. The report of the reviewer concludes with a recommendation on whether the work deserves to be published and, if needed, remarks and suggested modifications and/or insertions. If the topic implies the assessment of specialized issues, technical or exclusive sectorial aspects of the topic, the reviewers may seek advice from scholars having expertise in that specific field.
- On the basis of the reviewers' reports and, where applicable, after the evaluation of a new version of the manuscript resulting from the comments and remarks mentioned above, the scientific committee takes the final decision concerning the publication.

SILVIA ALLEGREZZA, VALENTINA COVOLO (edited by), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies*

GIUSTIZIA PENALE EUROPEA

Diretta da

S. Allegrezza, M. Gialuz, K. Ligeti, L. Lupária, G. Ormazabal, R. Parizot

8

1. MICHELE SIMONATO, *Deposizione della vittima e giustizia penale. Una lettura del sistema italiano alla luce del quadro europeo*. 2014.
2. LUCA LUPÁRIA (a cura di), *Lo statuto europeo delle vittime di reato. Modelli di tutela tra diritto dell'Unione e buone pratiche nazionali*. 2015.
3. LUCA LUPÁRIA (edited by), *Understanding wrongful conviction. The protection of the innocent across Europe and America*. 2015.
4. CELINA NOWAK (edited by), *The European Public Prosecutor's Office and national authorities*. 2016.
5. ANTONIO CAVALIERE - UWE HELLMANN - ALBERTO LUCARELLI - RAPHAËLE PARIZOT, *Les droits fondamentaux à l'épreuve de la prison*. 2018.
6. MITJA GIALUZ, *L'assistenza linguistica nel processo penale. Un meta-diritto fondamentale tra impulsi europei e resistenze italiane*. 2018.
7. KATALIN LIGETI and ANGELO MARLETTA (edited by), *Liability of company directors in a comparative EU criminal justice context*. 2018.
8. SILVIA ALLEGREZZA, VALENTINA COVOLO (edited by), *Effective defence rights in criminal proceedings. A European and comparative study on judicial remedies*. 2018.

EFFECTIVE DEFENCE
RIGHTS IN CRIMINAL
PROCEEDINGS

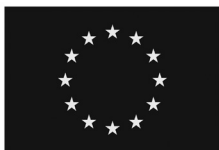
*A European and Comparative Study
on Judicial Remedies*

Edited by
Silvia Allegrezza, Valentina Covolo



Wolters Kluwer

CEDAM



The present publication reflects only the authors' view. The Commission is not responsible for any use that may be made of the information it contains.

The manuscript has been accepted by the scientific editors of the book series and submitted to peer review.

International research project "*Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies*", funded by the European Commission within the Criminal Justice Program (Action grant JUST/2014/JACC/PROC/AG/6583) - HYPERLINK

"<http://www.jurecripro.eu>" www.jurecripro.eu.

RESERVED LITERARY PROPERTY

Copyright 2018 Wolters Kluwer Italia S.r.l.
Via dei Missaglia n. 97 - Edificio B3 - 20142 Milano

The rights of translation, electronic storage, reproduction and total or partial adaptation, by any means (including microfilm and photostatic copies), are reserved for all countries.

Photocopies for personal use of the reader can be made within the limits of 15% of each volume/periodical issue upon payment to SIAE of the consideration provided in art. 68, paragraphs 4 and 5, of Law 22 April 1941 no. 633.

Reproductions other than those indicated above (for use other than personal - such as, without limitation, commercial, economic or professional - and / or beyond the limit of 15%) shall require the previous specific authorization of EDISER Srl, a service company of the Italian Editors Association (*Associazione Italiana Editori*), through the brand CLEARedi Centro Licenze e Autorizzazioni Riproduzioni Editoriali.

Information available at: www.clearedi.org.

The elaboration of texts, even if treated with scrupulous attention, cannot lead to specific responsibilities for any unintentional mistake or inaccuracy.

Printed by GECA s.r.l. - Via Monferrato, 54 - 20098 San Giuliano Milanese (MI)

TABLE OF CONTENTS

INTRODUCTION

Silvia Allegrezza

Pag. XVII

PART I

**FROM THE CHARTER TO THE ABC DIRECTIVES: AN OVERVIEW
OF PROCEDURAL SAFEGAURDS IN THE EUROPEAN UNION**

CHAPTER I

TOWARD A EUROPEAN CONSTITUTIONAL FRAMEWORK FOR
DEFENCE RIGHTS

Silvia Allegrezza

1. European integration and criminal justice: A brief history of a new alliance	»	3
2. Justice for Europe: Criminal law as a tool to protect the EU financial interests	»	7
3. The age of realism: Justice in Europe via police and judicial cooperation	»	12
4. Toward the approximation of criminal law and criminal procedure: The Lisbon Treaty	»	17
5. A European constitutional framework for procedural safeguards: Article 48(2) of the Charter of fundamental rights	»	25
6. Disentangling the content of Article 48(2) of the Charter: The link with the ECHR.....	»	31

CHAPTER II

THE ABC'S OF THE INTERPRETATION AND TRANSLATION
DIRECTIVE

Lawrence Siry

1. Introduction.....	»	35
----------------------	---	----

2.	Translation and Interpretation at the European Court of Human Rights.....	»	36
3.	The rights of suspects and accused persons under Directive 2010/64/EU.....	»	38
3.1.	<i>Defence rights to foster mutual trust</i>	»	38
3.2.	<i>The substance of the rights to interpretation and translation</i>	»	39
4.	First challenges and answers by the CJEU for the implementation of the EU Directive.....	»	42
4.1.	<i>The preliminary ruling in Covaci</i>	»	42
4.2.	<i>Right to translation or procedural obstacle to mutual recognition? The case in Balogh</i>	»	45
4.3.	<i>The scope of the right to translation in Sleutjes</i>	»	46
5.	Conclusions.....	»	48

CHAPTER III

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION
IN CRIMINAL PROCEEDINGS*Silvia Allegrezza and Valentina Covolo*

1.	The genesis of Directive 2012/13/EU.....	»	51
2.	The right to information about rights.....	»	53
3.	The right to be informed about the charges.....	»	55
4.	The right of access to the case file.....	»	59
5.	Recording procedure and legal remedies.....	»	61
5.	Conclusions.....	»	62

CHAPTER IV

THE RIGHT OF ACCESS TO A LAWYER
UNDER DIRECTIVE 2013/48/EU*Teresa Armenta Deu and Lisa Urban*

1.	Introduction.....	»	65
2.	Scope of application.....	»	68
3.	The content of the right to legal assistance.....	»	71
3.1.	<i>Access and communication with a defence lawyer</i> ...	»	72
3.2.	<i>The role of the defence counsel: from attendance to effective participation</i>	»	73
3.3.	<i>Legal assistance and EAW</i>	»	75
4.	Waiver and limitations.....	»	75
5.	Conclusions.....	»	78

PART II
EFFECTIVE REMEDIES FOR EFFECTIVE RIGHTS
IN THE EUROPEAN CRIMINAL JUSTICE AREA

CHAPTER I

ENSURING THE EFFECTIVENESS OF DEFENCE RIGHTS: REMEDIAL
OBLIGATIONS UNDER THE ABC DIRECTIVES

Valentina Covolo

1.	Effective judicial protection <i>versus</i> national procedural autonomy	»	83
2.	General obligation to provide an effective remedy	»	86
3.	Right to challenge in accordance with procedures in national law	»	87
4.	Restrictions on defence rights by judicial authorities or subject to judicial review	»	90
	4.1. <i>The concept of judicial authority</i>	»	90
	4.2. <i>The timing of review</i>	»	92
5.	Right to a new trial	»	94
6.	Conclusions	»	95

CHAPTER II

JUDICIAL REVIEW AS A FUNDAMENTAL RIGHT:
ARTICLE 47 OF THE CHARTER

Silvia Allegrezza

1.	The autonomous and multilayered meaning of right to an effective remedy under EU law	»	97
2.	Scope of application	»	100
	2.1. <i>Judicial protection of rights conferred by Union law</i>	»	100
	2.2. <i>Only when the Member States are implementing Union law</i>	»	102
	2.2.1. <i>National rules enacting EU instruments of police and judicial cooperation in criminal matters</i>	»	103
	2.2.2. <i>National criminal law performing Member States' obligations set out by EU law</i>	»	107
3.	Institutional and procedural requirements inherent to the structure of judicial review	»	109
	3.1. <i>Right to access a tribunal previously established by law</i>	»	109
	3.2. <i>Independence and impartiality of the reviewing body</i>	»	112

3.3.	<i>Procedural fairness</i>	»	114
3.3.1.	<i>Equality of arms and adversarial proceedings</i>	»	114
3.3.2.	<i>Specific procedural safeguards</i>	»	117
3.4.	<i>Time requirements</i>	»	120
4.	Requirements related to the function of judicial scrutiny: scope and powers of review.....	»	123
4.1.	<i>Full judicial review</i>	»	123
4.2.	<i>Evidence gathered in breach of individual rights</i>	»	125
4.3.	<i>Duty to state reasons</i>	»	127
4.4.	<i>Powers of review</i>	»	128
5.	Limitations on the right to access a court.....	»	129
6.	Conclusions.....	»	131

CHAPTER III

GUARANTEES OF JUDICIAL PROTECTION UNDER THE ECHR:
WHAT INTERACTIONS WITH EU LAW?

Valentina Covolo

1.	Reconciling autonomy and consistency.....	»	133
2.	Mapping guarantees of judicial review under the Convention.....	»	137
2.1.	<i>Right to an effective remedy and access to court</i>	»	138
2.2.	<i>Habeas corpus and right to a fair trial</i>	»	139
2.3.	<i>Right to appeal and fair trial guarantees</i>	»	142
2.4.	<i>Judicial review of investigative measures</i>	»	143
3.	Defence rights and judicial review.....	»	145
3.1.	<i>A two-way path</i>	»	145
3.2.	<i>To counterbalance or not to counterbalance?</i>	»	147
4.	Implementing ECHR guarantees in the field of Union law.....	»	150
4.1.	<i>Preliminary rulings and duty to state reasons</i>	»	151
4.2.	<i>Habeas corpus and fair trial rights in the execution of a EAW</i>	»	154
5.	Conclusions.....	»	157

CHAPTER IV

JUDICIAL REVIEW FOR THE PROTECTION OF DEFENCE RIGHTS
IN INTERNATIONAL CRIMINAL JUSTICE:
THE ICC AS A CASE STUDY

Anna Mosna

1.	Introductory remarks.....	»	161
2.	The right to appeal in front of the ICC.....	»	165

2.1.	<i>Judicial review of final decisions</i>	»	165
2.1.1.	<i>Procedural error</i>	»	166
2.1.2.	<i>Error of law</i>	»	167
2.1.3.	<i>Any other ground that affects the fairness or reliability of the proceedings or the decision</i>	»	168
2.1.4.	<i>Procedural aspects relating to appeals against final decisions</i>	»	169
2.2.	<i>Judicial review of interim decisions</i>	»	170
2.2.1.	<i>Interlocutory appeal, as of right, of a decision with respect to jurisdiction or admissibility</i>	»	171
2.2.2.	<i>Interlocutory appeal, as of right, of a decision granting or denying release</i>	»	173
2.2.3.	<i>Interlocutory appeal, with leave of the court, pursuant to Article 82(1)(d) ICCSt</i>	»	173
2.2.4.	<i>Procedural aspects of interlocutory appeals</i>	»	177
3.	<i>Concluding remarks</i>	»	179

CHAPTER V

MUTUAL RECOGNITION AND ABSOLUTE STANDARDS
OF EFFECTIVE JUDICIAL PROTECTION*Valentina Covolo*

1.	The European Arrest Warrant as a case study	»	183
2.	Presumption of equivalent and effective protection of fundamental rights	»	185
3.	An exceptional ground for postponement: real risks of inhuman and degrading treatment	»	187
4.	Real risks to breach the essence of the right to a fair trial, a further restriction on the duty to execute a EAW	»	190
5.	Judicial review in implementing grounds for non-execution	»	194
6.	Balancing effectiveness of mutual recognition instruments with the right to an effective remedy and fair trial	»	197
6.1.	<i>Constitutional guarantees of judicial review impairing the primacy and effectiveness of Union law</i>	»	197
6.2.	<i>National margin of discretion</i>	»	199
7.	Conclusions	»	201

PART III

DEFENDING THE RIGHTS OF SUSPECTS AND ACCUSED
PERSONS IN FRONT OF NATIONAL CRIMINAL COURTS

CHAPTER I

BELGIUM

Michele Panzavolta

1.	Constitutional guarantees.....	»	205
2.	Investigative measures subject to prior judicial authorization	»	207
	2.1. <i>Competent judicial authorities</i>	»	207
	2.2. <i>Scope of review</i>	»	208
	2.3. <i>Exceptions</i>	»	210
	2.4. <i>Remedies available to the defendant</i>	»	211
3.	Deprivation of liberty: Arrest and pre-trial custodial measures.....	»	212
	3.1. <i>Information about available remedies</i>	»	212
	3.2. <i>Arrest, habeas corpus and judicial review</i>	»	213
	3.3. <i>Detention pending trial</i>	»	216
	3.4. <i>Arrest and detention order for questioning</i>	»	219
4.	Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings.....	»	219
	4.1. <i>Restrictions on the right to access the case file</i>	»	219
	4.2. <i>Derogations on the right to access a lawyer</i>	»	224
	4.3. <i>Decisions finding that there is no need for interpretation</i>	»	233
	4.4. <i>Decisions finding that there is no need for translation</i>	»	237
	4.5. <i>Violations of the right to information</i>	»	239
5.	Sanctions against illegal or improperly obtained evidence...	»	240
	5.1. <i>Infringements to the right of access the case file</i>	»	243
	5.2. <i>Statements obtained in breach of the right to access a lawyer</i>	»	243
	5.3. <i>Breaches of the right to translation and interpretation</i>	»	244
	5.4. <i>Failure to provide information about rights and about accusation</i>	»	244
6.	Appeals against conviction and sentence.....	»	245
7.	Appeals in cassation.....	»	248
8.	Access to the Constitutional Court.....	»	250
9.	EAW and judicial review.....	»	252
	9.1. <i>Competent judicial authorities</i>	»	252
	9.2. <i>Judicial review by the Belgian executing authorities</i>	»	253

CHAPTER II

FRANCE

*Raphaële Parizot, Bernadette Aubert, Jérôme Bossan,
Christophe Poirier, Jérémy Bourgeois*

1.	Constitutional guarantees	»	255
2.	Investigative measures subject to prior judicial authorization	»	257
2.1.	<i>Competent authorities and scope of review</i>	»	257
2.2.	<i>Remedies available to the defendant</i>	»	258
3.	Deprivation of liberty: Arrest and pre-trial custodial measures	»	259
3.1.	<i>Information about available remedies</i>	»	259
3.2.	<i>Arrest, habeas corpus and judicial review</i>	»	260
3.3.	<i>Detention pending trial</i>	»	262
3.4.	<i>Arrest and detention order for questioning</i>	»	265
4.	Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings	»	266
4.1.	<i>Restrictions on the right to access the case file</i>	»	266
4.2.	<i>Derogations on the right to access a lawyer</i>	»	271
4.3.	<i>Decisions finding that there is no need for interpretation</i>	»	278
4.4.	<i>Decisions finding that there is no need for translation</i>	»	280
4.5.	<i>Violations of the right to information</i>	»	281
5.	Sanctions against illegal or improperly obtained evidence	»	283
5.1.	<i>Infringements to the right of access the case file</i>	»	284
5.2.	<i>Statements obtained in breach of the right to access a lawyer</i>	»	285
5.3.	<i>Breaches of the right to translation and interpretation</i>	»	285
5.4.	<i>Failure to provide information about rights and about accusation</i>	»	286
6.	Appeals against conviction and sentence	»	287
7.	Appeals in cassation	»	288
8.	Access to Constitutional Courts	»	289
9.	EAW and judicial review	»	291
9.1.	<i>Competent judicial authorities</i>	»	291
9.2.	<i>Judicial review by the French executing authorities</i> ..	»	291

CHAPTER III

GERMANY

Marco Mansdörfer, Christian Schmitt

1.	Constitutional guarantees	»	295
2.	Investigative measures subject to prior judicial authorization	»	297

2.1.	<i>Competent judicial authorities and scope of review...</i>	»	297
2.2.	<i>Exceptions for urgent cases</i>	»	299
2.3.	<i>Remedies available to the defendant</i>	»	299
3.	Deprivation of liberty: Arrest and pre-trial custodial measures	»	301
3.1.	<i>Information about available remedies</i>	»	301
3.2.	<i>Remand detention and provisional arrest</i>	»	302
3.3.	<i>Review of detention and complaints</i>	»	304
3.4.	<i>Defence rights and effective judicial review</i>	»	306
3.5.	<i>Arrest and detention for questioning</i>	»	308
4.	Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings	»	309
4.1.	<i>Restrictions on the right to access the case file</i>	»	309
4.2.	<i>Derogations on the right to access a lawyer</i>	»	311
4.3.	<i>Decisions finding that there is no need for interpretation</i>	»	314
4.4.	<i>Decisions finding that there is no need for translation</i>	»	316
4.5.	<i>Violations of the right to information</i>	»	318
5.	Sanctions against illegal or improperly obtained evidence... ..	»	319
5.1.	<i>Infringements of the right to access the case file</i>	»	320
5.2.	<i>Statements obtained in breach of the right to access a lawyer</i>	»	320
5.3.	<i>Breaches of the right to translation and interpretation</i>	»	321
5.4.	<i>Failure to provide information about rights and about accusation</i>	»	322
6.	Appeals on facts and law	»	322
7.	Appeals limited on errors of law	»	323
8.	Access to the Constitutional Court	»	325
9.	Judicial review and the EAW	»	326
9.1.	<i>Competent judicial authorities</i>	»	326
9.2.	<i>Judicial review by the German executing authorities</i>	»	326

CHAPTER IV

LUXEMBOURG

Valentina Covolo

1.	Constitutional guarantees	»	329
2.	Investigative measures subject to prior judicial authorization	»	331
2.1.	<i>Competent judicial authorities</i>	»	331
2.2.	<i>Scope of review</i>	»	333
2.3.	<i>Exceptions for urgent cases</i>	»	334
2.4.	<i>Remedies available to the defendant</i>	»	335
3.	Deprivation of liberty: Arrest and pre-trial custodial measures	»	338

3.1.	<i>Information about available remedies</i>	»	338
3.2.	<i>Arrest, habeas corpus and judicial review</i>	»	339
3.3.	<i>Detention pending trial</i>	»	342
3.4.	<i>Arrest and detention order for questioning</i>	»	348
4.	Specific remedies for alleged breaches of defence rights ...	»	350
4.1.	<i>Restrictions on the right to access the case file</i>	»	350
4.2.	<i>Derogations on the right to access a lawyer</i>	»	353
4.3.	<i>Decisions finding that there is no need for interpretation</i>	»	357
4.4.	<i>Decisions finding that there is no need for translation</i>	»	360
4.5.	<i>Violations of the right to information about the accusation</i>	»	363
5.	Sanctions against illegal or improperly obtained evidence .	»	365
5.1.	<i>Infringements of the right to access the case file</i>	»	367
5.2.	<i>Statements obtained in breach of the right to access a lawyer</i>	»	368
5.3.	<i>Breaches of the right to translation and interpretation</i>	»	369
5.4.	<i>Failure to provide information about rights and about accusation</i>	»	369
6.	Appeals against conviction and sentence	»	369
7.	Appeals in cassation	»	373
8.	Access to the Constitutional Court	»	375
9.	Judicial review and the EAW	»	376
9.1.	<i>Competent judicial authorities</i>	»	376
9.2.	<i>Defence rights in the execution of a EAW</i>	»	376
9.3.	<i>Judicial review and grounds for refusal</i>	»	379

CHAPTER V

POLAND

Maciej Fingas, Sławomir Steinborn, Krzysztof Woźniowski

1.	Constitutional guarantees	»	381
2.	Investigative measures subject to prior judicial authorization	»	384
2.1.	<i>Investigative acts authorized by a court</i>	»	384
2.2.	<i>Scope of review</i>	»	386
2.3.	<i>Exceptions for urgent cases</i>	»	386
2.4.	<i>Remedies available to the defendant</i>	»	386
3.	Deprivation of liberty: Arrest and pre-trial custodial measures	»	387
3.1.	<i>Information about available remedies</i>	»	387
3.2.	<i>Arrest, habeas corpus and judicial review</i>	»	387
3.3.	<i>Detention pending trial</i>	»	390
3.3.1.	<i>Competent authorities and procedural requirements</i>	»	390

3.3.2.	<i>Judicial scrutiny upon request and ex officio</i>	»	392
3.3.3.	<i>Defence rights and effective judicial review</i>	»	394
3.4.	<i>Arrest and detention order for questioning</i>	»	397
4.	Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings	»	399
4.1.	<i>Restrictions on the right to access the case file</i>	»	399
4.2.	<i>Derogations on the right to access a lawyer</i>	»	402
4.3.	<i>Decisions finding that there is no need for interpretation</i>	»	406
4.4.	<i>Decisions finding that there is no need for translation</i>	»	408
4.5.	<i>Violations of the right to information</i>	»	409
5.	Sanctions against illegal or improperly obtained evidence	»	411
5.1.	<i>Infringements of the right to access the case file</i>	»	412
5.2.	<i>Statements obtained in breach of the right to access a lawyer</i>	»	413
5.3.	<i>Breaches of the right to translation and interpretation</i>	»	413
5.4.	<i>Failure to provide information about rights and about accusation</i>	»	414
6.	Appeals against conviction and sentence	»	415
7.	Judicial review by Courts of Higher instance	»	419
8.	Access to the Constitutional Court	»	424
9.	Judicial review and the EAW	»	425
9.1.	<i>Competent judicial authorities</i>	»	425
9.2.	<i>Defence rights in the execution of a EAW</i>	»	425
9.3.	<i>Judicial review and grounds for refusal</i>	»	427

CHAPTER VI

SPAIN

Teresa Armenta, Susanna Oromí, Silvia Pereira, Fernando Alday

1.	Constitutional guarantees	»	431
2.	Investigative measures subject to prior judicial authorization	»	433
2.1.	<i>Competent judicial authorities</i>	»	433
2.2.	<i>Scope of review</i>	»	433
2.3.	<i>Exceptions for urgent cases</i>	»	434
2.4.	<i>Remedies available to the defendant</i>	»	435
3.	Deprivation of liberty: arrest and pre-trial custodial measures	»	436
3.1.	<i>Information about rights and reasons for arrest</i>	»	436
3.2.	<i>Arrest, habeas corpus and judicial review</i>	»	436
3.3.	<i>Detention pending trial</i>	»	438
3.4.	<i>Arrest and detention order for questioning</i>	»	440
4.	Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings	»	440

4.1. Restrictions on the right to access the case file	»	440
4.2. Derogations on the right to access a lawyer.....	»	443
4.3. Decisions finding that there is no need for interpretation	»	446
4.4. Decisions finding that there is no need for translation	»	450
4.5. Violations of the right to information	»	451
5. Sanctions against illegal or improperly obtained evidence...	»	453
6. Appeals before second instance courts	»	455
7. Appeals limited on errors of law	»	457
8. Access to the Constitutional Court	»	460
9. Judicial review and the EAW	»	460
9.1. Competent judicial authorities	»	460
9.2. Defence rights in the execution of a EAW.....		461
9.3. Judicial review and grounds for refusal	»	462

PART IV

FROM RIGHTS TO REMEDIES: A COMPARATIVE OVERVIEW

CHAPTER I

NATIONAL REMEDIES AGAINST BREACHES OF THE RIGHT TO TRANSLATION AND INTERPRETATION

Christian Schmitt

1. Introductory remarks	»	467
2. Right to interpretation	»	468
2.1. The reference to 'procedures in national law'.....	»	468
2.2. Judicial review in the pre-trial or trial stage of criminal proceedings.....	»	468
2.3. Reasons for divergences.....	»	470
3. Right to translation	»	473

CHAPTER II

RIGHT TO INFORMATION AND REMEDIAL OBLIGATIONS: A COMPARATIVE ANALYSIS OF NATIONAL REMEDIES

Slawomir Steinborn

1. Introductory remarks	»	475
2. Remedies against breaches of the right to access to case file	»	477
2.1. Variety of remedies under national laws	»	477
2.2. The timing of review, a key issue	»	479
3. Remedies against violations of the right to information about rights and accusation.....	»	482
4. Conclusions.....	»	485

CHAPTER III

JUDICIAL PROTECTION OF THE RIGHT TO ACCESS A LAWYER
IN THE MEMBER STATES*Valentina Covolo*

1.	Remedial obligations under Directive 2013/48/EU	»	487
2.	Decisions authorizing temporary derogations on the right to access a lawyer	»	489
	2.1. <i>Judicial authorization or ex-post judicial review</i>	»	489
	2.2. <i>Grounds for derogation</i>	»	491
3.	Incriminating statements obtained in breach of the right to legal assistance	»	493
	3.1. <i>Nullities and exclusionary rules</i>	»	493
	3.2. <i>A wide spectrum of sanctions</i>	»	495

CONCLUSIONS

Silvia Allegrezza and Valentina Covolo

1.	Reconciling EU and national approaches toward the effective protection of defence rights	»	499
2.	Mapping the great complexity of judicial remedies	»	501
3.	A European blueprint of the right to judicial review in criminal proceedings	»	502
	3.1. <i>Requirements related to the structure of judicial review</i>	»	503
	3.1.1. <i>Independence and impartiality of the review- ing authority</i>	»	503
	3.1.2. <i>Time requirements</i>	»	504
	3.1.3. <i>Procedural fairness</i>	»	505
	3.2. <i>Requirements related to the functions of judicial review</i>	»	506
	3.2.1. <i>Scope of review</i>	»	506
	3.2.2. <i>Powers of review</i>	»	507
4.	Enhancing the effectiveness of EU defence rights by means of guarantees, remedies and sanctions	»	507
5.	Further actions and challenges ahead	»	508
	5.1. <i>National level</i>	»	508
	5.2. <i>EU level</i>	»	510

INTRODUCTION

Silvia Allegrezza

This book aims to cast light on the effectiveness of defence rights in criminal proceedings and on their justiciability in the European criminal justice area. In particular, its main objective is to assess the existence and the efficiency of judicial remedies that ensure the respect of those rights in the light of the first three ‘Stockholm road map’ Directives, the so-called ABC Directives.¹

This ambitious goal represented the very heart of a research project financed by the EU Commission in 2015.² The study intended to map the European dimension of judicial remedies in case of breach of defence rights in six selected Member States (Belgium, France, Germany, Luxembourg, Poland, and Spain). It finally aimed to develop a European blueprint for the right to judicial review such as protected by the Charter of Fundamental Rights and the European Convention on Human Rights. The research was led by the University of Luxembourg and saw the priceless participation of excellent scholars of five other universities representing the different selected countries (University of Leuven, University of Poitiers, University of Gerona, University of Saarbrücken, and University of Gdansk).

¹ The formula ‘ABC Directives’ makes reference to the Roadmap approved in Stockholm on 30 November 2009 according to which the Commission ‘Work Plan’ urged the adoption of measures related to the following rights:

- Measure A: Translating and interpreting
 - Measure B: Informing of rights and charges
 - Measure C: Free legal advice and justice
 - Measure D: Communication with relatives, employers and consulate authorities,
- and

- Measure E: Special safeguards for vulnerable suspects or accused persons.

² Action Grant ‘Effective defence rights in criminal proceedings: a European and comparative study on judicial remedies’ (JUST/2014/JACC/AC/PROC/6583). More information about the research project is available at <www.jurecripro.eu>.

This project was designed explicitly as an integrate and comparative research programme. In many respects, it resembles an in-depth analysis of the European and national legal frameworks together with a wider supranational reflection on basic features of criminal justice. The analysis methodology was twofold: on the one hand, we looked into national implementation of European Directives with the aim to assess the completeness and correctness of the national legislative process. On the other hand, we observed the effectiveness of defence rights in its operational dimension, ie how the law in the books was translated into concrete guarantees for the individuals.

In that, it was intended to identify and describe which are the existing convergences among national systems and, conversely, which points of conflicts were emerging and acting as obstacles for the effectiveness of defence rights. Among those variables, a special place is given to the right to an effective legal remedy at the disposal of the defendant in case of a breach of a procedural safeguard. However, the research team soon realized that before analysing the single Directives, some basic concepts would have been in need of clarification. In particular, the meaning and scope of concepts such as ‘judicial review’ or ‘judicial control’ or ‘judicial authority’ tend to vary enormously. These differences are relevant for the assessment on the effectiveness.

In order to offer a complete overview, together with the contributions strictly related to the project, this book indeed offers to the reader an ample perspective of crucial topics such as the concept of judicial authority and judicial control, legal remedies. They are examined in a European and international dimension, including an overview on the ECHR case law and on international criminal law.

The defence rights in criminal proceedings have recently gained a central role in the European debate on criminal justice. Several reasons lie behind this long journey over troubled waters. In the not so distant past, the primary interest of the European Union action in this area was to promote security via criminal law harmonising the existing crimes or introducing new enforcement tools, first and foremost the European arrest warrant, via Framework Decisions, Directives or Conventions. All of them aiming at strengthening the punitive response to criminal activities against the Union or the Member States.

Furthermore, Member States have always been reluctant to harmonise procedural safeguards in criminal law. Neglected and rather ignored for several years, they have been later at the heart of a

harsh debate among the Council that brought to the failure of the proposal for a framework decision presented by the Commission in 2004.³ Several reasons led to this failure. First and foremost, the sceptical approach of the Member States toward a possible harmonisation of procedural guarantees. Criminal justice lies indeed at the very heart of the State action, being criminal punishment traditionally linked to the State sovereignty. Secondly, criminal justice systems differ technically and theoretically. Thirdly, a certain reluctance to submit national rules on criminal justice to the control of the Court of Justice emerged clearly from the declarations submitted according to ex-Article 35 of the Treaty on European Union (TEU) as amended by the Treaty of Amsterdam.⁴ Those days are now firmly gone. Human rights in general, and procedural safeguards in criminal proceedings in particular, receive a strong and rooted protection at the European level, sometimes more intense than what they seem to receive from national governments.

Procedural safeguards in criminal justice have proliferated in different forms within the European legal order. First and foremost, thanks to the daily work of the European Court of Human Rights (ECtHR), shaping and strengthening the rights provided by the Convention of 1950. A complex system of protection based on the unprecedented power for the individuals to hold the States responsible for the breaches of human rights. On that basis, the European Union built up an autonomous system in which procedural safeguards in criminal matters are strongly protected by several provisions of the Charter of Fundamental Rights of the European Union (CFR), now equated to the Treaties as for its legal value. Several provisions contribute in shaping a constitutional framework for criminal justice: Article 47 CFR on the right to an effective remedy and to a fair trial, Article 49 with a reference to the need to respect the legality principle or Article 50 on the *ne bis in idem* principle. Of utmost importance for our topic is Article 48 on the presumption of innocence and in particular its

³ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004)328.

⁴ According to Article 35 TEU, as amended by the Treaty of Amsterdam (ex Art. K.7), the jurisdiction of the Court of Justice to give preliminary rulings in criminal matters was subject to a formal declaration by the single Member State to accept such jurisdiction. Up to March 2008, only 17 Member States had made such declaration, see <https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/art35_2008-09-25_17-37-4_434.pdf>.

paragraph 2, paving the way for a constitutional basis of defence rights within the European legal order.⁵

Once the European competence to legislate in the field of procedural safeguards was inserted in Article 82 of the Treaty on the Functioning of the European Union (TFUE), the adoption of the Roadmap Directives was made possible. In less than six years, all the measures decided in Stockholm were approved. These texts represent only the first but extremely meaningful steps in highlighting a radical change in perspective. The clear orientation of EU policies in the sense of a stronger securitisation via criminal law has not been abandoned but it is now combined, even though not entirely matched, with a stronger attention to procedural safeguards.

Nevertheless, the texts of the Directives that were finally approved show immediately a common weakness. The EU legislation is very poor in describing the way national laws should guarantee the effectiveness of these procedural safeguards. The single provisions state in very general terms the right for the defendant ‘to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information’⁶ or to challenge ‘a decision finding that there is no need for the translation of documents’ or ‘the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings’.⁷ Only the Directive on the right to a lawyer offers something more, providing that ‘Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive’.⁸ The draft proposal was more valiant, suggesting that an exclusionary rule should ban any

⁵ See S Peers, T Harvey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing, 2014) 1309-1349; R. Mastroianni, O Pollicino, S Allegrezza, F Pappalardo, O Razzolini (eds), *Carta dei diritti fondamentali dell’Unione Europea* (Giuffrè Editore, 2017) 934-971; M Holoubek, G. Lienbacher (eds), *GRC Kommentar* (Manz Verlag, 2014).

⁶ Art. 8(2) Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2010] OJ L142/1.

⁷ Art. 3(5) Directive 2010/64/EU on the right to interpretation and translation [2010] OJ L280/1.

⁸ Art. 12(1) Directive 2013/48/EU of 22 October 2013 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 [2013] OJ L294/1. An almost identical provision lies in Art. 10(1) Directive 2016/343/EU of 9

evidentiary result obtained in violation of the right to access to a lawyer. But reluctance toward harmonisation of evidence law and the hustles in finding an agreement diluted this provision into a pilatesque one: ‘Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected’.⁹ A similar provision related to in the assessment of statements made and evidence obtained in breach of the right to remain silent or the right not to incriminate oneself can be found in the 2016 Directive on the strengthening of certain aspects of the presumption of innocence.¹⁰

The *leit motiv* of the European Directives is nevertheless the referral to national systems: the European legislator imposes to the Member States to provide for the possibility to challenge the breach of those rights but leaves to the national legislators the possibility to shape those remedies ‘in accordance with procedure in national law’. No specific reference is offered as to whether judicial control and potentially a procedural sanction should intervene in order to ‘protect’ the defence right and make it effective. Procedural autonomy is thus the tool for the national systems to adapt their rules to the European duties. But what reforms were adopted at national level in order to compel with the European Directives? Did the Member States change their rules on procedural remedies? And how? Are those remedies efficient in order to grant the effectiveness of European procedural safeguards? And last but not least, what is the role of the Court of Justice in assessing the adequacy of national judicial remedies?

These questions lie at the very heart of this book and guided the research team all along the two years. It intends also to fill a gap in the existing literature, which mostly deals with procedural safeguards and focalises exclusively on the content of the Directives, describing the harmonisation required for the different procedural safeguards. The topic of effectiveness was thus poorly treated and definitely not exhaustively analysed.

This book is divided into four different but consequential parts that

March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

⁹ Art. 12(2) Directive 2013/48/EU on the right to access a lawyer.

¹⁰ Art. 10(2) Directive 2016/343/EU on the presumption of innocence.

are intended to complement each other offering a comprehensive picture on the effectiveness of defence rights and judicial protection both at European and internal level. The first part will present the European Constitutional framework of the rights of suspects and defendants in criminal proceedings. A description of the relevant provisions of the EU Charter of fundamental rights, their origin and their relationship with the ECHR will be followed by the analysis of the so-called ABC Directives on which this book will focus: the Directive 2010/64/EU on the right to interpretation; the Directive 2012/13/EU on the right to information and the 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. The choice to limit the analysis to these three Directives is due to the fact that only for them national legislation and accordingly case law of national courts are sufficiently developed. The Directives more recently approved did not receive enough attention from the national legislators at the time of our research.

The second part of the book will set the scene on judicial remedies and discusses the concept, nature and scope of the right to an effective judicial protection. It aims to identify common standards and differences of this right analysing the meaningful case law of the Court of Justice of the European Union, the European Court of Human Rights and the International Criminal Court. These essays do not compose a fragmented puzzle but rather offer different perspectives of the same core problem: is there a convergence at European and international level on what is to be intended as ‘effective judicial protection’? This section also addresses critical issues rising from the need of effectiveness of defence rights and judicial review with regard to vertical and horizontal cooperation instruments in criminal matters, with a specific focus on the European arrest warrant.

The third part of the book will provide a detailed analysis of six selected criminal national systems. In particular, each chapter will focus on one national system checking the impact of the ABC Directives implementation and how this transposition reshaped the effectiveness of defence rights. Specific attention is given to the national system of judicial remedies and its effectiveness in offering a concrete protection for the defendant in case of a breach of procedural safeguards. In this light, this part of the book devotes itself to explain differences in national laws and practices in the selected jurisdictions of Belgium, France, Germany, Luxembourg, Poland and Spain.

The last part offers three comparative transversal studies elaborated

by the members of the research group on the basis of the national reports. These essays are focusing on crucial issues related to the effectiveness of judicial protection of the ABC Directives and thereby highlight commonalities and divergences in the structure of national criminal justice systems throughout Europe.

A final conclusive analysis indicates a potential blueprint for shaping the right to an effective judicial remedy at the European level. Conditions and variables of a continental approach to this highly technical topic will be described in the light of the comparative and transversal studies.

This book and the entire research is the fruit of a collective effort. Words of thanks go to all those who contributed to the success of this research, participating in workshops and in the final conference, held in Luxembourg in September 2017. First and foremost, we are extremely grateful to our colleagues of partner universities for their valuable contributions to the research. The national *rapporteurs* of the different research teams brought to the project a much-needed depth of understanding of national criminal justice systems.

PART I

**FROM THE CHARTER TO THE ABC DIRECTIVES:
AN OVERVIEW OF PROCEDURAL SAFEGAURDS
IN THE EUROPEAN UNION**

CHAPTER I

TOWARD A EUROPEAN CONSTITUTIONAL FRAMEWORK FOR DEFENCE RIGHTS

Silvia Allegrezza

TABLE OF CONTENTS: 1. European integration and criminal justice: A brief history of a new alliance. – 2. Justice *for* Europe: Criminal law as a tool to protect the EU financial interests. – 3. The age of realism: Justice *in* Europe via police and judicial cooperation. – 4. Toward the approximation of criminal law and criminal procedure: The Lisbon Treaty. – 5. A European Constitutional framework for procedural safeguards: Article 48(2) of the Charter of fundamental rights. – 6. Disentangling the content of Article 48(2) of the Charter: The link with the ECHR.

1. European integration and criminal justice: A brief history of a new alliance

The impact of EU law on criminal law and criminal procedure is a quite recent phenomenon. Criminal justice is a field in which external influences are traditionally unwelcome. Neglected and ignored for a long time, criminal justice lies currently at the very heart of the European Union policies. Despite all the efforts of the Member States to protect their sovereignty and maintain exclusive competence on criminalization and prosecution of crimes, the EU finally succeeded in abandoning the awkward cross-pillar character and gaining the power to legislate in this field. European criminal justice today is a work in progress, probably one of the areas in which the EU is more active.

For decades, the European integration process has followed other tracks, leaving criminal law and the related procedural rules undisturbed. Reasons are several. Firstly, of normative nature: the lack of an explicit EU competence in criminal matters, at least in the original

Treaties,¹ has precluded the adoption of specific legislative initiatives/proposals at EU level. Cultural differences, mutual distrust, divergent legal traditions did the rest. The awareness of the distance separating the several national frameworks, the result of thousand-year old traditions, led many to dismiss the possibility of a common criminal justice. The cultural background of criminal lawyers and the autarchic mould of criminal law and procedure have strengthened its resistance to change.²

It is out of our mandate to offer a complete historical detour on the development of European criminal justice,³ but it is nevertheless important to understand how the EU has shaped its current legal framework in this field. To this aim, we will sketch the main steps of this recent but complex history, highlighting the role of the different actors, the rationales behind certain proposals and the reasons of political opponents that thwarted them. We will concentrate on those European legal acts and case-law that are composing a 'European criminal procedure, with a specific focus on the constitutional framework for defence rights in criminal justice.

For a long time, the strongest influences on criminal procedure have come from the other Europe, the large one of the Council of Europe. The adoption of its fundamental text, the European Convention on Human Rights (ECHR) and its subsequent Protocols, marked a major milestone in the path towards a progressive harmonisation of the different national systems. But first and foremost, for the first time in

¹ The reference goes to the European Treaties previous to the Lisbon Treaty. A limited competence in the area of justice and home affairs was introduced by the Treaty of Maastricht in 1992 in the so-called third pillar, replaced by the area of freedom, security and justice by the Treaty of Amsterdam in 1997.

² In this sense A Bernardi, *L'europeizzazione del diritto e della scienza penale* (Giappichelli, 2004) 1 ff. In his view, 'it is not surprising that criminal law and criminal lawyers have proved to be, respectively, the area and the category of lawyers more reluctant to accept the primacy and the direct applicability of european law and its impact on the national legal framework'.

³ JHA Vervaele, *European Criminal Justice in post-Lisbon area of Freedom, security and justice* (ESI, 2014); E Herlin-Karnell, *The Constitutional dimension of European Criminal Law* (Hart, 2012) 3 ff; A Klip, *European Criminal Law* (Intersentia, 2016) 15 ff; V Mitsilegas, *EU Criminal Law* (Hart, 2009); H Satzger, *International and European Criminal Law* (C.H. Beck-Hart-Nomos, 2018) 46 ff.; F Sgubbi, 'Diritto penale comunitario' in *Dig. d. pen.*, vol. IV (Utet, 1990) 102; G Grasso, *Comunità europee e diritto penale* (Giuffrè, 1989) and recently E Aprile, *Diritto processuale penale europeo e internazionale* (Cedam, 2007).

history, individuals were granted the possibility to bring their case directly to a supranational court.⁴

The European Court of Human Rights (ECtHR), the first judicial body of a continental dimension and with a continental competence, has carried out a thorough work on the single legal systems, going at the heart of their procedural rules, each time assessing their compatibility with the guarantees enshrined in the Convention.⁵ Although it proved reluctant to verify the abstract conformity of the national legal systems, there were cases in which the Strasbourg Court explicitly required the Contracting States to modify their internal provisions and adapt them to the Convention's principles. The abundant case law of the Court of Strasbourg reveals how still today, after decades of condemnations and censures by the supranational judge, plenty are the frictions between the internal rules and the conventional rights.

The European Union, on the other hand, seemed to be indifferent to criminal justice, showing no interest in dealing with issues so closely related to State sovereignty. It has been observed how criminal proceedings have remained for long time immune from the birth and development of the European Communities. The gist of the new entities was entirely market oriented. The initiatives designed to abolish borders were meant to foster commercial trade and exchanges, the 'free movement'; harmonisation was necessary with regards to trademarks, patents and customs. Criminal justice laid at a sidereal distance from this world.

What happened thereafter is well-known: geographical borders have fallen down also for criminals; the globalisation of crime and of the instruments it uses (not only money laundering, but also terrorism and paedophilia, and cybercrime) have cancelled the distances and blurred the function of territory as limit to States' sovereignty. Freedom of movement has favoured those forms of criminality that are more able to profit from new spaces or from agreements with similar phenomena in other countries. Furthermore, the European Community itself has become the target of crime, in particular frauds,

⁴ For an historical overview, W Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press, 2015) 3ff.

⁵ More specifically, on the prolific case law inherent to the right to a fair trial under Article 6 of the Convention, W Schabas (n 4) 264 ff; S Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006) 45 ff; K Ambos, *Internationales Strafrecht* (C.H. Beck, 2006) 335 ff.

corruption and extortions at the hands of its own officials.⁶ This led to the development of a European criminal law, but such relationship between the national legal order and EU law requirements is not always untroubled: it is marked by steps forward, regressions, new impulses and new standstills.

Despite the indisputable successful results of the last decade, we are still far from a real integration in this field. Especially when it comes to criminal procedure, European integration has still to go through a real rocky way. Even compared to substantive criminal law, the historical steps of the development of a European criminal procedure are different, at list for two reasons. Firstly, the ‘open’ structure of certain offences – environmental crimes, for example – allows for an indirect influence of EU law, either by means of interpretation (integrating or disapplying the offence) or thanks to the impact of secondary legislation on the constitutive elements of the offences (the concept of ‘waste’, in our example). Secondly, the circumstance that criminalisation is regarded as a means to protect effectively the interests of the EU and as a way for Member States to discharge EU obligations in this sense.⁷ This is not the case for procedural rules: these are more fragile, on the one hand, in terms of respect of the legality principle in a strict sense, but stronger, on the other, as to their resistance to external influences seeking to affect directly the essence of the rule.

Only recently we are noticing a progressively direct impact of EU legislation and case law on procedural law, even for crimes of purely national character, lacking of any transnational dimension.

In analysing how and to what extent the EU has influenced criminal procedure, offering a comprehensive picture goes beyond our present objectives – and capacities. We will limit ourselves to recall the major historical and cultural milestones, going more into detail only where needed.

Despite the existing wealth of literature about European criminal

⁶ A remarkable example are the fraud allegations revealed by the Committee of Independent Experts, which lead to the collective resignation of the Santer Commission in 1999. See Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission, 15 March 1999, < http://www.europarl.europa.eu/experts/report1_en.htm>.

⁷ V Covolo, *L'émergence d'un droit penal en réseau. Analyse critique du système européen de lutte antifraude* (Nomos, 2015) 39.

law⁸ and judicial cooperation in criminal matters,⁹ very poor literature is indeed dedicated to the European concept of ‘criminal defence’ and its effectiveness. This book aims at contributing to fill that gap.

The first part of this chapter will sketch the history of the difficult relationship between criminal justice and European law, highlighting the use of criminal policy as a tool in protecting financial interests of the European Union. It will list the different actors and instruments approved in the last twenty years in order to grant justice for the European Union, up to the approval of the European Prosecutor Office. In the following paragraph, the issue of police and judicial cooperation will be addressed with the aim of presenting how the EU has developed into an area of freedom, security and justice (AFSJ). The primary actors such Europol and Eurojust will be analysed. As for the approximation of criminal procedure, the fourth part will first introduce the provisions of the Lisbon Treaty dealing with criminal justice and their functional link with the principle of mutual recognition. The last paragraph concludes on the real constitutional framework of defence rights in European criminal justice: the meagre but meaningful Article 48(2) of the Charter of fundamental rights (CFR).

2. Justice for Europe: Criminal law as a tool to protect the EU financial interests

European law and criminal justice always had a turbulent relationship. The very idea of a European interference in that sensitive field posed a conundrum for national stakeholders and a dilemma for scholars. Political obstacles linked to dangerous challenges to national sovereignty, the lack of a specific legal basis in the Treaties and the need for robust constitutional protections in criminal matters, lacking at the EU level since very recently, contributed to the impasse.

⁸ A Klip (n 3) ; H Satzger (n 3) ; V Mitsilegas, *EU Criminal Law* (Hart, 2009) ; J Vervaele (n 3) ; S Peers, *EU Justice and Home Affairs Law* (Oxford, 2011); D Flore, *Droit pénal européen* (Larcier, 2014) ; K Ambos, *European Criminal Law* (Cambridge University Press, 2018).

⁹ V Mitsilegas, *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe* (Hart, 2016); L Surano, G Vernimmen-Van Tiggelen, A Weyembergh, *The future of mutual recognition in criminal matters in the European Union* (Editions de l’Université de Bruxelles, 2009); K Ligeti, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union* (Duncker & Humblot, 2005).

Nevertheless, pragmatism won over scepticism and criminal law and criminal procedure finally became part of the European integration process.

Dealing with criminal justice and the European Union, a first crucial distinction should be made between instruments and organs that deal with justice *in* Europe and others aimed at ensuring justice *for* Europe.¹⁰ In the first case, the policies are designed to ensure security and justice to the European citizens within the continent's borders, dealing also with merely 'internal' situations; conversely, in the second case, the objective is the protection of the EU interests themselves. The European initiatives therefore move along these two lines, the dominant trend being variable.

Historically the justice *for* Europe has prevailed for very pragmatic reasons. The Union very soon realised that criminal law was needed in terms of prevention and protection of breaches hitting the Union's financial interests. In the last decade of last century the EU became aware of how costly were frauds committed against the EU common budget, affecting directly the Union and indirectly all European citizens. It has thus risen a need for justice for Europe, to protect the financial interests of the community. To that end, a number of legal instruments imposing on State parties to assimilate the protection offered to community and national goods have been adopted.¹¹ These have a direct impact on substantive criminal law, but no real impact with respect to criminal procedure. Nevertheless, the problem of States not complying with European obligation remains on the table, as also the wide differences between the implementation measures and concrete enforcement adopted by the member States.¹² Yet this first will brought to the adoption of a European Public Prosecutor Office (EPPO) and seems to promise a future of deep harmonisation.

At the end of last century, a group of European experts, led by Mireille Delmas-Marty, elaborated a project called *Corpus Juris*, a

¹⁰ V Covolo (n 8) 51.

¹¹ In particular, Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests [1995] OJ C 316/49, replaced by Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [2017] OJ L 198/29.

¹² A general overview of the current fragmented legal framework can be found in the Report from the Commission to the European Parliament and the Council, Protection of the European Union's financial interests — Fight against fraud 2016 Annual Report, COM (2018) 383 final.

sort of micro-codification of criminal law and procedure with the specific aim to protect the financial interests of the EU.¹³ It included crimes to the detriment of the Union's budget, which only indirectly affect the Member States. The rationale is clear: a more limited scope of action guarantees more chances of success to a prosecuting authority, whose action goes side by side to the repressive activities of the national authorities, as it reduces the risk of refusal by the single national systems. The competences confined to the sole financial crimes affecting the community interests were leading to a sectorial process of criminal unification.

At procedural level, the major novelty was the proposal to introduce a European Public Prosecutor Office (EPPO), a fully-fledged European organ composed by national members under the direction of a common European chief prosecutor and conferred with the power to prosecute within the whole European judicial area. With the idea of a European public prosecutor, a qualitative leap was achieved. Though sectorial – being devoted to the sole protection of the financial interests – such proposal was highly significant also for the years to come, for it demonstrated the possibility of accomplishing the adoption of common procedural rules.

A part of that idea finds its way into the Green paper on the criminal protection of the financial interests and on the creation of a European public prosecutor adopted at the end of 2001,¹⁴ and subsequently is given a formal consecration by the project on the European Constitution. The failure of the latter does not put an end to the idea of a centralised prosecutor at European level.

Both the *Corpus Juris*, the ensuing Green paper and, at last, the European Constitution forewent the project of 'socialization of the Union through criminal law' and of the EPPO as the key actor of the regional criminal policy with a role of 'super guardian' of justice in the European area. But the time was premature.

The creation of the European Public Prosecutor should have been the main objective of the European Council in Tampere in October 1999, but the boldness of the idea caused great opposition on the part of certain Member States, so that the meeting ended up with a strong statement on the principle of mutual recognition and a small opening

¹³ M Delmas-Marty et al., *Corpus Juris: Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Paris: Economica, 1997).

¹⁴ Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final.

to harmonization, but without any significant step forward as to the creation of a common organ. The idea was proposed again within the European Constitution, whose failure is well known.¹⁵ Even weaker was the Hague Programme,¹⁶ ‘shy and generic’ in indicating the lines of intervention, very distant from the possibilities opened by the constitutional treaty. Nonetheless, the *Corpus Juris* remains an essential reference for those wanting to trace back the path of European criminal law: the subversive nature of the idea of a unique prosecutor acting before national jurisdictions has spurred a debate – the first in our subject – of continental dimensions. Many the opponents, many the problems inherent in the project: the difficulties in separating ‘prosecution’ from ‘jurisdiction’, the uncertainties on the status of the European Public Prosecutor, on the rules on prosecution and on the decision not to prosecute between the European prosecutor and national systems, on the law of evidence.

Despite all these obstacles, the strength of the initial idea evolved and survived several turmoils until the final approval in 2017.¹⁷ This was made possible because the Lisbon Treaty now offers a solid legal basis and recognises the possibility of enhanced cooperation among certain member States, allowing ambitious policies in criminal matters to have a chance to succeed.¹⁸ One prosecutorial agency for one single legal area, provided with a limited but relevant material scope, as defined by the Directive 2017/1371 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law.¹⁹

¹⁵ Treaty establishing a Constitution for Europe [2004] OJ C 310/1.

¹⁶ The Hague Programme: strengthening freedom, security and justice in the European Union [2004] OJ C 53/1.

¹⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office [2017] OJ L 283/1. For a detailed analysis, L Bachmaier Winter (ed), *The European Public Prosecutor’s Office. The Challenges Ahead* (Springer, 2018); W Geelhoed, L H Erkelens, A Meij (eds), *Shifting Perspectives on the European Public Prosecutor’s Office* (Asser Press, 2018); V Mitsilegas, F Giuffrida, Raising the bar? Thoughts on the establishment of the European Public Prosecutor’s Office, CEPS research report, No 2017/39; F Giuffrida, The European Prosecutor’s Office: Kind without Kingdom?, CEPS research report, No 2017/03.

¹⁸ According to Article 86 TFEU, ‘[i]n order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust’.

¹⁹ On the material scope of the future EPPO, see K Ligeti, ‘Approximation of Substantive Criminal Law and the Establishment of the European Public

Nevertheless, the original idea of a ‘single office’ operating in a ‘single legal area’ has been partially overruled by a collegial complex structure, as a compromise to overcome political hurdles. However, the metamorphosis of this initial idea, from how it was reflected in the first Proposal for a Regulation on the establishment of an EPPO²⁰ to how it is transposed into the adopted version of the Council Regulation,²¹ reveals scarce harmonisation of procedural rules related to evidence gathering²² and defence rights.²³ Harsh criticism has been raised for the lack of specific rules on defence rights. Scholars have questioned the extent to which the poor provisions of the EPPO Regulation, entirely relying on the approximation made by the Stockholm roadmap directives recently approved, can effectively guarantee fundamental defence rights.²⁴

The inherently weaker position of the accused is indeed particularly

Prosecutor’s Office’ in F Galli, A Weyembergh, *Approximation of substantive criminal law in the EU: The way forward* (Editions de l’Université de Bruxelles, 2013) 73; S Peers, ‘The European Communities Criminal Law Competence: the plot thickens’ (2008) 33 *European Law Review* 399; Sicurella, ‘Some reflections on the need for a general theory of the competence on the European Union in criminal law’ in Klip (ed) *Substantive criminal law of the European Union* (Maklu, 2011) 233; R Sicurella, ‘EU competence in criminal matters’ in V Mitsilegas, M Bergström, T Konstadinides (eds), *Research handbook on European criminal law* (Edward Elgar, 2016) 49 ff. It has been observed that ‘Article 86 TFEU is phrased in an ambiguous way when it comes to the legal basis for harmonising the material scope of competence of the EPPO. Its predecessors were much clearer and did include an explicit reference to substantive criminal law as forming part of the EPPO regulatory package. However we cannot conclude that the legislator has deliberately excluded substantive harmonisation from the phrasing under Article 86’, see J Vervaele, ‘The material scope of competence of the European Public Prosecutor’s Office: a harmonised national patchwork?’ (2015) *Centro Studi di Diritto Penale Europeo*, <<http://dirittopenaleeuropeo.it/wp-content/uploads/2015/10/Vervaele-2014-15.pdf>>.

²⁰ Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, COM (2013)534 final, of 17 July 2013.

²¹ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office [2017] OJ L 283/1.

²² Art 37 Regulation 2017/1939.

²³ Art 47 Regulation 2017/1939.

²⁴ N D Abad, ‘The legal framework of the protection of fundamental rights of the suspected or accused in transnational proceedings under the EPPO’ in L Bachmaier Winter (ed), *The European Public Prosecutor’s Office. The Challenges Ahead* (Springer, 2018), forthcoming; V Mitsilegas, F Giuffrida, ‘The European Public Prosecutor’s Office and Human Rights’, in W Geelhoed, L H Erkelens, A Meij (eds), *Shifting Perspectives on the European Public Prosecutor’s Office* (Asser Press, 2018).

sensitive in transnational proceedings, as the disadvantage compared to the prosecution is even more accentuated with regard to information and available means, especially when it comes to evidence gathering. An appropriate consideration for the rights of the defence is thus essential in view of the growth of a common, European culture of procedural rights, where a homogeneous protection of defence rights is guaranteed.²⁵ This is why the effectiveness of defence rights as protected by the European directives within national jurisdictions will be crucial also to ensure the fairness of the EPPO investigations and prosecutions.

3. The age of realism: Justice in Europe via police and judicial cooperation

When it comes to justice *in* Europe, the key of European policies in criminal matters always has been the police and judicial cooperation, areas in which the Union, since the Treaty of Maastricht, and mostly, the Treaty of Amsterdam, could benefit from new actors and new instruments.

Since the Council of Tampere, judicial cooperation as a tool to grant justice in Europe should have developed along two interconnected lines: mutual recognition and freedom of movement of judicial decisions, on the one hand, and harmonization of criminal law and procedure on the other. The strengthening of that political and juridical notion of ‘area of freedom, security and justice’, objective of the whole European criminal policy, is pursued via the strengthening of judicial cooperation.²⁶ The harmonisation of criminal procedure and defence rights always stayed in the backstage.

The field of police cooperation has seen the birth of a number of *ad hoc* organisms. First, the European Police Office (Europol) and its database,²⁷ in conjunction with the Schengen Information System, created with the Schengen Agreement and then extended to the whole

²⁵ See S Allegrezza, A Mosna, ‘Cross-border criminal evidence and the future European Public Prosecutor. One step back on mutual recognition?’, L Bachmaier Winter (ed), *The European Public Prosecutor’s Office. The Challenges Ahead* (Springer, 2018) forthcoming.

²⁶ E Herlin-Karnell, ‘Recent Developments in Substantive and Procedural EU Criminal Law –Challenges and Opportunities’ in M Bergström, A Jons-son Cornell (eds), *European Police and Criminal Co-operation* (Hart Publishing 2014) 33.

²⁷ Convention based on Article K.3 TEU creating a European Police Office (Europol Convention) of 26 July 1995 (OJ 27 November 1995 n. C 316).

Community thanks to the corresponding Convention.²⁸ More recently, the landscape of transnational police enforcement is enriched by the Joint Investigation Teams (JITs), a real investigative police force that can be created by two or more Member States in order to fight transnational crimes. Whereas Europol lacks of investigative powers and can hardly be defined as a European police agency, the JITs may enjoy concrete enforcement powers as allowed by national legislations. These teams, composed by agents of different nationalities, are conferred with true investigative powers also beyond the borders of the single Member State.²⁹ Nevertheless, these bodies remain at the margins of the internal criminal procedure: they represent forms of cooperation limited in time and in scope, more or less formalised, allowing the different police authorities to directly exchange information relevant for the investigations. The issues brought about by the JITs are, rather, the existence of a dual legal basis³⁰ of such teams or the judicial control over their activities. Their effect on harmonisation of procedural law is merely indirect, forcing the police forces to a continuous confrontation of different rules and practices.

As for judicial cooperation, the new actor was introduced in 2002 with the creation of Eurojust, a collegial judicial cooperation unit with the aim to reinforce the fight against trans-border crime by consolidating cooperation among judicial authorities. Eurojust is

²⁸ Agreement of Schengen of 14 June 1985 on the gradual abolition of checks at their common borders, the implemented by the Convention implementing the Schengen Agreement of 19 June 1990 [2000] OJ L 239/1.

²⁹ Council Framework Decision of 13 June 2002 on joint investigation teams [2002] OJ L 162/1. On the structure and powers, see the Guidelines on the use of the Joint investigation team, <<https://rm.coe.int/16806f720a>>. M Plachta, 'Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 284; C Rijken, G Vermeulen (eds), *Joint Investigation Teams in the European Union: From Theory to Practice* (Asser Press, 2006); J Kappllinghaus, 'Joint Investigation Teams: Basic Ideas, Relevant Legal Instruments and First Experiences in Europe' (2006) 134 *th International Training Course Visiting Experts' Papers*, <https://www.unafei.or.jp/publications/pdf/RS_No73/No73_07VE_Kapplinghaus2.pdf>; M Helmberg, 'Eurojust and Joint Investigation Teams: How Eurojust Can Support JITs' (2007) 2 *ERA-Forum* 245; J Monar, 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems' (2007) 3 *Government and Opposition* 292.

³⁰ C Rijken, 'Joint Investigation Teams: principles, practice, and problems. Lessons learnt from the first efforts to establish a JIT' (2006) 2 *Utrecht Law Review* 99, 105.

composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to their own legal systems. Anticipated by Pro-Eurojust in 2000, the new judicial cooperation unit was introduced by Council Decision 2002/187/JHA as a consequence of the the attacks of 9/11 in the USA.³¹ It serves the goal of facilitating judicial cooperation among the Member States authorities when they need coordination to fight against transnational crimes such as terrorism, trafficking in human beings, drug cartels. In 2008 a new Council Decision was adopted in order to further reinforce ‘the operational capabilities of Eurojust, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and strengthen and establish relationships with partners and third States’.³² The Lisbon Treaty formally recognised the judicial cooperation unit and its crucial role ‘to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States [...]’.³³ But Eurojust architecture and powers are still a work in progress. The next step will be the approval of a new Regulation ‘to increase information exchange between Eurojust and Member States while ensuring an adequate level of data protection’ together with governance reforms, including the creation of a new Executive Board, an effective democratic oversight to ‘be guaranteed through regular reporting to the European Parliament and national parliaments’.³⁴ The Regulation also establishes ‘institutional, operational and administrative relations with the new European Public Prosecutor’s Office to ensure complementarity and synergies’.³⁵

Besides European actors, judicial cooperation has been completed

³¹ Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L 63/1.

³² Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime [2009] OJ L 138/14.

³³ Art 85 TFEU.

³⁴ Eurojust Press Release, ‘EU lawmakers reach political agreement on a new Regulation for Eurojust’, 19 June 2018.

³⁵ See the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535 final.

by the adoption of several instruments such as the European Arrest Warrant,³⁶ the European investigation order,³⁷ the European protection order.³⁸ Furthermore, several framework decisions and directives were adopted in the field of mutual recognition of final decisions and financial penalties,³⁹ transfer of prisoners,⁴⁰ freezing orders⁴¹ and confiscation.⁴² As for the latter, the Council just reached a political agreement for a ‘single regulation covering freezing and confiscation orders, directly applicable in the EU’ with the aim to ‘resolve the issues linked to the implementation of the existing instruments, which have led to insufficient mutual recognition’.⁴³

The cornerstone of judicial cooperation in criminal matters is indeed the principle of mutual recognition, the golden rule elaborated in the Council of Tampere and confirmed by the Hague Programme of 2004.⁴⁴ In a nutshell, it means that all judicial decisions in

³⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190/1.

³⁷ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

³⁸ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ L 338/2.

³⁹ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

⁴⁰ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

⁴¹ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L 196/45.

⁴² The composite legal framework includes the Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59, the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39 that partly modified the Framework Decisions 2001/500/JHA and 2005/212/JHA.

⁴³ Council of the EU Press release, ‘Freezing and confiscation: Council agrees general approach on the mutual recognition of freezing and confiscation orders’, 20 June 2018.

⁴⁴ On mutual recognition L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer, 2017); A Souminen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia, 2011).

criminal matters taken in one EU country will normally be directly recognised and enforced by another Member State.

The Hague programme stressed out the need to complete the implementation of the principle of mutual recognition extending it to 'judicial decision in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the *ne bis in idem* principle and the execution of final sentences of imprisonment or other (alternative) sanctions.⁴⁵

The implementation of the principle in criminal matters still represents, however, a challenge. Initially developed within the internal market, mutual recognition originally aimed to support the free movement of goods. Where no harmonised rules exist at European level, 'products lawfully marketed in one Member State can be sold in other Member States regardless of complying or not with the national technical rules of these Member States'.⁴⁶ Thus, for mutual recognition to work, the decision adopted by the authority of a different Member State can enter into another national system only if it is recognized as similar. Such similarity should build or strengthen mutual trust, the essential precondition for mutual recognition. The existence of a relation of confidence is the key for the good functioning of simplified mechanisms; in the absence of such condition, any policy relying on mutual recognition is inexorably deemed to fail.

In criminal matters, however, mutual trust is not a given fact: it is more a hard-earned objective than a sound prerequisite from which to move forward. The most useful and effective technique to this aim seems to be that of increasing the harmonization of national laws, of introducing at European level those 'minimum rules' needed to ensure 'the compatibility of the applicable rules in the Member States, to the extent necessary improve [...] cooperation'.⁴⁷ In other words, mutual recognition requires an understanding of cooperation that cannot be achieved without a minimal normative harmonization. Only sharing certain basic principles can dispel the fears against a decision coming from outside, because common values pave the way to the recognition of that decision as homologous. Without this passage, mutual

⁴⁵ The Hague Programme (n 19).

⁴⁶ Commission Background document, Public consultation on the possible revision of the Mutual Recognition Regulation (EC) No 764/2008, <<http://ec.europa.eu/DocsRoom/documents/16827>>.

⁴⁷ Art.82 §2 TFEU.

recognition can only mean the enforcement of an order imposed from above, not the action of someone who feels to be contributing to the development of an area of justice of continental dimension.

The relationships between mutual recognition and harmonisation, however, have always been troublesome. It suffices to consider that in European criminal policy the principle of mutual recognition has often been regarded as a true, easy and cheap alternative to harmonization. As for the latter, the EU went through a real rocky way, especially when it comes to procedural safeguards. It took several years and a new Constitutional framework composed by the Nice Charter and the Lisbon Treaty to overcome the opposition of several Member States and reach a common agreement on minimum standards. Those provisions deserve a detailed analysis. Inverting the chronological order, we will first describe the Treaty provisions related to criminal justice and then analyse Article 48 CFR as the real Constitutional basis for defence rights.

4. Toward the approximation of criminal law and criminal procedure: The Lisbon Treaty

The real turning point for the EU toward the harmonization of procedural safeguards in criminal proceedings has been the approval of the Lisbon Treaty. After the failure of the Constitution project, the European Union did not renounce to amend the treaties. Once the flag and the hymn out of the picture, in 2007 the Member States finally approved the Treaty of the European Union (TEU) and the Treaty on the functioning of the European Union (TFEU). They both provide for provisions related to criminal justice and in particular to defence rights.

As for the TEU, of utmost importance is Article 3, according to which ‘the Union shall offer its citizens an area of freedom, security and justice’ to be achieved, *inter alia*, ‘preventing and combating of crime’. An ‘area of freedom, security and justice’ implies that criminal justice in Europe becomes a priority of European policy, with the need to combine punitive choices together with the due respect of fundamental rights. Where the former received so much attention from the EU – producing a ‘massive imbalance of the European criminal policy at the expense of the defendant’⁴⁸ - the latter were

⁴⁸ H Satzger (n 3) 129.

left to the CJEU case law and to the non-binding provisions of the Charter. It was thus pivotal for the EU to finally confer a specific role to the Charter within the EU legal framework. It is with Article 6 TEU that the Union formally recognises the rights, freedoms and principles set out in the CFR, ‘which shall have the same legal value as the Treaties’. Despite the introduction of some limit, such as the fact that the ‘Charter shall not extend in any way the competences of the Union as defined in the Treaties’.

Article 6 TUE solves once for all the disputes related to the role of the CFR in the EU legal order: those provisions shall be treated as founding, Constitutional principles of the Union. It also clarifies the relationship between first the CFR and the ECHR, stating ‘the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application’, which make explicit reference to the ECHR provisions as interpreted in the ECtHR case law. To close the circle, Article 6 TUE provides that ‘the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’. The troubled path toward the accession is still an ongoing process and its description would exceed our mandate but it is worth notice how the creation of the AFSJ reshaped the face of criminal justice in Europe.⁴⁹

More detailed provisions on procedural safeguards are offered by the TFEU. After recalling that ‘the Union shall constitute an area of freedom, security and justice with respect for fundamental rights’, Article 67 TFEU highlights the need to respect ‘the different legal systems and traditions of the Member States’. In the same light, Article 82(2) confirms that the approximation exercise ‘shall take into account the differences between the legal traditions and systems of the Member States’. A common goal, indeed, but respectful of national

⁴⁹ On the rocky way toward the accession, see S Allegrezza, ‘The Interaction between the ECJ and the ECtHR with Respect to the Protection of Procedural Safeguards after Lisbon: the Accession of the EU to the ECHR’ in K Ligeti (ed), *Toward a Prosecutor for the European Union* (Hart Publishing 2013) 905; P Layden, T Lock, ‘Protection of Fundamental Rights post Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions’ (FIDE National Report for the United Kingdom) (2011) University of Edinburgh, School of Law, Working Papers 34-35; J Morijn, ‘After Opinion 2/13: how to move on in Strasbourg and Brussels?’ (2015) eutopia law, <<http://eutopialaw.com/2015/01/05/after-opinion-213-howto-move-on-in-strasbourg-and-brussels/>>.

diversities. The principle of procedural autonomy hence receives a formal acknowledgement from the Treaties.⁵⁰

Article 82 and Article 83 TFEU, related to the harmonization of criminal law and criminal procedure, need to be read in the light of Article 67 TFEU. This last provision recalls Articles 3 and 6 TUE and stipulates that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Moreover, it reads that the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism, xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Article 82 TFEU directly focuses on criminal procedure and sets up the basic principles of harmonization of law in this field as a tool to build up an area of freedom, security and justice. As a result, the AFSJ reflects broader trends in European integration, namely the increasing scope of European law combined with a more flexible model of integration.⁵¹ Article 82(1) TFEU builds the bridge between approximation and mutual recognition stating that ‘judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States’.⁵² Mutual recognition⁵³ is indeed intended to be the

⁵⁰ For a detailed analysis of the legal concept, D U Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer, 2010). On the consequences in criminal matters, see *infra* Part II, Chap I.

⁵¹ G Grasso, R Sicurella, V Scalia, -Articles 82 – 86 of the Treaty on the Functioning of the European Union and Environmental Crime’ (2015) Report, <<https://efface.eu/articles-82-%E2%80%9386-treaty-functioning-european-union-and-environmental-crime>>; E Herlin-Kamell (n 28) 33.

⁵² Art 82(1) TFEU.

⁵³ On the concept and the problems related to the principle of mutual recognition, see among others V Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) 10 *Common Market Law Review* 1277-1311; G Corstens, ‘Criminal Justice in the post-Lisbon era’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 23; M J Borges, ‘Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters’ (2010) 18 *Criminal Law and Criminal Justice* 99; M Möstl, ‘Preconditions and limits of mutual recognition’ (2010) 47 *CMLRev* 432 ff; G de Kerchove, A Weyembergh, *La*

main motor of European integration in the field of criminal justice,⁵⁴ whereas approximation of criminal law and criminal procedure seems to play an ancillary role. The reference to mutual recognition is twofold: first, it means that judicial cooperation ‘shall include’ law approximation, i.e. EU criminal policy cannot be limited to measures of mutual recognition.⁵⁵ Second, approximation seems instrumental to mutual recognition and serves the goal of mutual recognition, especially (but not exclusively) ‘criminal matters having a cross-border dimension’.⁵⁶

Despite the wording could suggest a limited field of application, i.e. covering only those crimes having a cross-border nature or proceedings where more than one Member State is involved, it is hardly conceivable an harmonization of criminal procedure related to evidence or defence rights but limited by the cross-border dimension of the crime or of the specific criminal case. As it has been correctly highlighted, the EU powers in the field of criminal procedure ‘would be rendered meaningless if they could only be applied in cross-border proceedings, given that Article 82(1) TFEU already sets out a power to regulate criminal proceedings with a purely cross-border nature’.⁵⁷ Furthermore, nothing in the directives approved until now points at excluding non-transnational cases and the first decisions of the Court of Justice of the European Union (CJEU) seem to justify an ample interpretation of the EU competence in this field.⁵⁸

reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne (Editions de l'Université de Bruxelles, 2002); G L Tosato, ‘Some remarks on the limits to mutual recognition of judicial decisions in CML and criminal matters within the European Union’ (2002) 4 *Rivista di diritto internazionale* 869; D Spinellis, ‘Mutual recognition and harmonisation of national criminal legislations. The example of the European Arrest Warrant’ in G Grasso, R Sicurella (eds), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale* (Giuffrè, 2008) 457; G Vernimmen-Van Tiggelen, L Surano, ‘Analysis of the future of mutual recognition in criminal matters in the European Union’, <http://ec.europa.eu/justice_home/index_en.htm>; M Bargis, ‘La cooperazione giudiziaria penale nell’Unione europea tramutuo riconoscimento e armonizzazione: analisi e prospettive’ (2012) 4 *Rivista di diritto processuale* 914; J B Banach-Gutierrez, ‘Globalised Criminal Justice in the European Context – How Theory meets Practice’ (2013) 1-2 *New Journal of European Criminal Law* 154; E Smith, ‘Running before we can walk? Mutual recognition at the expense of fair trials in Europe’s area of freedom, justice and security’ (2013) 1-2 *New Journal of European Criminal Law* 82.

⁵⁴ V Mitsilegas (n 9) 154.

⁵⁵ S Peers (n 9) 666.

⁵⁶ Art 82(2) TFEU.

⁵⁷ S Peers (n 9) 670.

⁵⁸ Case C216/14 *Covaci* EU:C:2015:686.

Thanks to Article 82 TFEU, criminal procedure falls thus within the competence of the European Union,⁵⁹ representing an explicit and express – albeit functional – EU competence.⁶⁰ ‘Functional’ means that in order to justify new measures of approximation, to be ‘adopted in accordance with the ordinary legislative procedure’,⁶¹ the EU should highlight how the differences in national procedural rules are hindering judicial cooperation in criminal matters. The successful exercise of this test should support and justify the European initiatives to adopt measures of approximation. In this light, harmonization of criminal procedures is not a goal in itself but it rather serves mutual recognition to be effective. In other words, ‘co-operation *by* approximation merely complements the principle of mutual recognition’.⁶² The rationale behind it is obvious: the closer the systems are, the smoother judicial cooperation will be.

To this aim, Article 82(1) TFEU first identifies specific areas in which approximation measures are required, such as (a) mutual recognition throughout the Union of all forms of judgments and judicial decisions; (b) prevention and settling of conflicts of jurisdiction between Member States; (c) the training of the judiciary and judicial staff; (d) facilitation and cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions. For those areas, the ordinary legislative procedure always applies and there is no possibility for the Member States to rely on the so-called ‘emergency brake’, as it is the case for the competence set up by paragraph 2 of Article 82 TFEU.⁶³

But the real legal basis to harmonise criminal procedure is provided by Article 82(2) TFEU that confers to the EU the power to establish minimum rules ‘by means of directives adopted in accordance with the ordinary legislative procedure’, with the abovementioned

⁵⁹ A Klip (n 3) 248.

⁶⁰ V Mitsilegas (n 10) 156.

⁶¹ This is the main political achievement of the Lisbon Treaty in the field of criminal justice, see A Klip (n 3) 21 ff; S Peers (n 9) 665 ff.; Unanimity survives only to increase the areas of criminal procedure that would deserve approximation of law, see Art 82(2) TFEU.

⁶² H Satzger (n 3) 128.

⁶³ In those cases, if a Member State considers that a draft directive ‘would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council’ and, as a consequence suspend the legislative procedure. On the emergency brake, see S Peers (n 9) 664-668.

possibility for the Member States to trigger the emergency brake. These measures shall concern (a) the mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) or any other specific aspects of criminal procedure which the Council has unanimously identified in advance by a decision.⁶⁴ Article 82(2)(b) TFEU clearly represents the specific legal basis of all the directives approved within the realm of the Stockholm Roadmap.

Before focusing on the defendant's rights, it is worth to define what 'minimum rules' means. The first approach might be a 'qualitative' definition of minimum rule as referred to the level protection granted by EU law. In this light, the first reference goes to the rich case law of the ECtHR as developed in the last decades:⁶⁵ the level of protection of a fundamental right as defined by the ECHR and its case law represents the 'minimum' level to which the EU law shall obey. Neither the EU nor the Member States can go below those standards, as confirmed by Article 6 TUE and Article 52 CFR. But in principle, the EU is allowed to go beyond (it indeed went further in certain fields)⁶⁶ and develop higher standards of protection. Moreover, Article 82(2) states that the adoption of the minimum rules 'shall not prevent Member States from maintaining or introducing a higher level of protection for individuals'. In order to respect the limits of a shared competence and of national constitutional identities, the EU should accept national differences. However, as the *Melloni* doctrine made very clear,⁶⁷ when EU standards have been adopted, the CJEU is not keen to tolerate national guarantees that might frustrate the primacy of Union law and thereby hinder judicial cooperation.

The second meaning of 'minimum rules' might refer to the limits of the European interference in such a sensitive field. 'Minimum' means limited to the functional rationale as set up by the Treaties: the EU should justify the approximation of procedural rules only to the extent

⁶⁴ Art 82(2) TFEU.

⁶⁵ M Böse, 'Kompetenzen der Union auf dem Gebiet des Straf- und Strafverfahrensrechts' in M Böse (ed), *Europäisches Strafrecht* (Nomos, 2013) 149, 174.

⁶⁶ An example thereof is Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1. See *infra* Part I, Chap II.

⁶⁷ C-399/11 *Melloni* EU:C:2013:107. LFM Besselink, 'The parameters of Constitutional conflict after Melloni' (2014) 39 *European Law Review* 531.

that this policy might support judicial cooperation in criminal matters and serve, as we have seen, the principle of mutual recognition.

However, mutual recognition of decisions in criminal matters ‘can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own’⁶⁸. In this way, the European legislator ‘attempts to address the consequences of the perceived moral distance inherent in mutual recognition via the harmonization of criminal procedural law’.⁶⁹ The reference to mutual trust helps to reduce the excessive functionalism of the mutual recognition rationale but might hinder the potential control on the respect of legality of the legal basis and subsidiarity of the adopted measures. In other words, strengthening mutual trust is a fluid un-objective parameter, unable to sustain the scrutiny of the Court of justice on the exercise of EU competence in this field.⁷⁰ Nevertheless, it is important to overcome functionalism adding references to the *Kern* of criminal justice, which is the protection of the individuals against the use and misuse of State coercive powers. In the end, the Lisbon Treaty has made mutual recognition as dependent from the existence of minimum rules rather than the contrary.

Strengthening mutual trust is a two-steps process: it first implies ‘to trust the adequacy of other Member States’ rules, but also trust that those rules are correctly applied’. This second step links mutual trust to procedural safeguards, because only a specific set of detailed rules on the protection of the procedural rights and guarantees can increase mutual trust. However, the European constitutional framework composed by the Charter and the ECHR seems not enough. The Union should, by means of Directives, make these rights concrete and effective. Only a collective effort, involving EU and national legislators in adopting and transposing EU directives, national and European courts in accepting a European Constitutional dimension of defence rights despite national diversity will contribute to this will. In this light, effective remedies play a prominent role.

⁶⁸ See Recital 6 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 [2013] OJ L 294/1.

⁶⁹ V Mitsilegas (n 10) 157.

⁷⁰ Ibid.

In an EU oriented perspective, defence rights are clearly the crucial starting point as they often represent the major obstacles to a smooth and rapid cooperation among the national judicial authorities.⁷¹ With the aim of standardizing minimum procedural safeguards for the suspect and the defendant in criminal proceedings, the EU thus intended to grant a common level playing field to support judicial cooperation and facilitate mutual recognition. The provision at stake targets for the first time the suspect/defendant as the one deserving protection and represents the specific legal basis of all the directives approved within the realm of the Stockholm roadmap. After several initiatives to protect the victims' rights and increase the right their right to compensation,⁷² the EU finally recognizes the need to add minimum rules on defense rights in the European toolbox.

Despite its crucial role, this provision received scarce attention from legal literature. As for the content, it implies the power to harmonise whatever suspect's right related to fair trial, with the only exception of the *ne bis in idem*, for which the Treaty offers a specific provision under Article 82(1)(b) TFEU.⁷³ Some stressed how its application should be considered as an *ultima ratio*, as if the EU could intervene only once every other possible solution has failed and should be limited to those provisions that directly grant a right to a suspect.⁷⁴ Accepting that Article 82(2)(b) TFEU might justify the approximation of provisions indirectly confer a procedural right would mean to increase the EU competence to almost all procedural rules. This argument is certainly solid as far as direct legislative power of the Union is concerned but seems shortsighted as for the indirect effects of EU procedural safeguards: the entire national criminal procedure should be interpreted in the light of granting effectiveness to the EU minimum standards, including direct and indirect conferral of defence rights.

⁷¹ The case law of the CJEU shows several clashes among the different national systems when it comes to defence rights. For instance C-399/11 *Melloni*; Case C-168/13 PPU *Jeremy F.* EU:C:2013:358.

⁷² Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1, replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L 315/57; Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261/15.

⁷³ S Peers (n 9) 671.

⁷⁴ H Satzger (n 3) 128-129.

Even though the EU competence in the field of criminal procedure is still limited, the definition the rights of individuals in criminal procedure as a priority area under Article 82(2)(b) TFEU has been welcomed as an unprecedented development in EU criminal law, allowing the Union to adopt secondary legislation in the field of fundamental rights in the field of criminal justice.⁷⁵

Since 2002, right after the approval of the Framework Decision on the European Arrest Warrant, the Commission started working on the proposal for a framework decision on the rights of the defendant that was finally presented in 2004.⁷⁶ Despite its modesty as for the contents, Member States never found an agreement to turn the proposal into EU law. Politicians fear ‘far-reaching implications for the integrity of their domestic criminal justice systems’.⁷⁷ But that proposal still represented the starting point on which the current directives are based. It already included the specific rights that later on were made object of single directives: right to interpretation and translation, right to information, right to a lawyer, right to legal aid.⁷⁸

As it has been highlighted by some authors,⁷⁹ integration in the AFSJ can therefore be seen to be a system for organising difference, since the limited nature of its competence, the increased capacity for a ‘multi-speed’ Europe and above all the variety of tools and techniques aim, not to construct a complete pan-European legal regime, but rather to increase cooperation and inter-operability between national legal system and, thereby, manage variation within a single coherent system.

5. A European constitutional framework for procedural safeguards: Article 48(2) of the Charter of fundamental rights

As previously mentioned, the CFR has been approved in Nice in 2000, but its legal value has been fully recognised only with the

⁷⁵ V Mitsilegas (n 10) 153 ff.

⁷⁶ Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

⁷⁷ On the negotiations, V Mitsilegas (n 10) 155 ff.

⁷⁸ See the contributions in the collective book C Araguena Fanego (Ed), *Los derechos procesales penales en la Unión Europea Garantías procesales en los procesos penales en la Unión Europea* (Lex Nova, 2007).

⁷⁹ V Covolo (n 8) 153 ff. More generally on the origins and the constitutional implications of the EU legal pluralism, M. Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Cambridge University Press, 2007); J Habermas, *La Constitution de l'Europe* (Gallimard, 2012) 100 ff.

Lisbon Treaty.⁸⁰ Despite the efforts to limit the impact of this catalogue of fundamental rights for the EU, as stated by Article 51(2) CFR,⁸¹ the Charter represents the real Constitutional basis of any European policy, especially in the field of criminal justice.

In a legal culture of liberal criminal law that is firmly committed to the legality principle and devoted to fair trial and judicial review, there is little space for the exercise of punitive powers without a solid Constitutional background. The answer to this need is offered by several provisions of the Charter explicitly dedicated to criminal justice, in particular its Chapter VI, where the criminal law and procedure play a main role.⁸²

The most relevant provision is Article 48(2) Charter EU, according to which ‘Respect for the rights of the defence of anyone who has been charged shall be guaranteed’. Despite its concise formulation, the provision is in fact a very meaningful since it triggers new perspectives and future developments of European criminal law. It presents several interrelations with other provisions of the Charter that protect the rights of the defence under different circumstances and with various nuances. The first one is Article 47 (2), according to which ‘everyone shall have the possibility of being advised, defended and represented’ and is applicable to every kind of proceedings, be it a civil, administrative or criminal one. Article 48 (2) should therefore be read as a specification of the rights of defence for the particular field of criminal proceedings. Such an interpretation is suggested by the different personal scope of the two provisions: while Article 47 (2) deals with the rights of defence enjoyed by ‘everyone’, the provision at issue refers only to the accused.

As a first approximation, it could then be argued that Article 48 (2) is of little significance, as its scope of application is limited to *stricto sensu* criminal proceedings. This seems to be the current stance of the Court of Justice, according to which Article 48 ‘protects the

⁸⁰ G De Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator’ (2013) 20 MJ 168, 173.

⁸¹ According to the provision, the CFR ‘does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. On this topic, see M Condinanzi in R Mastroianni, O Pollicino, S Allegrezza, F Pappalardo, O Razzolini, *Carta dei diritti fondamentali dell’Unione europea* (Giuffrè, 2017) 1085 ff.

⁸² For a detailed analysis of the said rights, S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1197 ff.

presumption of innocence and rights of the defence of which must be enjoyed by a person ‘who has been charged’ and is therefore not applicable in administrative proceedings’.⁸³ However, there are two main reasons suggesting that it would be hasty to maintain such a drastic interpretation.

Firstly, the notion of ‘accused’ should be construed in the light of the case law of the ECtHR, with particular reference to its broad understanding of ‘criminal charge’. The explicit reference to the ECHR in the Explanations relating to the Charter calls for an extensive interpretation of the notion of ‘accused’, from which follows, as a result, the applicability of Article 48 (2) to all those proceedings, which are very common in European law, that are formally administrative but have, in substance, a punitive nature.⁸⁴ In this regard, many crucial fields for the EU come into consideration, such as competition, the financial market and the European Banking Union.⁸⁵ Their effectiveness, indeed, depends largely on the existence of strong sanctioning powers, which turns them precisely into quasi criminal systems.

Secondly, the CJEU itself has explicitly referred to the *Engel* criteria⁸⁶ in the cases *Bonda* and *Spector*⁸⁷ noting that ‘observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt in respect of a person a measure which will adversely affect him’.⁸⁸ Furthermore, in other fields such as competition, the Court of Justice has acknowledged that the notion of accused under Article 48 (1) CFR depends on the nature and the degree of severity of the penalties likely to be imposed, thus finding the presumption of innocence to be applicable also in that field.⁸⁹

The second interrelation is with Article 41 CFR, which is concerned with the right to good administration. Both the right of every person to

⁸³ Case C-419/14 *WebMindLicences Kft. v Nemzeti* EU:C:2015:832, para 83.

⁸⁴ V Manes in V Zagrebelsky, P De Sena, S Bartole (eds), *Commentario alla convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (CEDAM, 2012) 334.

⁸⁵ *Dubus S.A. v France* App no 5242/04 (ECtHR, 11 June 2011).

⁸⁶ *Engel and others v the Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976) para 82.

⁸⁷ Case C-489/10 *Bonda* EU:C:2012:319, para 36; Case C-45/08 *Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* EU:C:2009:806, para 42.

⁸⁸ Case C-419/14 *WebMindLicences Kft. v Nemzeti*, para 84.

⁸⁹ Case T-11/06 *Romana Tabacchi v Commission* EU:T:2011:560, paras 129-143.

be heard before any individual measure which would adversely affect him and the right of every person to have access to his file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, listed under that provision belong also to the rights of defence. Accordingly, when the procedural guarantees ensured under the right to a good administration overlap with those afforded by Article 48 CFR, Article 41 shall be regarded as *lex specialis* in relation to the administrative proceedings at European level.⁹⁰ As to the national level, Article 48 (2) is conversely fully applicable, provided that the scope of Article 41, unlike the former provision, is *expressis verbis* limited to the actions of European institutions, and thus does not cover proceedings before national authorities.⁹¹

In sum, Article 48 (2) CFR is applicable when there is a criminal charge, either from a formal or substantive perspective, that allows to qualify an individual as an ‘accused’. This first approximation highlights a potential danger: what is the effect and the scope of the provision at hand with reference to the pre-trial stage? Should the applicability of Article 48 (2) be ruled out in relation to those phases of the proceedings occurring before the formal acquisition of the status of accused? Certain scholars, especially English-speaking ones, take this view.⁹² The English version, admittedly, confines the personal scope of the provision to ‘anyone who has been charged’.

Nevertheless, a different reading, adopted also in the case law of the Court of Strasbourg, seems preferable: with reference to Article 6 paragraphs 1 and 3, the ECtHR clarifies that those rights are guaranteed to every person who has been charged within the autonomous meaning of the Convention. A ‘criminal charge’ comes into play from the moment an individual has received an official notification by the competent authorities of an allegation that he has committed a criminal offence or from the moment when his situation has been substantially affected by actions of the authorities upon the suspect that he has committed a criminal offence.⁹³

The autonomous interpretation adopted by the ECtHR thus extends

⁹⁰ H P Nehl in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1290.

⁹¹ W Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon’ (2011) 7 *European Constitutional Law Review* 64, 88-90.

⁹² For instance H P Nehl (n 93) 1291 ff.

⁹³ *Deweert v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 42-46;

the relevance of such guarantees to the pre-trial phase, in which the individual is particularly vulnerable, in as far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the rights of defence in the previous stages.⁹⁴ The same approach is followed by the Court of Justice in relation to anti-trust administrative proceedings, in which the rights of the defence are relevant also in the investigation stage before the notification of the ‘charge’.⁹⁵

Nevertheless, several State Parties limited considerably the right of access to a lawyer in the preliminary phase, making it often contingent upon a deprivation of liberty.⁹⁶ For this reason, the Directives play a fundamental role: they extend the applicability of their provisions to both ‘suspects and accused’, thus also to the preliminary investigations phase, thereby confirming the importance of the substantial notion of charge developed in the ECtHR case law.

However, there are some differences among the Directives as to the exact moment starting from which they become applicable *ratione temporis*. Such discrepancies are, in part, minimal and rather irrelevant: while Article 1 (2) Directive 2010/64/UE on the right to interpretation and translation and Article 2 (1) Directive 2013/48/UE on the right of access to a lawyer provide that the relevant defence right is applicable from the moment in which a person is ‘made aware by the competent authorities of a Member State, by official notification or otherwise, that [he or her is] suspected or accused of having committed a criminal offence’, Article 2 (1) Directive 2013/13/UE on the right to information simply refers to the moment when ‘persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence’. It seems more interesting to notice that only the provision under Article 2 (1) Directive 2013/48/UE specifies explicitly that the application of the right is not contingent upon the deprivation of liberty of the suspect. Considerably different is the provision under

Eckle v Germany App no 8130/78 (ECtHR, 15 July 1982) para 73; *McFarlane v Ireland* App no 31333/06 (ECtHR, 10 September 2010) para 143.

⁹⁴ *Foti and others v Italy* App nos 7604/76, 7719/76, 7781/77 and 7913/77 (ECtHR, 10 December 1982) para 52; *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993) para 36; *Dvorski v Croatia* App no 25703/11 (ECtHR, 20 October 2015) para 76.

⁹⁵ Case C-105/4 P *CEF City Electrical Factors BV and CEF Holdings Ltd v Nederlandse Federatieve Vereniging* EU:C:2006:592, § 50; V Covolo (n 8) 435 – 437.

⁹⁶ E Cape, Z Namoradze, R Smith, T Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010) 558 ff.

Article 2 Directive 2016/343/UE on the presumption of innocence, which generally foresees that the rights therein are applicable ‘at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence’. Such a wording, vague and uncertain, is nevertheless needed to protect the rights in question and avoid potential abuses and undue postponements of their applicability. It seems, however, that, thanks to the substantive notion of ‘suspect’ and ‘accused of the case law of the ECHR, it is viable to interpret such provision in accordance with the other Directives.

As to the final moment until when the rights provided are applicable, the provisions of the different Directives in principle coincide. An identical rule is set forth in Directives 2010/64/UE, 2012/13/UE and 2013/48/UE: the corresponding rights are relevant ‘until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal’.⁹⁷ At last, according to Directive 2016/343/UE the rights provided are guaranteed ‘until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive’.⁹⁸

As to the scope *ratione materiae*, the rights of the defence are applicable in any criminal proceedings and in the proceedings for the execution of a European Arrest Warrant, exception made for the Directive on the presumption of innocence that does not cover the latter procedure.

More importantly, the rights of the defence, as confirmed by the said Directives⁹⁹ and in accordance with the ECHR, are applicable irrespective of the type of offence in issue. In this age of global terror threat, the ECtHR has reminded that it is not possible to derogate the fair trial rights when faced with terrorism crimes.¹⁰⁰ Nevertheless, the

⁹⁷ Art 1(2) Directive 2010/64/EU; Art 2(1) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1; Art 2(1) Directive 2013/48/EU.

⁹⁸ Art 2 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1.

⁹⁹ See *infra*.

¹⁰⁰ *Ibrahim and others v the United Kingdom* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016) para 252.

ECtHR itself has authorized a lowering of such guarantees on grounds of public interest¹⁰¹ in so far as such restrictions do not cause disproportionate difficulties to the enjoyment of the rights of the defence and do not extinguish the very essence of those rights.

Although the wording of Article 48 (2) seems to have natural persons as main reference, its guarantees are in fact applicable also to legal persons when they are involved in punitive proceedings. It is easier to reach such finding when referring to the English version referring to ‘anyone’.¹⁰² With regards to the Directives, on the other hand, it is not clear whether they also apply to legal persons or not, as the term ‘person’ is used without any further specification. Directive 2016/343/EU on the presumption of innocence, however, explicitly limits its scope only to natural persons.¹⁰³ The existence of a precise restriction to the personal scope of application in only one of the Directives suggests that all the others, in which such limit does not appear, may be invoked also by legal persons.

6. Disentangling the content of Article 48(2) of the Charter: The link with the ECHR

The wording of Article 48 (2) recalls the main international treaties for the protection of human rights, notably Article 11 (1) of the Universal Declaration of Human Rights, Article 14 (3) of the International Covenant on Civil and Political Rights and, first and foremost, Article 6 (3) ECHR. This last provision plays an essential role when determining the substantive content of Article 48 (2), as indeed confirmed by the Explanations relating to the Charter which assert that the two rules are the same.¹⁰⁴

Article 48 (2) is to be regarded as one component of the right to a fair trial under Article 47 CFR, to the effect that a violation of the rights of the defence entails at the same time also an infringement of the fairness of the trial. More particularly, it constitutes the backbone of that right: by ensuring the principle of equality of arms, it affords the necessary instruments to the defence, which is, precisely, the structurally weak party in the balance of powers of criminal proceedings.

¹⁰¹ *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006) para 97.

¹⁰² H P Nehl (n 93) 1292; W Weiß (n 94) 190.

¹⁰³ Art 2 Directive 2016/343/EU.

¹⁰⁴ Explanations relating to the Charter of Fundamental Rights [2007] JO C303/29.

In order to define what the rights of the defence are, it is necessary to refer to the wording of Article 6 (3) which lists the specific procedural guarantees that fall within such notion. The notion of ‘defence’ in criminal matters is sometimes self-referential, as if a definition for such a clear concept were redundant. The truth is, however, that an effective protection of the defence requires to specify its single components, which are necessarily more than one, as shown by the use of the term ‘rights’ in Article 48 (2) CFR. In order for a trial to be ‘fair’, in light of the reference to Article 6 (3), the accused shall have the right:

- ‘(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.’

The reference to Article 6 (3), however, is not limited to the wording of such provision, but rather extends also to the interpretation given to it by the Court of Strasbourg. This can be deduced from the Explanations relating to the Charter, where it is clarified that Article 48 (2) CFR ‘has the same meaning and scope as the right guaranteed by the ECHR’. As a result, the protection afforded to the rights of the defence under Article 48 (2) encompasses also those guarantees that are not explicitly provided in Article 6 (3) ECHR, but which the ECtHR in its rich case law has read into such provision, in accordance also with Article 6 TUE. Therefore, when defining what are ‘the rights of the defence’, the list laid down in Article 6 (3) is not exhaustive because in several occasions the ECtHR has read into that scanty provision a much wider set of guarantees by filling the loopholes and adopting an evolutive interpretation of the Convention in order to adjust it to the challenges of contemporary criminal justice.

In this connection, the Court of Strasbourg, taking in consideration the object and purpose of Article 6 taken as a whole, has acknowledged

the right to be present at the trial as the precondition for an effective exercise of the rights laid down at letters *c*), *d*) and *e*) of Article 6 (3) ECHR.¹⁰⁵

Also the right to remain silent, despite not being expressly mentioned in Article 6 of the Convention among the rights of the defence, has been acknowledged by the ECtHR as a standard that lies at the heart of the notion of a fair procedure. The rationale for this right is to protect the accused against improper compulsion by the authorities and, thus, avoid miscarriages of justice. More in particular, the right not to incriminate oneself entails the prohibition for the prosecution to obtain evidence through methods of physical or psychological coercion in defiance of the will of the accused. In this sense, the said right is strictly linked to the presumption of innocence under Article 6 (2) of the Convention.¹⁰⁶

The specific referral to the ECHR in the Explanations relating to the Charter reveals the age of latter instrument: at the time of its adoption, legal instruments dealing with the rights of the defence were scarce in EU legislation. This gap has now been filled through the adoption of several directives protecting the rights of the accused that represent the laboured implementation of Article 82 (2) TFUE and of the so-called Roadmap adopted in Stockholm in 2009.¹⁰⁷ By virtue of Article 82 (2) TFUE, the legal basis of the said directives, the European legislator has set minimum rules to harmonize of the rights of individuals in criminal proceedings in order to facilitate mutual recognition of criminal judgments and decisions. The directives on procedural rights, whose content will be discussed hereinafter, represent today a reference point for procedural guarantees and should be regarded as an integral part of the scope of protection afforded by Article 48 (2) CFR.

Aside from this functional aspect, the legislation on procedural safeguards represents an important step forward also from a substantive

¹⁰⁵ *Colozza v Italy* App no 9024/80 (ECtHR, 12 February 1985) para 27; *F.C.B. v Italy* App no 12151/86 (ECtHR, 28 August 1991) para 29; *T. v Italy* App no 14104/88 (ECtHR, 12 October 1992) para 26; *Belziuk v Poland* App no 23103/93 (ECtHR, 25 March 1998) para 37; *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006) para 81; W Schabas (n 4) 316.

¹⁰⁶ *Saunders v the United Kingdom* App no 19187/91 (ECtHR, 16 December 1996) para 68; *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000) para 40; W Schabas (n 4) 319.

¹⁰⁷ The Stockholm Programme - An open and secure Europe serving and protecting citizens [2010] OJ C 115/1.

viewpoint thanks to the introduction of a ‘non-regression clause’ echoing Article 53 CFR. Such clause is meant to preclude any interpretation of the directives’ provisions which has the effect of lowering the level of protection of fundamental rights by limiting or derogating the rights and procedural guarantees that are ensured under the ECHR, the Charter and other relevant provisions of international law or the law of any Member State which provides a higher level of protection.¹⁰⁸ As to its scope, it is well known that the rights enshrined in the ECHR represent the minimum standard that all State parties must ensure, though they remain free to afford a higher level of protection.¹⁰⁹ The same applies also for the EU, as clarified by Article 52 (3): the EU is free to provide more extensive protection when adopting legislation that implements the rights of the Charter. However, since the UE is not yet a contracting party to the ECHR, its institutions are not bound to comply with its provisions. This is where the above-mentioned directives become relevant: for the moment being, they set the rules for national enforcement authorities, but in the future, they will represent the backbone of an eventual European criminal proceeding.

¹⁰⁸ B De Witte in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1524.

¹⁰⁹ S Trechsel (n 5) 333.

CHAPTER II

THE ABC'S OF THE INTERPRETATION AND TRANSLATION DIRECTIVE

Lawrence Siry

TABLE OF CONTENTS: 1. Introduction. – 2. Translation and interpretation at the European Court of Human Rights. – 3. The rights of suspects and accused persons under Directive 2010/64/EU. – 3.1. Defence rights to foster mutual trust. – 3.2. The substance of the rights to interpretation and translation. – 4. First challenges and answers by the CJEU for the implementation of the EU Directive. – 4.1. The preliminary ruling in *Covaci*. – 4.2. Right to translation or procedural obstacle to mutual recognition? The case in *Balogh*. – 4.3. The scope of the right to translation in *Sleutjes*. – 5. Conclusions.

1. Introduction

Perhaps nothing is more fundamental to the right to fair trial in the criminal realm than the right of a defendant to understand what is the nature of the process against him, the evidence against him and the outcome of the trial. While this may seem like an obvious right, one that should bare little debate, in reality it can prove to be an elusive right fraught with ambiguity and at times difficult to ensure.

One of the fundamental freedoms of the Union law is the free movement of people. With this, almost by necessity, comes the free movement of crime, and accused persons who do not speak the language of the investigation and prosecution of their alleged crimes.

There are over 250 indigenous languages on the European continent,¹ with 24 official languages recognized by the European

¹ Meirion Prys Jones, 'Endangered Languages and Linguistic Diversity in the

Union.² This ease of movement has also led to a greater awareness of the difficulties faced by individuals who are suspected or accused of committing crimes within the European criminal justice area. The concept that a defendant is entitled to interpretation and or translation in Europe is not new and has existed within the European Convention on Human Rights (ECHR) for nearly seventy years.³ More recently it has developed since 2009 with the European Union's Directive 2010/64/EU, wherein the Union has attempted to codify and regularize the very fundamental rights of accused and suspected individuals, which are key components of the right to a fair trial.

This paper will examine the development of the rights to interpretation and translation in Europe, paying particular mind of Directive 2010/64/EU, and the resulting jurisprudence of the Court of Justice of the European Union, asking whether recent developments represent progress for criminal defendants, or rather, are minor steps which provide little real help in clarifying what can be at most, a strange, Kafkaesque process, particularly if one does not understand or can communicate in the language of the court.

2. Translation and Interpretation at the European Court of Human Rights

Since the adoption of the ECHR in 1951, the primary source of protection for fair trial rights in Europe has been Articles 5 and 6 of the Convention. Both of these articles have been interpreted by the European Court of Human Rights (ECtHR) as including the right to language services for those who cannot communicate in the language of the criminal proceedings.

Article 5 ECHR provides process protection for those who have been arrested or detained, whether or not their arrest results in a trial, with Article 5(2) providing that: 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'.⁴ While

European Union', European Parliament's Committee on Culture and Education (Brussels 2013) 41.

² Official website of the European Commission, Office of Translation, <https://ec.europa.eu/info/departments/translation_en> accessed 1 March 2018.

³ Art. 6 para 3 (a) and (e) ECHR.

⁴ Art. 5 (2) ECHR.

Article 5 protects individuals who have been deprived of their liberty, Article 6 affords procedural safeguards aimed at guaranteeing a fair criminal trial.

Article 6(3)(a) provides the right to ‘be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him,’ and in subsection (e) the right to ‘have the free assistance of an interpreter if he cannot understand or speak the language used in court’.⁵

The ECtHR has, over the years, delineated the extent to which the right to interpretation (and translation) applies.⁶ The Court pays particular attention to the ultimate goal of those rights, verifying whether the interpretation assistance provided is ‘such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events’.⁷ Consideration is thus given to the specific circumstances of the individual case, notably whether ‘the nature of the offence and communications to the accused by domestic authorities (...) are sufficiently complex as to require detailed knowledge of the language used during the trial proceeding’.⁸ In *Cuscani v United Kingdom* and *Amer v Turkey*, the Court applied a holistic, rather than a technical approach, imposing a positive obligation on the domestic courts to ensure that the right is adequately protected.⁹

The case law has melded these rights over time, bringing the right from different sources to an identical place, as today the right covers the moment of contact with the police until the termination of the case, either by judgment, through to the final appeal.

⁵ Art. 6 ECHR.

⁶ *Ladent v Poland*, 11036/03 [2008] ECHR 212 (18 March 2008) para 59-63 (the translation protections of Article 6(3), such as in the case where a defendant is arrested, but subsequently released); *Galliani v Romania*, 69273/01 [2008] para 53-54 (right applies to individual who is arrested for the purposes of deportation); *Diallo v Sweden*, 13205/07 [2010] para 25 (right begins at the first contact or questioning by the law enforcement agency).

⁷ *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) para 70.

⁸ W A Schabas, *The European Convention of Human Rights. A commentary* (Oxford University Press 2015) 314.

⁹ *Amer v Turkey*, 25720/02 [2009] para 81-83, *Cuscani v United Kingdom* (32771/96) [2002] ECHR 625 (24 September 2002) para 38-39, See also, J Brannan, ‘Raising the Standard of Language assistance in Criminal Proceedings From the Rights under Article 6 (3) ECHR to Directive 2010/64/EU’ (2012) 1 *Cyprus Hum. Rts. L. Rev.* 128.

3. The rights of suspects and accused persons under Directive 2010/64/EU

3.1. Defence rights to foster mutual trust

The ECHR paradigm of defence rights protection sets the minimum standard, yet it is fragmented and provides little guidance as to the practical application of when and how these rights were to be applied. With the entry into force of the Treaty of Lisbon in December 2009, the European Union, in an effort to foster mutual trust between Member States, particularly in judicial proceedings, has sought to further elaborate the core fair process rights with a certain degree of consistency.¹⁰

Notably, the Treaty raised the value of the Charter of Fundamental Rights to that on par with the Treaties. The Charter however is limited in its provisions which protect an accused,¹¹ as it only applies when Member States are implementing Union law, meaning that the Court of Justice has jurisdiction to rule on the consistency of domestic law with the Charter provided that the case or controversy at hand comes within the scope of EU law.¹² Article 82(2) of the Treaty on the Functioning of the European Union (TFEU), however, provides the legal basis of Union action regarding the protection of the rights of the accused, with the purpose of harmonizing the rights of individuals in criminal proceedings to the ‘extent necessary to facilitate mutual recognition of judicial decisions in criminal matters’.¹³

¹⁰ Competence for harmonizing criminal procedures is provided in Article 82 TFEU. The Union had previously delved into the field of criminal law, yet only for the purpose of combatting crime, through the adoption of mechanisms which coordinated and strengthened communication and mutual recognition between the Member States.

¹¹ Articles 47 to 50 EU Charter of fundamental rights specifically apply to rights protected in criminal proceedings, with Article 47 guaranteeing the right to an effective remedy and fair trial; Article 48 providing the presumption of innocence; Article 49 ensuring the principles legality and proportionality of criminal offences and penalties; and Article 50 ensuring the application of *ne bis in idem*. It should be noted that while there is no specific provision providing for translation or interpretation, Article 48 (2) reads: ‘Respect for the rights of the defence of anyone who has been charged shall be guaranteed.’

¹² Case C-617/10 *Åklagaren v Hans ÅkerbergFransson* EU:C:2013:105, para 19; Case C- 650/13 *Delvigne v Commune de Lesparre-Médoc and Préfet de la Gironde* EU:C:2015:648, para 27.

¹³ S Allegrezza, V Covolo, ‘The directive 2012/13/EU on the right to information in criminal proceedings: Status quo or step forward?’ in Z Đurđević and E Ivičević Karas (eds), *European Criminal Procedure Law in Service of Protection of European*

After earlier attempts to provide procedural protections for accused individuals,¹⁴ in November 2009, the Council of the European Union adopted the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.¹⁵ What was named the *Stockholm Programme* was seen as a compromise, a place to begin on the task of guaranteeing procedural rights, which would foster mutual trust.¹⁶ The directives which followed are often referred to as the ABC directives. The Directive on Interpretation and Translation¹⁷ would be the Union's first legislative act in the field of criminal law which sought to protect the rights of the accused, and represented a base-line of agreement for the Member States: the essential right of understanding of the process brought against an individual was paramount to the effectiveness and legitimacy of the proceedings, and is a significant step for the protection of procedural rights of suspected and accused persons.¹⁸

3.2. *The substance of the rights to interpretation and translation*

The Directive is straightforward requiring the Member State to provide, free of charge, language assistance which would ensure that the accused is able to participate in his own defence and understand the actions, which might be being taken against him.¹⁹

Article 2 covers the right of interpretation in criminal proceedings, with Article 2(1) providing a core right of interpretation at all stages of the investigatory and fact-finding process. Article 2(2) provides for interpretation for communication between the accused and her legal

Union Financial Interests: State of Play and Challenges (Croatian Association of European Criminal Law 2016) 41, 41.

¹⁴ See, S Cras, L De Matteis, 'The Directive on the Right to Interpretation and Translation in Criminal Proceedings: Genesis and Description' (2010) 4 *Eucrim* 153.

¹⁵ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1. See also, S Cras, L De Matteis (n 14). The rights included in the Roadmap were: Right to Interpretation and Translation; Right to Information; Access to a Lawyer; Legal Aid Reform; Vulnerable Accused and Suspected Persons; Pre-Trial Detention; and, Presumption of Innocence.

¹⁶ J S Hodgson, 'Safeguarding Suspects' Rights in Europe A Comparative Perspective' (2011) 14 *New Criminal Law Review* 611, 655.

¹⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/ 1.

¹⁸ S Cras, L De Matteis (n 14) 153.

¹⁹ S Allegrezza, V Covolo (n 13) 41.

representatives albeit limited in a twofold way: the communication must be in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications and the interpretation necessary for the purpose of safeguarding the fairness of the proceedings. Article 2(3) extends these rights to the hearing and speech impaired. The physical presence of the interpreter is not systematically required. Indeed, Article 2(6) allows the Member States to use technology in the provision of interpretation services. The right to interpretation also belongs, according to Article 2(7), to persons who are the subject of a European Arrest Warrant in the executing Member State. Lastly, Directive 2010/64/EU does not solely guarantee linguistic assistance. Article 2(8) requires measures, which insure the quality of the interpretation provided.²⁰

Article 3, on the other hand, covers the right to translation of essential documents in criminal proceedings. Article 3(2) defines the term ‘essential documents’ as including ‘any decision depriving a person of his liberty, any charge or indictment, and any judgment’. Where the defence requests the translation of other documents, the EU Directive leaves however the national authorities free to decide whether document is essential.²¹ Likewise, Article 3(4) restricts the right by limiting the requirement of translation to only ‘essential documents, which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them’. Article 3(5) provides a mechanism wherein the accused may challenge a court’s decision regarding which documents are essential. Mirroring Article 2, Article 3(6) provides for translations of documents for those who are the subject of a European Arrest Warrant. Just as the case law of the ECtHR,²² Article 3(7) allows national authorities to substitute the right to translation of documents for the right of interpretation of the documents in circumstances where ‘such oral translation or oral summary does not prejudice the fairness of the proceedings’. Unlike with the right to interpretation, Article 3(8) expressly allows an accused to waive translation rights. Any waiver must nonetheless fulfil specific requirements. The waiver must be unequivocal, given voluntary and in full knowledge of the

²⁰ Art. 2 Directive 2010/64/EU.

²¹ Art. 3 (3) Directive 2010/64/EU.

²² See for instance *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) para 70.

consequences thereof, for instance after having received legal advice.²³ Finally, Article 3(9) requires that the translations provided be of ‘a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence’.²⁴

The quality required in the interpretation and translation does however provide pragmatic challenges. While the EU Directive seems to hold a high standard, when read together with Article 2(6) on the use of technology, it becomes apparent that the Union was attempting to hit a middle ground of protecting the right in a sufficient manner to ensure the integrity of the proceedings while not creating an insurmountable standard for the Member States.²⁵ Additionally, there is no apparent mechanism of ensuring that the translation or interpretation is of the necessary quality, whatever level that may be. To date, no cases specific to quality standards of Article 2(8) and 3(9) have come through the courts wherein an accused has alleged that the quality of language services violated EU law. Instead, the European Union has encouraged Member States to pursue training for language professionals to fill the posts as required by the obligations set forth in the Directive.²⁶

As mentioned above, the Directive also allows for the use technology for Courts and law enforcement agencies in their upholding of the duties proscribed.²⁷ This has proven to be quite effective for law enforcement agencies, which may encounter a defendant on the street and share no common language with them. To this end many law enforcement authorities have developed technological services, which ensure compliance and thereby afford an accused with real-time interpretation services.²⁸

The Directive does not create a specific right to have the proceedings or crucial documents translated into a language that is the

²³ Art. 3 (8) Directive 2010/64/EU.

²⁴ Art. 3 Directive 2010/64/EU.

²⁵ Article 2(6) reads, ‘Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.’

²⁶ Art. 6 Directive 2010/64/EU.

²⁷ Art. 2(6) Directive 2010/64/EU.

²⁸ See, S Braun, J Taylor ‘Videoconference and remote interpreting in legal proceedings’ (2012) <<http://epubs.surrey.ac.uk/805380/>>, accessed 1 March 2018.

choice of the accused, but rather, simply to a language which the accused understands. Additionally, while the Directive requires that the accused be afforded an interpreter for the entirety of the procedure, from the initial contact to the imposition of a final judgment (including appeal), the obligation regarding translation of documents only extends to essential documents, which concern an accused's deprivation of liberty, any imposition of charges, or any judgment lodged against the accused.²⁹

4. First challenges and answers by the CJEU for the implementation of the EU Directive

Three cases have been referred to the Court of Justice of the European Union (CJEU) for interpretation of Directive 2010/64/EU. Each of the cases regard the question of the scope of the right to translation and interpretation and the measures, which are required to be taken by Member States with regards to their obligations under EU law. Two of the decisions, *Covaci* and *Sleutjes*, dealt with the nuanced practicalities of the application of the Directive, while the third, *Balogh*, was much more clear cut as to the specific application of it.

4.1 The preliminary ruling in Covaci

In the 2014 case of Gavril Covaci, a German court of first instance requested a preliminary ruling seeking clarification on two questions.³⁰ The first as whether the national courts could require a defendant to lodge an appeal in the language of the proceedings. The second was whether Articles 2, 3(1)(c) and 6(1) and (3) precluded the accused from being required to appoint a person authorised to accept service, in cases where the time for bringing an appeal began to run upon the service on the person authorised to accept service, whether or not the accused had actual notice (or knowledge) of the charged offense.³¹

Mr Covaci, a Romanian citizen, was charged with failing to produce proof of insurance, and providing forged insurance

²⁹ See Case C-216/14 *Covaci* EU:C:2015:686; Case C-25/15, *Balogh* EU:C:2016:423.

³⁰ Case C216/14 *Covaci* EU:C:2015:686.

³¹ *Ibid* para 16.

documentation when he was stopped at a traffic checkpoint.³² Paragraph 132 of the German Code of Criminal Procedure (*Strafprozessordnung*) requires that an accused persons who is not resident in Germany, appoint a person to accept service of process. This person is the clerk of the local court. Additionally, under German law, the time periods for bringing appeals against any judicial decision begins to run from date of service of the decision upon the persons appointed. As Mr Covaci was not domiciled in Germany, he executed the required authorization, appointing the clerk of the court as the person authorized to accept service.³³

Paragraph 410 of the Code of Criminal Procedure also contains an abbreviated process called a ‘Penalty Order’, which allows prosecutors to apply to a competent court for an order establishing the guilt of the defendant and the penalty in cases where there is no discernable question of fact that would require a hearing or trial. If the court issues the order and no objection is made, the provisional order becomes the permanent order enforceable upon the party accused. An objection may be submitted either in writing or by making a statement recorded by the registry of the court. If an objection is lodged, the court will hold a hearing to determine the merits of the charges.³⁴

In Mr Covaci’s case, a Penalty Order was sought by the prosecutor’s office.³⁵ The judge charged with determining whether or not to issue the order sought guidance from the CJEU on the interpretation of Directive 2010/64/EU.

In what is a narrowly drawn decision the CJEU did not take as an expansive view of the rights protected under the Directive. Similar to the Opinion of Advocate General Bot, the Court stressed the purpose of the Directive was to ensure that a minimum right to translation and interpretation was necessary in order to promote mutual trust in criminal proceedings, yet their focus was on the minimum standards of protection that EU secondary law provides.³⁶ However, the Court viewed the case not strictly as a question of whether the defendant could submit an appeal in a language different from the official language of the national court, but rather, whether a national court

³² Ibid

³³ Ibid paras 18 to 20.

³⁴ Ibid para 20.

³⁵ Ibid para 21.

³⁶ Ibid para 67.

was obliged to provide or pay for the translation of the appeal as required under Article 5 Directive 2010/64/EU.

Against this background, the Court took view that requiring the Member States ‘to take responsibility (...) for the translation of every appeal brought by the persons concerned against a judicial decision which is addressed to them would go beyond the objectives pursued by Directive 2010/64 itself’.³⁷ Nonetheless, guarantees of free linguistic assistance must enable the suspect or accused persons to ‘exercise their rights of defence and safeguarding the fairness of the proceedings’.³⁸ In this regards, the Court noted that under German law objections against a penalty order constitute the ‘only possibility’ for the accused to defend himself against the charges against him and have an adversarial trial.³⁹

Yet, German law allows an accused person to object to the Penal Order in person, as well as in writing. As a consequence, the court distinguished the two situations since they call into question different rights. Where the accused submit the objection orally without the assistance of a legal counsel, he shall benefit from the free legal assistance of an interpreter under Article 2 Directive 2010/64/EU. By contrast, Article 3 of the Directive does not grant the accused the right to lodge an objection in writing in a language other than the one of the proceedings. As the Court stressed, the right to translation ‘concerns, in principle, only the written translation into the language understood by the person concerned’.⁴⁰ Moreover, it is up to the national court to assess whether such an objection do constitute an ‘essential document’ within the meaning of Article 3 Directive 2010/64/EU.⁴¹

The right of interpretation was restricted to oral statements related to the case. This however, in the Court’s view, does not require that a national court provide defendants with a *carte blanche* with regards to translation:

‘compliance with the requirements relating to a fair trial merely ensures that the accused person knows what is being alleged against him and can defend himself, and does not necessitate a

³⁷ Ibid para 38

³⁸ Ibid para 37.

³⁹ Ibid para 41.

⁴⁰ Ibid para 44.

⁴¹ Ibid para 49.

written translation of all items of written evidence or official documents in the procedure'.⁴²

The provision of German law, which allows an accused person to object to the Penal Order in person, as well as in writing, seemed to satisfy the Court, as this allowed for the assistance of an interpreter under Article 2, and therefore German Law.⁴³

4.2. Right to translation or procedural obstacle to mutual recognition? The case in Balogh

In June of 2016, a second decision regarding the Directive's interpretation was handed down regarding the application of the Directive to a special proceeding of the Hungarian courts for the recognition of a foreign judgment.⁴⁴

In 2014, István Balogh, a citizen of Hungary, was convicted in Austria of aggravated burglar. He was sentenced to imprisonment and to pay the costs of his prosecution. He was assisted at trial and sentencing with an interpreter. Pursuant to the requirements of Article 4(2) of Framework Decision 2009/315, Austrian officials then informed Hungarian authorities of the conviction, using the European Criminal Record Information system (ECRIS).⁴⁵

For the recognition of foreign convictions, including those from other EU Member States, Hungary applies a 'special proceeding', which requires that the judgment be translated into Hungarian in order to be fully recognized under Hungarian law.⁴⁶ The procedure's sole purpose was to give Hungarian legal affect to the Austrian judgment and did not involve the determination of new facts or in fact the guilt of Mr Balogh. The question referred essentially was, who should pay for the translation – the Hungarian State, or the defendant.

The Judgment of the Fifth Chamber of the CJEU, noted that the Article 1 of the Directive required that Mr Balogh receives an interpretation of the judgment of sentencing at the time of the courts

⁴² Ibid para 39, relying on *Kamasinski v Austria*, 9783/82 ECtHR [1991] 13 EHRR 36 (19 December 1989).

⁴³ Ibid para 38-42.

⁴⁴ Case C-25/15 *Balogh* EU:C:2016:423.

⁴⁵ Ibid paras 8, 9, 10, 29.

⁴⁶ Ibid para 37.

pronouncement in Austria, and a written translation as soon as possible thereafter, and that is precisely what occurred in the case before the Court.⁴⁷ The Hungarian special procedure, however, fell outside of the proceedings covered by the Directive, as the Hungarian court was not determining the guilt or innocence of Mr Balogh, but rather it was merely confirming the conviction in Hungarian law.⁴⁸

Significantly, the Court found that the Hungarian procedure for the enforcement of a foreign conviction in and of itself violated Union Law as Article 82(1) TFEU provides that judicial cooperation in criminal matters is based on the principle of mutual recognition of judicial decisions. The Union's mechanisms to effectuate this recognition are Framework Decision 2009/315 and Decision 2009/316, which provide for the uniform sharing of criminal adjudications through the ECRIS system.⁴⁹ The special procedure employed by Hungary violated the principle of mutual recognition because it required a separate proceeding to 'recognise' the foreign (EU Member State) judgment.⁵⁰ ECRIS was designed to eliminate the necessity for such proceedings. The Court noted that the principle of mutual recognition under Article 82(1) does not permit a Member State to condition the recognition of a decision on such a procedure.⁵¹

4.3. *The scope of the right to translation in Sleutjes*

Finally, in October 2017, the CJEU handed down the most recent decision interpreting the Directive in the case regarding criminal charges against Frank Sleutjes.⁵²

On 2 November 2015, upon the application of the Aachen Public Prosecutor, the Düren Local Court (*Amtsgericht Düren*, Germany) issued a penalty order against Mr Frank Sleutjes, a Dutch national imposing, imposing a fine for failure to stop at the scene of an accident. The documentation accompanying the Penalty Order informed Mr Sleutjes, in Dutch, that the order would become legally

⁴⁷ *Ibid* para 39.

⁴⁸ *Ibid*, see also Case C-25/15 *Balogh*, Opinion of AG Bot EU2016:29, para 37

⁴⁹ Case C-25/15 *Balogh* Opinion of Advocate General Bot, para 68: ECRIS is a 'decentralised information technology system based on the criminal records databases in each Member State.'

⁵⁰ *Ibid*.

⁵¹ Case C-25/15 *Balogh*, paras 51, 54

⁵² Case C-278 *Franck Sleutjes* EU:C:2017:757.

binding if he did not challenge or object to it within two weeks of its service.⁵³ Notably, while the notice as to his legal remedies was provided in Dutch, the Penalty Order itself was not translated into Dutch and was served upon Sleutjes in German, the language of the proceedings, yet determined by the court to be a language that Mr Sleutjes did not understand.

Mr Sleutjes objected to the imposition of the Penalty Order by emails sent in Dutch to the Düren court. The Düren court then informed Sleutjes that correspondence to the court must be in German by letter dated 1 December 2015. At the same time, Mr Sleutjes's lawyer filed an objection to the Penalty Order by fax on 1st December 2015. On 28th January 2016 the court dismissed the objection as inadmissible on account of its late submission. Mr Sleutjes appealed against the order of dismissal of the appeal.⁵⁴

The German appellate court asked the CJEU for a preliminary ruling pursuant to Article 267 TFEU whether the Penalty Order was a judgment covered by Article 3 of the Directive.⁵⁵

Interestingly, the German Government, in its written observations, conceded that the under German domestic law entitled the accused is entitled to a translation of the Penalty Order and any opposition which he might lodge. The Government argued that therefore the matter was moot before the Court.⁵⁶ The position of the German Government – that the accused had a right under German Law to have his objection translated, was also a departure from the German position in *Covaci*. Additionally, as the CJEU pointed out, this was a view that the Düren Appeals Court did not seem to share.⁵⁷

In making its ruling, the Court likened the penalty order to both an indictment and a judgment, both being necessarily covered by the Directive, and therefore the document must be translated into a language that the accused would understand.⁵⁸

The tone of the judgment of the Court was significant. In *Covaci*, the Court seemed hesitant to push forward the rights granted to defendants by the directive, setting it was a minimum with modest application, the Court in *Sleutjes* more confidently pressed Member

⁵³ Ibid para 11.

⁵⁴ Ibid para 15.

⁵⁵ Ibid para 17.

⁵⁶ Ibid para 20

⁵⁷ Ibid para 20.

⁵⁸ Ibid para 33.

States to provide translation for necessary documents. This can be seen, not only in the words used by the Court, but also in the fact that they judged on the case at all, as the German Government had conceded that the right to translation under German Law applied to the Penalty order, and any objection which would be filed by the accused.⁵⁹

Additionally, appears to be movement in the acceptance of these rights by the Member States, if Germany serves as a barometer of state sentiments. Whereas in *Covaci*, neither the Court, nor the German Government would advocate for a translation of the objections to be covered by this right, now the point would be conceded.

5. Conclusions

While the right of translation and interpretation is vital for an accused defending himself in a foreign court in a language he does not understand, the right is only as effective as its implementation. As cooperation in criminal matters expands between the Member States, these guarantees, along with the sibling fair trial rights contained in the Stockholm Roadmap will become much more important. It is not about homogenizing criminal law, but rather about ensuring that the minimum rights allow for a fair process in order to foster mutual recognition between the Member States. These rights serve to nurture not only cooperation but also trust, at a cost that is insignificant when weighed against the protection granted.

This is particularly important as Member States develop ‘simplified’ processes, which, while they may be more economically efficient, cut against the ideas of a process where evidence is presented, tested and justice is served. It is particularly important in these cases that the core process rights be vigilantly protected. That seems to be the underlying theme or flavour of the Court’s reasoning. What applies in a normal process must also apply in a truncated process, in so far as procedural safeguards are essential to ensure the fairness of the criminal proceedings.

As with much legislation which implements and protects rights, the test of effectiveness of the measure often depends on the interpretation of the duty imposed upon the Member States and the extent to which the competent national authority is willing to broadly construe the duty. Directive 2010/64/EU contains provisions which, when interpreted

⁵⁹ Ibid para 20.

narrowly, could have a negative effect upon the exercise of defence rights. Chief among these is the provision, which allows Member States to avoid or limit the cost of translation.

This could occur primarily in two situations. The first is a narrow reading of the documents which are ‘necessary for the defence’, as provided in Article 3(1). This problem is perhaps the easiest to address in the CJEU and the three cases, which have come before the Court have dealt specifically with this provision. Interestingly, however, the Court declined to delineate what constitutes the essential character of a document. Additionally, from a defence point of view, what might be relevant to the authority making the determination as to what constitutes ‘essential’ is either the prosecutorial agency or the court. Often the significance of material can only be seen when viewed against other material. For example, a witness statement, which seems to be insignificant, may gain greater importance when read in conjunction with other ‘relevant’ or ‘irrelevant’ pieces of evidence.

The second, and perhaps most amorphous is Article 3(4) which allows for the translation of only the relevant portions of the statement, this limitation allows for judicial actors outside of the defence to determine what is significant to the defence of a case. This might also be more difficult to challenge, either at the national level or at the European level.

Article 3(7) permits the national court to allow for a verbal communication of the relevant material (via interpretation as opposed to translation), or an ‘oral summary’ provided that there is no prejudice to the defence. This also could be problematic, and difficult to prove the violation of. Thus far this issue has not come before the CJEU.

Additionally, Article 1(3), regarding the scope of the Directive, provides that minor offenses, which have the possibility of an appeal to a higher court, are exempt from the application of the Directive. The right would therein only apply once the individual appeals the adverse judgment. This provision could have a negative impact upon defence rights, as often convictions on minor offenses are the basis for enhanced sanctions on subsequent convictions. Additionally, this may be a bulk of the cases where translation and interpretation is needed.

Lastly, and perhaps most fundamentally, is that the Member States are largely left to themselves to assess whether or not the quality of translation and interpretation meets the criteria of allowing an accused to understand the process brought against him and meaningfully

participate in his own defence. The Directive sets no criteria for the qualifications of translators or interpreters – this is left to national law. Hence, according to a 2016 study published by the Legal Experts Advisory Panel, the measure of qualification of service providers, and the quality of language services are inconsistent across the European Union.⁶⁰ Thus far, no cases have been brought before the CJEU seeking interpretation as to the level of ‘quality’ foreseen in Article 2(8) and 3(9) of the Directive.

Perhaps important is the goal of Directive 2010/64/EU when read in conjunction with the other Roadmap directives. These are base-line rights, which are Europeanised in order to facilitate judicial cooperation, mutual trust and recognition. Taken with Directive 2012/13 on the right to information; Directive 2013/48 on the right to access to a lawyer; Directive 2016/343 on the presumption of innocence and Directive 2016/800 on the special safeguards for children, and Directive 2016/1919 on the provision of legal aid, Directive 2010/64 can be seen as a positive base-line from which to build, in order to ensure that the right to fair trial, enshrined in Article 47 of the EU Charter and Article 6 ECHR, are actually and effectively respected and implemented. The proof however will be in the pudding, or in other words, how the rights are enforced at the national level.

⁶⁰ See, Legal Experts Advisory Board, *The Quality of Interpretation in Criminal Proceedings*, LEAP Survey Report (2106) <<https://www.fairtrials.org/wp-content/.../LEAP-Interpretation-Report-Mar2016.pdf>> accessed 16 March 2017.

CHAPTER III

DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

Silvia Allegrezza and Valentina Covolo

TABLE OF CONTENTS: 1. The genesis of Directive 2012/13/EU. – 2. Right to information about rights. – 3. The right to be informed about the charges. – 4. The right of access to the case file. – 5. Recording procedure and legal remedies. – 6. Conclusions.

1. The genesis of Directive 2012/13/EU

The right to information is aimed at enabling persons suspected or accused of having committed a criminal offence to effectively prepare their defence, and, thereby, guaranteeing the fairness of the proceedings.¹ With this understanding, the Court of Justice of the European Union (CJEU) interpreted for the first time Directive 2012/13/EU on the right to information in criminal proceedings² and, more generally, the rights of defence that EU secondary law grants to suspects and accused persons in criminal matters.³ Indeed, the 2012 Directive implements measure B of the Roadmap for strengthening procedural rights of defendants adopted by the Council in 2009.⁴ Pursuant to Article 82 (2) TFEU, which forms the legal basis for the

¹ Case C- 216/14 *Covaci* EU:C:2015:686, para 63.

² Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

³ In particular, the preliminary ruling referred to the CJEU in *Covaci* also concerned the interpretation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

⁴ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1. On the difficulties encountered during the

ABC Directives, their purpose lies in harmonizing rights of individuals in criminal proceedings to the extent necessary to facilitate mutual recognition of judicial decisions in criminal matters.⁵ Despite the approximation of domestic law resulting from the extensive case law of the European Court of Human Rights (ECtHR), significant discrepancies between national criminal procedures may still jeopardize mutual trust between Member States.⁶ Moreover, recent studies have highlighted the limited effectiveness of the Strasbourg system in exhorting national legislators to strengthen procedural guarantees by reforming criminal procedures.⁷

Against this background, Directive 2012/13/EU is intended to promote common minimum standards for the information to be provided to suspects and accused persons in order to ensure the fairness of transnational criminal proceedings, considering both the vertical and horizontal dimension of the European penal area.⁸ To this end, the right to information guaranteed under the directive is rooted on the one hand in the common constitutional traditions of the Member States. On the other, it falls within the umbrella concept of defence rights referred to in Article 48 (2) of the EU Charter of Fundamental Rights. The latter provision and, in a similar fashion, Directive 2012/13/EU, reflect the corresponding rights to be informed arising from Articles 5 and 6 of the European Convention on Human Rights (ECHR).⁹ Even though the right to information is not explicitly mentioned in the wording of the Convention, its scope has been outlined over the years by the case law of the ECtHR.¹⁰ From this perspective, does Directive 2012/13/EU represent a step forward? To answer this question, the following sections will analyse the three dimensions of the procedural safeguard harmonized by the 2012

legislative process, S Cras, L De Matteis, 'The Directive on the Right to Information. Genesis and Short Description' (2013) 1 *Eucrim* 22.

⁵ Art. 82 para 2 (b) TFEU.

⁶ T Spronken, G Vermeulen, D De Vocht, *EU Procedural Rights in Criminal Proceedings* (Maklu, 2009) 25 ff.

⁷ L Van Puyenbroeck, G Vermeulen, 'Towards minimum procedural guarantees for the defence in criminal proceedings in the EU' (2011) 60 *Int Comp Law Q* 1017 – 1038, 1022 ff.; M Morgan, 'Are article 6 ECHR and ECtHR enough to protect defence rights?' (2007) *J Eur Crim Law* 27 – 35.

⁸ Recital 10 Directive 2012/13/EU.

⁹ In particular, Article 5 §2 of the Convention guarantees the right to be promptly informed of the reasons of the arrest, whilst Article 6 §3 (a) enshrines the right to be informed promptly of the nature and causes of the accusation.

¹⁰ E Lloyd-Cape, Z Namoradze, R Smith, T Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2012) 32 ff.

Directive: respectively, the right of the suspect or accused person to be informed about procedural guarantees,¹¹ the right to be informed about charges¹² and the right to access the case file.¹³

2. The right to information about rights

The effective exercise of the right to defence presupposes that the suspected or accused persons are promptly made aware of the rights they are entitled to in criminal proceedings. To this end, the right to be informed about procedural rights arises ‘from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings’.¹⁴ Consequently, the right to information about rights guaranteed under Article 3 Directive 2012/13/EU does not depend on the official notification of the charges, nor on the indictment by the prosecuting authorities. Indeed, the term ‘suspect’ refers to an individual who has not yet been officially charged.¹⁵ Similarly, the ECtHR does not systematically adopt a formal definition of criminal charges in order to identify the procedural stage that triggers the applicability of the fair trial guarantees enshrined in Article 6 (3) of the Convention. Rather, the European case law refers at times to a substantial criterion, where the situation of the applicant who is not formally accused is nevertheless ‘substantially affected’ by the criminal investigation.¹⁶ In this circumstance, the Court admits that Article 6 ECHR comes into play at an early stage of the proceedings considering the ‘special features of those proceedings and the circumstances of the case assessed in relation to the entirety of the domestic proceedings conducted in the case’.¹⁷ Therefore, the procedural stage at which the suspect must be first informed will mostly depend on the significance of the secrecy of pre-trial investigations within criminal justice systems and, consequently, may

¹¹ Art. 3 Directive 2012/13/EU.

¹² Art. 6 Directive 2012/13/EU.

¹³ Art. 7 Directive 2012/13/EU.

¹⁴ Art. 2 §1 Directive 2012/13/EU.

¹⁵ S Quattrocolo, ‘The Right to Information in EU Legislation’, in S Ruggeri, *Human Rights in European Criminal Law* (Springer, 2015) 81 – 93, 85.

¹⁶ *Zaichenko v Russia*, App no 39660/02 (ECtHR, 18 February 2010) para 42 – 43.

¹⁷ *Ibid* para 45.

vary significantly among Member States.¹⁸ Thus, Directive 2012/13/EU is expected to entail limited harmonization in this respect.

Having regard to the substance of information conveyed, Article 3 Directive 2012/13/EU enacts only a minimum content. National authorities must inform the suspect or the accused, at the very least, of their right of access to a lawyer, any entitlement to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent.¹⁹ Concerning the latter procedural guarantee, it remains doubtful whether the right to remain silent should be understood as encompassing the privilege against self-incrimination. Although these rights are intrinsically linked, the case-law of the ECtHR refers separately to both guarantees while interpreting Article 6 of the Convention.²⁰ As with regards to procedural requirements, the 2012 Directive requires the competent national authorities to communicate the information orally or in writing, as well as in simple and accessible language.²¹ This last requirement has to be interpreted in line with Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.²²

The standards of protection are higher in the case of deprivation of liberty. According to Article 4 of the Directive, Member States must inform promptly the arrested or detained person in writing about further procedural guarantees.²³ The so-called ‘Letter of Rights’ shall indicate the right of access to the materials of the case, the right to have consular authorities and one person informed, the right of access to urgent medical assistance, the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.²⁴ The Directive also provides for a model letter of rights to be used in proceedings for the execution of a European arrest warrant.²⁵ In addition, basic information about any

¹⁸ S Quattrocolo (n 15) 85.

¹⁹ Art. 3 (1) Directive 2012/13/EU.

²⁰ See for instance *Saunders v United Kingdom*, App. no 19187/91 (ECtHR, 17 December 1996) para 68.

²¹ Art. 3 (2) Directive 2012/13/EU.

²² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

²³ Art. 4 (1) Directive 2012/13/EU.

²⁴ Art. 4 (2) Directive 2012/13/EU.

²⁵ Art. 5 Directive 2012/13/EU.

possibility, under national law, of challenging the lawfulness of the arrest, obtaining a review of the detention or making a request for provisional release must be provided.²⁶ The inclusion of the latter information corresponds to the *habeas corpus* guarantees enshrined in Article 5 (4) ECHR. In this respect, it is worth recalling that the right to a review of the lawfulness of the arrest does not simply require information about the possibility of appealing a detention order and the related procedural requirements. It also implies the opportunity for the arrested person to know the reasons for his arrest and detention, as well as the right to have access to the case file within adequate time, in order for the right to review of arrest warrants to be effectively exercised according to the principle of equality of arms.²⁷

3. The right to be informed about the charges

According to Article 6 Directive 2012/13/EU, the right to be informed about the accusation takes different forms. While the first paragraph of the provision guarantees the right for the defendant to be promptly informed about the offence he is suspected of having committed,²⁸ the third paragraph compels national authorities to provide detailed information, at the very latest, upon the submission of the merits of the accusation to a court.²⁹ In other words, the closer the proceedings come to the adversarial stage, the more detailed the information available to the defendant must be.

The provision first guarantees that general information about the criminal act that an individual is suspected or accused of having committed.³⁰ Little guidance for determining the scope of the right arises from the wording of Article 6 itself. On the one hand, the directive gives a rather vague and broad definition of the content of such a communication. Indeed, it requires that the information about the charges must be provided ‘in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of defence’.³¹ Given the lack of precise requirements, Member States are likely to adopt divergent standards of protection in

²⁶ Art. 4 (3) Directive 2012/13/EU.

²⁷ *Schöps v Germany*, App no 25116/94 (ECtHR, 9 December 1998) para 44.

²⁸ Art. 6 (1) Directive 2012/13/EU.

²⁹ Art. 6 (3) Directive 2012/13/EU.

³⁰ Art. 6 (1) Directive 2012/13/EU.

³¹ Art. 6 (1) Directive 2012/13/EU.

implementing Article 6 (1) of the Directive. On the other hand, the provision does not specify the time period in which the person must be informed.³² Nonetheless, recitals 19 and 28 indicate a certain timeframe that national authorities should respect. When read in conjunction, a ‘prompt’ provision of information means that the guarantees under Article 6 Directive 2012/13/EU apply, at the latest, before the first official interview of the suspect or accused person by the police or by another competent authority.³³

Both aspects were addressed by the CJEU in *Covaci*.³⁴ The preliminary rulings submitted by a German Court brought into question the compatibility of national notification procedures with Article 6 Directive 2012/13/EU.³⁵ In the dispute in the main proceedings, a German Court, upon the request of the Public Prosecutor, issued a penalty order against Mr Covaci, a Romanian citizen who was not resident in Germany. The penalty order constitutes a provisional decision, which informs the accused about the charges against him and imposes a fine in case of minor offences. Thus, the service of the penalty order must be seen as a communication of the accusation against the offender. Yet, German law provides that the accused who is not resident in the country is under an obligation to appoint a person authorized to accept service of a penalty order. The period of two weeks for lodging an objection against that order runs from the service of the penalty order to the authorized person.

Following the opinion delivered by Advocate General Bot, the Court firstly recalled that the 2012 Directive ‘does not regulate the procedures whereby information about the accusation (...) must be provided’.³⁶ However, those procedures cannot undermine the objective of Article 6 (1) and (3), which consists in enabling suspects or accused persons to prepare their defence and in safeguarding the fairness of the proceedings.³⁷ Therefore, the notification procedure in question was consistent with Article 6 Directive 2012/13/EU in as far as the period for lodging an objection begins to run from the time when the accused person actually becomes aware of the penalty

³² Art. 6 (1) Directive 2012/13/EU.

³³ Recitals 19 and 28 Directive 2012/13/EU.

³⁴ Case C- 216/14, *Covaci* EU:C:2015:686.

³⁵ *Ibid* para 52.

³⁶ Case C- 216/14 *Covaci*, para 62; Case C- 216/14 *Covaci*, Opinion of AG Bot EU:C:2015:305, para 105.

³⁷ Case C- 216/14 *Covaci*, para 63.

order.³⁸ With this reasoning, the Court did not address the appropriateness of the limitation period established under national law, but merely applied the principle of non-discrimination between accused persons with a residence within or outside the territory of the Member State.³⁹

A similar question was addressed by the CJEU in *Tranca*.⁴⁰ The preliminary ruling relates once again to the German notification rules governing penalty orders against persons who have no fixed domicile or residence in Germany, nor in their country of origin. In line with the ruling in *Covaci*, the Court emphasised that ‘the objective of Article 6 of Directive 2012/13 [...] is manifestly infringed if the addressee of a penalty order such as those at issue in the main proceedings, which has become final and enforceable, could no longer object to it, even though he had not been aware of the existence and content of that order at a time when he could have exercised his rights of defence, in so far as, for want of a known place of residence, it was not served on him personally’.⁴¹ As a result, an accused person who has not been served personally with the order must benefit from the whole of the prescribed period for lodging an objection against the penalty order,⁴² an objection that represents the first and only possibility for the accused to exercise his right of defence in the simplified penalty order procedure. This does not only require the competent authorities not to reduce the duration of that period by the time needed by the person authorized to receive notice of the order to transmit it to its addressee.⁴³ Article 6 Directive 2012/13/EU also implies the right of the accused person to have his position restored to the *status quo ante*, where this is necessary to guarantee the right to lodge an objection and, thereby, the effective right of defence.⁴⁴

Secondly, the defendant has the right to obtain more precise information at a later stage of proceedings. Thus, the competent authorities shall provide the accused person with detailed information on the accusation, which includes the nature and legal classification of the criminal offence as well as the nature of participation by the

³⁸ Ibid para 66 - 67.

³⁹ Ibid para 65.

⁴⁰ Joined Cases C-124/16, C-188/16 and C-213/16, *Criminal proceedings against Ianos Tranca and Others* EU:C:2017:228.

⁴¹ Ibid para 45.

⁴² Ibid para 47.

⁴³ Ibid para 43.

⁴⁴ Ibid para 48 ff.

accused.⁴⁵ The right to be informed under Article 6 (3) of the Directive applies, at the latest, upon submission of the merits of the accusation to a court.⁴⁶ In the view of Advocate General Bot, the wording of the provision must be understood as referring to the opening of the oral procedure before the trial court.⁴⁷ Therefore, the communication of detailed information about the charges must take place at the latest before the adversarial assessment of evidence in the court room, provided that such communication is ‘accompanied by the grant of a period which suffices for the accused to prepare an effective defence’.⁴⁸ The information to be provided encompasses factual and legal aspects, while the right to be informed enshrined in paragraph 1 of the provision might be construed as limited to the factual aspects of the case.⁴⁹ Lastly, the directive requires that any changes in the information given in accordance with Article 6 must be communicated to suspects and accused persons.⁵⁰

In addition to criminal charges, Article 6 Directive 2012/13/EU contains a specific provision on the right to information for the reasons of the arrest.⁵¹ As mentioned above, the right to be informed constitutes the *conditio sine qua non* that enables the person deprived of their liberty to challenge the lawfulness of an arrest warrant or detention order, as guaranteed by Article 5 (4) ECHR.

Likewise, the right to be promptly informed about the reasons for the arrest corresponds to the procedural safeguard enshrined in Article 5 (2) of the Convention.⁵² In this respect, the ECtHR case law provides clarification regarding both the content of the information conveyed and the timeframe within which such a communication should be made. On the first aspect, the Court considered that by virtue of Article 5 (2) of the Convention ‘any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest’.⁵³ As regards to the

⁴⁵ Art. 6 (3) Directive 2012/13/EU.

⁴⁶ Art. 6 (3) Directive 2012/13/EU.

⁴⁷ Case C-612/15 *Criminal proceedings against Nikolay Kolev and Stefan Kostadinov*, Opinion of AG Bot EU:C:2017:257 para 100.

⁴⁸ *Ibid* para 101.

⁴⁹ S Quattrocolo (n 15) 87.

⁵⁰ Art. 6(4) Directive 2012/13/EU.

⁵¹ Art. 6 (2) Directive 2012/13/EU.

⁵² C Grabenwarter, *European Convention of Human Rights. Commentary* (2014, Beck, Hart, Nomos) 85.

⁵³ *Fox, Campbell and Hartley v United Kingdom*, App nos 112244/86, 12245/86 and 12383/86 (ECtHR, 30 August 1990) para 40.

time frame, neither the Convention provisions, nor the case-law, establish an exact interval defined by minimum and maximum terms during which the information must be provided. As a general rule, the information should be given immediately or as soon as practicable after the person is deprived of his liberty, the requirement of promptness being assessed in each case according to its special features.⁵⁴ The Court held, for instance that information provided a few hours after arrest complied with Article 5 (2) ECHR,⁵⁵ whilst it found a violation of the provision where the delay between the arrest and the communication amounted to 76 hours.⁵⁶ Again, the extensive case law of the Strasbourg Court offers guidance for interpreting Article 6 (2) Directive 2012/13/EU.

4. The right of access to the case file

The third component of the right to information under the 2012 Directive lies in access to the case file. On the one hand, Article 7 grants the arrested and detained persons access to documents that are essential to effectively challenging the lawfulness of arrest and detention.⁵⁷ The wording of the provision coincides with the interpretation adopted by the ECtHR of Article 5 (4) of the Convention. Indeed, in *Mooren v Germany*, the Court explicitly stressed that proceedings ‘before the court examining an appeal against detention must be adversarial and must always ensure equality of arms between the parties (...). Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of his client’s detention’.⁵⁸ It is interesting to note that, unlike the ECtHR case law,⁵⁹ Article 7(4) Directive 2012/13/EU rules out any possibility of restricting the right of the person deprived of his liberty to access documents essential to

⁵⁴ Ibid.

⁵⁵ Ibid; *Murray v United Kingdom*, App no 14310/88 (ECtHR, 28 October 1994) para 78.

⁵⁶ *Saadi v United Kingdom*, App no 13229/03 (ECtHR, 29 January 2008) para 84.

⁵⁷ Art. 7 (1) Directive 2012/12/EU.

⁵⁸ *Mooren v Germany*, App no 11364/03 (ECtHR, 9 July 2009) para 124.

⁵⁹ See for instance *Piechowicz v Poland*, App no 20071/07 (ECtHR, 17 April 2012) para 203.

challenging the lawfulness of detention. The exact content of the information to be provided ultimately relies on the way the competent court interprets the ‘essential’ character of those documents. Hence, the provision of incomplete factual information or brief summaries may raise concerns about whether the national judicial practice is fully respectful of the requirement in Article 7(1) of the EU Directive.⁶⁰

On the other hand, the EU Directive guarantees to any other suspect or accused person the right to access all material evidence in the possession of the competent authorities, whether for or against them.⁶¹ The information disclosed must be sufficient to safeguard the fairness of the proceedings and to enable the adequate preparation of the defence.⁶² Furthermore, access to the case materials shall be granted in due time.⁶³ In this respect, the directive adds a precise time limit prior to which the procedural guarantees must be enforced, namely ‘at the latest upon submission of the merits of the accusation to the judgment of a court’.⁶⁴ However, it is not clear from the wording used whether the right to access the case file should be granted during the pre-trial stage of criminal proceedings. Consequently, discrepancies may persist among the legislation of Member States.

The entitlement to disclosure of relevant materials and evidence is not an absolute right.⁶⁵ Accordingly, Article 7 (4) Directive 2012/13/EU allows Member States to refuse access to certain case materials in a limited number of circumstances. The grounds of refusal that are allowed by EU legislation are restricted to threats to the life or the fundamental rights of another person, as well as the need to safeguard an important public interest provided that the refusal to access the case file is strictly necessary for that purpose.⁶⁶ In a similar way, the ECtHR consistently held that restrictions to the right to access to the

⁶⁰ A Tinsley, ‘Protecting Criminal Defence Rights through EU Law: Opportunities and Challenges’ (2013) 4 *New J Eur Crim L* 461 – 480, 478.

⁶¹ Art. 7 (2) Directive 2013/13/EU. For an overview of the ECtHR case law on the right to access the case file, A Tsagkalidis, ‘Directive 2012/13/EU on the Right to Information in Criminal Proceedings’ (2017) <http://www.era-comm.eu/procedural_safeguards/kiosk/pdf/2017/Article_Right_to_Information.pdf>, 9 ff.

⁶² Art. 7 (2) Directive 2013/13/EU.

⁶³ Art. 7 (3) Directive 2013/13/EU.

⁶⁴ Art. 7 (3) Directive 2013/13/EU.

⁶⁵ *Rowe and Davis v United Kingdom*, App no 28901/95 (ECtHR, 16 February 2000) para 61.

⁶⁶ Art. 7 (4) Directive 2013/13/EU.

case file are admissible under Article 6 of the Convention in as far as they are ‘strictly necessary’.⁶⁷

It should however be stressed that Article 7 Directive 2012/13/EU does not refer to official questioning. The silence of the text on this point might seem surprising, especially considering that knowledge of incriminating evidence is crucial for the defence to prepare for interrogation. Indeed, empirical studies have shown the reluctance of prosecuting authorities to disclose information. The reasons highlighted by these studies have their basis in the culture of secrecy characterizing criminal investigations and distrust toward defence lawyers.

5. Recording procedure and legal remedies

Directive 2012/13/EU provides two legal mechanisms in order to ensure the effectiveness of the right to information. First, Article 8 grants the suspect or accused person, or their lawyer, the right to challenge the failure or refusal of the competent authorities to provide information in accordance with the directive.⁶⁸ It is worth noting that an equivalent right to challenge is not guaranteed as such by the ECHR. Indeed, the Strasbourg Court assesses the overall effectiveness of the right to be informed and the access to evidence under the principle of equality of arms.⁶⁹ The right to access the case file constitutes an essential element forming part of the reasonable opportunity that must be afforded to the defence to present his case in conditions that do not place him at a disadvantage *vis-à-vis* the prosecution.⁷⁰ Secondly, all the information provided in accordance with the Directive shall be noted using the recording procedure specified in the law of the Member State concerned.⁷¹ Similarly, the ECtHR found, for instance, a breach of the right to be informed of the reasons for the arrest in case of a lack of reliable information resulting from the absence of recording.⁷²

⁶⁷ *Jasper v United Kingdom*, App no 27052/95 (ECtHR, 16 February 2000) para 52.

⁶⁸ Art. 8 (2) Directive 2012/13/EU.

⁶⁹ *Foucher v France*, App no 22209/93 (ECtHR, 18 March 1997) para 32 ff.

⁷⁰ *Ibid.*

⁷¹ Art. 8 (2) Directive 2012/13/EU.

⁷² *Kaboulov v Ukraine*, App no 41015/04 (ECtHR, 19 November 2009) para 147 – 148.

However, no procedural sanctions are provided in case of a violation of the duty to record or a breach of the right to information. One could wonder whether the lack of legal consequences in case of infringement would undermine the effectiveness of the procedural guarantees enshrined in the EU Directive.⁷³ Although the defendant shall have the possibility to challenge the failure of the competent authorities to provide information, the concrete consequences (if any) of such an appeal procedure where the competent authorities found a breach of the right to information strongly relies on the national legislation of each Member State. Furthermore, some empirical studies have pointed out that despite the information conveyed, individuals mostly remain ignorant of the procedural guarantees they are entitled to. In order for the accused to gain a sound understanding of the procedure, the tone of communication is just as important as the content. From that perspective, does the right to information guarantee, in an effective way, sufficient awareness of the suspected or accused person of their own rights?

5. Conclusions

Even though Directive 2012/13/EU is mostly built upon the ECHR and its related case law, it takes a step forward with regards to certain aspects of the right to information in criminal proceedings. While the abundant case law of the Strasbourg Court provides further explanations concerning the amount of information that must be communicated, the EU Directive imposes on national authorities more specific requirements relating to the time frame, recording and legal remedies. In doing so, the EU legislator strove to enhance the effectiveness of the right to be informed.⁷⁴ Similarly, the ECtHR pays particular attention to the effective exercise of defence rights stemming from the principle of a fair trial.⁷⁵ However, the effectiveness of the right to information under the Convention primarily relies on the specific features and circumstances of a case. Likewise, the ECtHR stressed that the fact that competent authorities passively make information available to the suspect or accused person

⁷³ S Quattrocolo (n 15) 90.

⁷⁴ Recital 16 Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392 final.

⁷⁵ *Padalov v Bulgaria*, App no 54784/00 (ECtHR, 10 August 2006) para 51.

does not necessarily mean that they systematically comply with the rights guaranteed under the Convention.⁷⁶ Indeed, the right to information in criminal proceedings also entails a positive obligation on competent authorities to provide individuals with information on their defence rights as well as to take additional steps in order to ensure that they effectively understand the information conveyed.⁷⁷ Despite this common background, it should be emphasized that Member States have less leeway regarding the duty to inform the suspect or accused person under the Directive compared to the ECHR.

Although the Directive strengthens the right to information arising from European legal texts, its transnational implementation still raises questions. In this regard, the CJEU explicitly held that ‘in so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law’.⁷⁸ To what extent is the EU judiciary willing to limit the principle of mutual recognition in criminal matters in the event of a violation of the right to be informed and more generally when procedural guarantees of the defendant have been infringed? The question does not only reflect concerns about the judicial dialogue between European judges. It also reminds us that the effective implementation of defence rights guaranteed by the new directives depends *in fine* on the judicial review undertaken by national and European courts. The judgments of the CJEU in *Covaci* and *Tranca* are surely the first of a series of preliminary rulings, which will further clarify the scope of defence rights within the multilayered European penal area.⁷⁹

The role the CJEU will play in interpreting defence in criminal

⁷⁶ *Mattoccia v Italy*, App no 23969/94 (ECtHR, 25 July 2000) para 65.

⁷⁷ *Talat Tunç v Turkey*, App no 32432/96 (ECtHR, 27 March 2007) para 61; *Panovits c. Cyprus*, App no 4268/04 (ECtHR, 11 December 2008) para 72 – 73.

⁷⁸ CJEU, Opinion 2/13 EU:C:2014:2454, para 194.

⁷⁹ At the time of writing this contribution, two additional preliminary rulings dealing with the interpretation of Directive 2012/13/EU are pending. See Requests for a preliminary ruling in Case C-510/17 *Criminal proceedings against ML* and Case C-646/17 *Criminal Proceedings against Gianluca Moro*.

proceedings is even more crucial given the potential scope of application of the Charter of Fundamental Rights. According to article 51 (2) of the EU Charter, the latter applies to the Member States only when they are implementing the Union law.⁸⁰ In other words, the Court of Justice has jurisdiction to rule on the consistency of domestic law with the Charter provided that the legal situation under consideration comes within the scope of EU law.⁸¹ As Directive 2012/13/EU shows, the scope of application of secondary law harmonizing procedural guarantees covers any kind of criminal proceedings, irrespective of the seriousness of the offence at stake.⁸² Likewise, the applicability of EU Directives on defence rights under criminal procedure is not dependent on prior harmonization of substantive criminal law, nor should the procedural guarantees stemming from the Charter be limited to those sectors of penal law falling within the scope of Article 83 TFEU. The transversal dimension of the newly adopted directives will dramatically increase the number of preliminary rulings addressed to the EU judicature in the coming years. Let us hope that this will give rise to courageous stances and fruitful judicial dialogue.

⁸⁰ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 19.

⁸¹ Case C-650/13 *Delvigne* EU:C:2015:648, para 27.

⁸² Art 2 Directive 2012/13/EU.

CHAPTER IV

THE RIGHT OF ACCESS TO A LAWYER UNDER DIRECTIVE 2013/48/EU

Teresa Armenta Deu and Lisa Urban

TABLE OF CONTENTS: 1. Introduction. – 2. Scope of application. – 3. The content of the right to legal assistance. – 3.1. Access and communication with a defence lawyer. – 3.2. The role of the defence counsel: from attendance to effective participation. – 3.3. Legal assistance and EAW. – 4. Waiver and limitations. – 5. Conclusions.

1. Introduction

At the very heart of a fair criminal trial stands the right of the defendant¹ to adequately and effectively defend himself. A keystone of this defence is the possibility of having access to a lawyer. In this context, Article 6 paragraph 3 (c) of the European Convention of Human Rights (ECHR) states that any person charged with a criminal offence is entitled to ‘defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of Justice so require’. Indeed, the defence lawyer holds a central role throughout the procedure, as he ensures, on several levels, effective defence for the suspect or the accused. By explaining and advising his client, the legal counsel enables the defendant to understand the case against him, prepare his defence and enforce his rights, thereby enhancing the equality of arms.

Although the European Court of Human Rights (ECtHR) has stated that the right to legal advice must be guaranteed at any stage of the

¹ Defendant, as used in this article, is to be understood as both the suspect and the accused person.

proceedings,² past experiences have shown that the exact scope of this right and its limitations differ greatly from one Contracting State to another.³ This is due to a number of factors. Firstly, the Convention itself sets only minimum standards for the protection of human rights and leaves it to the national legislators to implement and enforce the guaranteed rights accordingly. As a consequence, the practical implementation into national law may vary greatly. Secondly, the role of the ECtHR as a harmonizing tool is also essentially limited, since the Strasbourg judges only decide in a reactive manner and on a case-to-case basis. Furthermore, the decisions only unfold their effect *inter partes* and without the guarantee of effective and rapid enforcement mechanisms.⁴ Consequently, the actual application of the right to legal assistance, as with many other rights protected by the Convention, differs greatly among the Contracting States.

However, common standards in the protection of procedural rights are essential to promote cross-border cooperation among EU Member States. Indeed, judicial cooperation within the EU criminal justice area is based on the principle of mutual recognition, which requires mutual trust that only grows where fundamental rights are respected. Therefore, Article 82 paragraph 2 (b) of the Treaty on the Functioning of the European Union (TFEU) demands the establishment of homogenous minimum rules concerning ‘the rights of individuals in criminal procedure’ in order to facilitate mutual recognition of judicial decisions and to render cooperation in cross-border criminal procedures more effective. To this end, the Swedish Presidency elaborated a Roadmap⁵ in 2009, promoting common minimum

² *Volkov and Adamskiy v Russia* App nos 7614/09 and 30863/10 (ECtHR, 26 March 2015).

³ See the example of the *Salduz* doctrine described in J Jackson, ‘Providing Suspects with Access to a Lawyer’ in R Colson, S Field (eds), *EU Criminal Justice and the Challenges of Diversity* (Cambridge, 2016) 183. ‘Repetitive Cases’ are another problem in this context, for more detail see: T. Spronken, D de Vocht, ‘EU Policy to Guarantee Procedural Rights in Criminal Proceedings: “Step by Step”’ (2011) 37 *North Carolina Journal of International Law and Commercial Regulation*, 443 ff.

⁴ See statistics on pending cases and their length provided by the Department for the Execution of Judgments of the European Court of Human Rights, online available under <<https://rm.coe.int/2-pending-cases-2013-2017-state-by-state/16807b8668>> and <<https://rm.coe.int/5-length-of-the-execution-process-pending-state-by-state-eng/16807b91b5>> (last accessed on 15.04.2018).

⁵ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.

standards for the protection of suspected and accused persons in criminal proceedings.⁶ In this Roadmap, which was later incorporated into the Stockholm Programme,⁷ the European Council proposed to address the different procedural safeguards separately, in order to facilitate negotiations between the Member States.⁸ In the following years, a number of Directives on defence rights in criminal proceedings were adopted, among which was the Directive 2013/48/EU on access to a lawyer.⁹

In accordance with the above, the Directive follows three general aims: (a) to harmonize national procedural standards on the right to legal assistance in order to generate trust among the EU Member States, (b) to overcome shortcomings of the protection of this right in the ECHR and (c) to further develop and strengthen the existing standards of protection for the right to access to a lawyer as set out by the ECHR and the EU Charter of Fundamental Rights (hereinafter the Charter).

The provisions of the Directive had to be transposed into national law by the 27 November 2016, as stated in Article 15 paragraph 1. All Member States complied with the transposal deadline. By November 2019 the Commission will assess the application of the right to legal assistance by submitting a report on the effectiveness of the implementation into national law.¹⁰

⁶ With this Roadmap, the Swedish Presidency invited the Commission to submit new legislative proposals on the topic, after the Proposal for a Framework-Decision on Procedural Rights in Criminal Cases, COM (2004) 328, 28 April 2004, had failed. See: Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295, 4.

⁷ European Council, The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens, 4 May 2010, Doc no C 115/01.

⁸ The Roadmap separated the issue in the following Measures: Measure A: Translation and Interpretation; Measure B: Information on Rights and Information about the Charges; Measure C: Legal Aid and Legal Advice; Measure D: Communication with Relatives, Employers and Consular Authorities; Measure E: Special Safeguards for Vulnerable Persons; Measure F: A Green Paper on the Right to Review of the Grounds for Detention.

⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 [2013] OJ L 294/1.

¹⁰ Art. 16 Directive 2013/48/EU.

2. Scope of application

Article 2 Directive 2013/48/EU defines the personal, objective, territorial and temporal scope of application of the right to a lawyer, as it is guaranteed under the Directive.

The subjective scope of application extends to all suspects and accused persons in criminal proceedings, including persons subject to European Arrest Warrant proceedings,¹¹ independently of EU citizenship or country of residency. Furthermore, the right to access a lawyer benefits all persons ‘who in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons’.¹² In other words, the person has to be a suspect or accused person and not just a witness in criminal proceedings. Recitals 20 and 21 clarify that the term questioning does not include preliminary interviews that are undertaken in order to identify a suspect or to gather general information and determine whether an investigation should be opened or not. Any interview of a witness should be ‘suspended immediately’ as soon as the questioned person becomes a suspect or an accused person. In this interruption, he should be informed of his rights and be given the opportunity to have access to a lawyer.¹³

The directive gives, however, no concrete guidelines on how to determine the moment in which a person must cease to be considered a witness and start to be considered a defendant.¹⁴ Such determination implies several undefined concepts. Firstly, Member States might differ on the minimum threshold of evidence generally needed to declare somebody a suspect in a criminal investigation. While in one country a slight probability might be sufficient grounds for somebody to be officially considered a suspect, another Member State might require strong evidence in order to provide him with the same status. Secondly, the considerations depend on the evaluation of evidence in the individual case at hand, demanding a subjective opinion and evaluation of the specific circumstances of the case. The determination of the exact moment in which someone starts to be considered a suspect in criminal proceedings depends therefore on a combination of

¹¹ Article 2 (2) and 3 Directive 2013/48/EU.

¹² Article 2 (4) Directive 2013/48/EU.

¹³ Recital 21 Directive 2013/48/EU.

¹⁴ L Bachmaier Winter, ‘The EU Directive on the Right to Access to a Lawyer: A Critical Assessment’ in Stefano Ruggeri (ed), *Human Rights in European Criminal Law* (Cham/Heidelberg/New York/Dordrecht/London, 2015) 113.

less foreseeable factors. This uncertainty arising from the vague formulation of the Directive could have been better controlled, had Article 2 paragraph 3 been followed by a clarification that even in cases where doubt has arisen about the statute of the interrogated person, the questioning should be suspended and the rights stemming from this Directive should be granted.¹⁵

In its material scope of application, the right of access to a lawyer is limited to criminal proceedings and proceedings for the execution of a European Arrest Warrant.¹⁶ Furthermore, the Directive states explicitly that the right to legal advice has to be guaranteed whenever a suspect or accused person finds himself deprived of his liberty.¹⁷ Not all types of proceedings are, however, included in the scope of application. Paragraph 4 of this Article restricts the application of the Directive in proceedings regarding minor offences. Where the deprivation of liberty cannot be imposed as a sanction or if an authority other than a court having jurisdiction in criminal matters imposes a sanction that may be appealed or referred to such a court, the ‘Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters’.¹⁸ This leads to important shortcomings in the protection of the right to legal advice, since it does not encompass the entirety of administrative proceedings that actually have a criminal nature. Indeed, the definition of ‘minor offences’ might strongly vary among the Member States and matters that might entail important economic sanctions might fall outside the scope of protection of the Directive.¹⁹ In order to compensate for these shortcomings as much as possible, the Directive ensures its rights from the moment that those cases are brought before a criminal court onwards, either directly or in the form of appeal proceedings. A better defined wording of the Directive,²⁰ in line with the case law of the ECtHR, would have been preferable regarding this point.

¹⁵ See L Bachmaier Winter (n 15) 113, where the author demands additionally that witnesses should be granted the right to seek the assistance of a lawyer, whenever they require so, and that this assistance should not be conditioned by the fact that the concerned person is considered as a witness or as a suspect or accused.

¹⁶ Art. 2 Directive 2013/48/EU.

¹⁷ Art. 2 (4) (b) Directive 2013/48/EU.

¹⁸ The Directive 2013/48/EU states in Recital 17 that this exception was made to exclude, for instance, proceedings in minor traffic offences or in minor offences in relation to general municipal regulations or public order.

¹⁹ W van Ballegooij, *The Nature of Mutual Recognition in European Law* (Cambridge/Antwerp/Portland, 2015) 211 ff.

²⁰ Also in view of the jurisprudence of the ECtHR on the criminal nature of

As to the territorial scope, the Directive applies to all EU Member States, with the exception of Denmark, UK and Ireland who applied their right to opt-out of the Directive as foreseen in the Treaties.²¹

Regarding its time scope, the right to legal assistance is granted to defendants 'from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence' and until the proceedings, including respective appeal proceedings,²² are concluded.²³ Basing the existence of the right to a lawyer on the act of informing the defendant about his status of being a suspect or accused entails two risks. On the one hand, it must be noted that the provision only addresses competent authorities of the Member States. This raises questions as to the application of Directive 2013/48/EU *vis-à-vis* the European Public Prosecutors Office (EPPO).²⁴ On the other hand, making the protection of the Directive depend on whether or not a person has been informed about his status as a suspect or accused could encourage the authorities to delay the point from which legal assistance has to be granted by simply deferring the moment of notification.²⁵ This theoretical risk is limited by the clarifications in Article 3 paragraph 2. Independent of any notification, access to a lawyer must be granted '*without undue delay*' and at the latest, (a) before the first questioning, (b) when investigative measures or acts of evidence-gathering are undertaken, (c) when the concerned person is deprived of his liberty, (d) before court appearances. By ensuring the suspect or accused benefits from access to a lawyer even before the first questioning, the Directive follows the standards set out by the ECtHR jurisprudence.²⁶ However, specifically in situations in which a witness becomes a suspect or accused in the course of an interview,

certain administrative sanctions *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, ECtHR, 8 June 1976, para 82 - 83.

²¹ Recital 58 and 59 Directive 2013/48/EU

²² Compare to ECtHR case-law: for instance *Volkov and Adamskiy v Russia* App nos 7614/09, 30863/10 (ECtHR, 26 March 2015).

²³ Art. 2 paragraph 1 Directive 2013/48/EU.

²⁴ L Bachmaier Winter(n 15) 119.

²⁵ *Ibid* 118.

²⁶ In *Salduz v Turkey*, the Court states that a lawyer should be present from the initiation of the proceedings onwards, since a lawyer should be available as 'an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence'. *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) para 52.

the aforementioned risk stands. As noted above, it might cause additional difficulties to determine this exact moment. For proceedings regarding an EAW, Article 2 paragraph 2 specifies that the Directive applies from the moment the concerned person is arrested in the Member State.

3. The content of the right to legal assistance

The Directive focusses on the protection of four different procedural rights: The right to legal assistance, the right to have a third person informed in case of deprivation of liberty, the right to communicate with third persons while deprived of liberty and the right to communicate with consular authorities. This study will concentrate only on the first aspect, the right to access to a lawyer.

At the outset, it is to be pointed out that Article 14, specified by Recital 54, states that the Directive only sets minimum guarantees, which do not prevent the Member States from providing a higher level of protection, in accordance with the standards set out by the ECHR and the EU Charter.

Concerning concrete content of the right, Article 3 of the Directive specifies that the effective exercise of the right to legal assistance includes (a) the right of the suspect or accused person to meet and communicate in private with his lawyer,²⁷ (b) the effective participation of the lawyer in questioning²⁸ as well as (c) the attendance of the lawyer during certain investigative and evidence-gathering acts.²⁹ The content of the right will therefore be analysed under two perspectives. Firstly, the actual access to a lawyer, that is the possibilities of the concerned person to contact a lawyer of his choosing, the communication between the lawyer and the suspect or accused, and the confidentiality of this communication. Secondly, the analysis will focus on the role of the lawyer in the light of the Directive. This includes rules concerning effective participation in questioning and attendance at investigative measures.

²⁷ Art. 3 (3) (a) Directive 2013/48/EU

²⁸ Art. 3 (3) (b) Directive 2013/48/EU.

²⁹ Art. 3 (3) (c) Directive 2013/48/EU.

3.1. Access and communication with a defence lawyer

In general, the Directive does not lay down procedures to establish the contact to a lawyer, let alone whether the competent authorities should take an active role in this regard. However, Recital 27 requires the Member States to make general information available. Website-information or leaflets at police stations are mentioned as examples of actions that Member States could engage in to facilitate obtaining a lawyer. However, when a suspect or accused is deprived of his liberty, the obligations of the Member States increase: national competent authorities should take an active role in arranging for legal assistance by providing, for instance, lists of available lawyers and, eventually, legal aid.³⁰ Additionally, the competent authorities should take any potential vulnerability of the person concerned into consideration in order to ensure the effective exercise of the rights provided by the Directive in those situations.³¹

Regarding the choice of a lawyer, the wording of the Directive falls short when compared to the case law of the ECtHR. Indeed, Article 6 paragraph 3 (c) states that the right to legal advice should entail the right to be represented by the lawyer of one's choice, irrespective of reasonable exceptions.³² Article 3 Directive 2013/48/EU does not do so. Although the absence of this detail in the Directive is regrettable, in practice it will hardly be of consequence. As Recital 53 notes, the implementation and interpretation of Directive 2013/48/EU have to be effected in light of the ECHR and the related case law. Consequently, the fact that the right to legal assistance expands to a lawyer of one's choice should be read into the Directive 2013/48/EU.³³

When provided with a lawyer, the suspect or accused person should be able to meet and communicate in private with his legal counsel. While it is generally up to the Member States to decide on the practical arrangements of these communications, regarding, for example, the duration and frequency of meetings, the Directive requires that general means of communication be provided at any stage of the proceedings, even before lawyer and suspect actually

³⁰ Recital 28 Directive 2013/48/EU.

³¹ Art. 13 Directive 2013/48/EU; Recital 51 Directive 2013/48/EU.

³² See *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) para 34 and *Pakelli v Germany* App no 8398/78 (ECtHR, 25 April 1983) para 31.

³³ A Ogorodava, T Spronken, 'Legal Advice in Police Custody: From Europe to a Local Police Station' (2014) *Erasmus Law Review* 193.

meet.³⁴ By way of example, Recital 23 Directive 2013/48/EU mentions the possibility of video-conferencing and communication technology as means by which the effective exercise of the right could be granted.

In any case, the communication between a lawyer and his client has to be confidential, in order to ensure a trust-based relationship.³⁵ This means that all communications which are permitted between the suspect and his legal counsel have to have their privacy protected to ensure that an effective defence can be composed. Guaranteeing the confidentiality of the communication not only means that Member States should stay passive and refrain from any interruption or disruption of the communication, but also that they should actively support the facilitation of confidential communication if the suspect or accused finds himself deprived of his liberty.³⁶

3.2. The role of the defence counsel: from attendance to effective participation

As far as the role of the lawyer during the proceedings is concerned, the Directive distinguishes two situations: interrogations and other measures of evidence gathering. Regarding interrogations by either law enforcement or judicial authorities, the Directive provides for the lawyers presence and effective participation.³⁷ It is up to the Member States to define and regulate the specifics of this participation, as long as the national procedural rules ‘do not prejudice the effective exercise and essence of the right concerned’. Recital 25 states that the participation of the lawyer may for instance consist in asking questions, requesting clarifications and making statements. Interpreted in line with ECtHR case-law,³⁸ the participation of the lawyer should also include the possibility of intervening whenever the defendant’s right to remain silent has to be protected and to prevent any unlawful or unfair behaviour from the competent authorities.³⁹ Nonetheless, Directive 2013/48/EU only sets vague minimum standards on this point, using undefined terms like ‘effective participation’⁴⁰ and the

³⁴ Recital 23 Directive 2013/48/EU.

³⁵ Art. 4 Directive 2013/48/EU.

³⁶ Recital 33 Directive 2013/48/EU.

³⁷ Art. 3 (3) (b) Directive 2013/48/EU.

³⁸ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) para 54.

³⁹ *A Ogorodava, T Spronken* (n 36) 195.

⁴⁰ Art. 3 (3) (b) Directive 2013/48/EU.

‘effective exercise and essence of the right’,⁴¹ a lack of clarity that calls for interpretation by the Court of Justice of the European Union (CJEU).

Outside the specific situations of questioning, the Directive requires the possibility of the lawyer’s participation only when the suspect or accused finds himself deprived of his liberty. In such cases it is necessary that the lawyer is able to question the conditions of the deprivation of liberty with the competent authorities.⁴² For other evidence-gathering acts, Directive 2013/48/EU is even more limited, since several Member States feared that the presence of a lawyer at every investigative step would delay investigations, without contributing significantly to the protection of the defendant.⁴³ It only foresees the lawyer’s attendance at investigative acts at which the defendant also might attend under national law and without any obligation for the Member States to provide additionally for the possibility for the lawyer to participate actively in those acts. Article 3 paragraph 3 (c) states that the defendant’s lawyer should at least attend identity parades, confrontations and reconstructions of a crime scene,⁴⁴ as long as they are provided for in national law, since they represent key measures in establishing the facts of a criminal offence and the guilt of a suspect. For any additional investigative act, the Member States remain free to decide whether the lawyer might be allowed to attend. By choosing such specific requirements, the scope of the protection of the right to legal assistance is greatly limited in the Directive.⁴⁵

⁴¹ Recital 25 Directive 2013/48/EU. Critics also by E Cape, J Hodgson ‘The Right to Access to a Lawyer at Police Stations – Making the European Union Directive Work in Practice’ (2014) *New Journal of European Criminal Law* 467 s.

⁴² Recital 29 Directive 2013/48/EU.

⁴³ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – Note by Belgium/France/Ireland/the Netherlands/ the United Kingdom, 22 September 2011, Doc no 14495/11. Explanation and comment in J Jackson (n 3) 189.

⁴⁴ Little case-law of the ECtHR is available that defines the general role of the lawyer in criminal proceedings. One example is the *Dayanan v Turkey* case, in which the Court states that the ‘counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organization of the defence, collection of evidence favorable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention’. *Dyanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009) para 32.

⁴⁵ In this context, L Bachmaier Winter proposes that the Directive 2013/48/EU should have required ‘the widest possible participation of the defence lawyer in the

3.3. Legal assistance and EAW

Article 10 Directive 2013/48/EU adapts the right to legal assistance to the specifics of EAW proceedings. According to the rules set out by Framework Decision 202/584/JHA on the EAW, which allows a challenge to an EAW only in the executing Member State, Directive 2013/48/EU provides that persons subject to an EAW shall have access to a lawyer in the executing Member State. Additionally, the executing State should inform the person subject to the request about his right to appoint a secondary lawyer in the issuing State, who would assist the primary lawyer with information and advice. For this purpose, the issuing State shall provide information to facilitate the appointment of such a secondary lawyer, upon request by the concerned person and the executing State.⁴⁶ Critics invoke that this mere provision of information about the right of access to a lawyer in the issuing State might not be enough to protect the right to legal assistance sufficiently in practice.⁴⁷ The actual content of the right granted under Article 10 paragraph 2 is nearly identical to the wording of Article 3.⁴⁸ However, the wording is less diligent, since Article 10 paragraph 2 abstains to refer to an ‘effective participation’ and the ‘effective exercise and essence of the right’⁴⁹ as safeguards of this right. Nonetheless, this discrepancy in the drafting of the Directive will most likely not have any consequences in practice.⁵⁰

4. Waiver and limitations

The right to legal assistance is not an absolute right. A first consequence thereof is the possibility for the suspect or accused to waive his right to legal assistance. Article 9 Directive 2013/48/EU sets out the conditions of a waiver. It should be noted, however, that the possibility of waiving the right protected by the Directive might be limited by national rules requiring the mandatory assistance of a

investigative stage, as long as this does not prejudice the success of the investigation and establish the exclusionary rule for evidence for not complying with the right of access to a lawyer during those three investigative acts set out under Article 3(3)(c)’. L Bachmaier Winter (n 15) 122.

⁴⁶ Art. 10 (4) and (5) Directive 2013/48/EU.

⁴⁷ L Bachmaier Winter (n 15) 123; opposed opinion by W van Ballegooij (n 20) 217.

⁴⁸ Compare also Recitals 42-44 Directive 2013/48/EU.

⁴⁹ Art. 3 (3) (b) Directive 2013/48/EU.

⁵⁰ See Recital 53 Directive 2013/48/EU.

lawyer. This might, for example, be the case in proceedings in front of higher courts and tribunals.

For a waiver to be effective, the suspect or accused must have been duly informed about his right to access a lawyer and about the consequences of a waiver. This information must have been clear, sufficient and in simple and understandable language.⁵¹ In this aspect, the protection granted by the ECtHR goes further, demanding that the competent authorities take all reasonable steps necessary in order to ensure that the defendant is fully aware of his rights, their content and the consequences of a waiver.⁵² The second condition is that the waiver is given voluntarily and unequivocally. With regards to the case law of the ECtHR this means that no inaccurate or misleading information should be given.⁵³ The wording of the Directive could have been more detailed at this point, setting out concrete rules of conduct and ensuring that the defendant be placed in a position in which he is actually able 'to make a considered and informed choice'.⁵⁴ Any waiver might be revoked at any point of the subsequent proceedings.

The Directive 2013/48/EU recognizes several circumstances under which the right to a lawyer might be limited: temporary derogations under Article 3 paragraph 5 and Article 3 paragraph 6, as well as limitations to the confidentiality in the communication between lawyer and defendant.

Firstly, under Article 3 paragraph 5, after a person is deprived of his liberty, the Member State might derogate temporarily from the right to have access to a lawyer, if the geographical remoteness of the detained person so requires. This might be the case, if he finds himself in overseas territories or in a military mission outside the national territory, as Recital 30 clarifies. However, during such temporary derogation, the authorities should refrain from any questioning or investigative measures. Furthermore, the person deprived of his liberty should, if possible, be provided with communication to his lawyer, for instance via telephone or video-conference.⁵⁵

⁵¹ Art. 10 (1) (a) Directive 2013/48/EU.

⁵² *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008) paras 67 ff and *Plonka v Poland* App no 20310/02 (ECtHR, 31 March 2009) paras 37 ff.

⁵³ A Ogorodava, T Spronken (n 36) 193.

⁵⁴ E Cape, J Hodgson (n 44) 459.

⁵⁵ Recital 30 Directive 2013/48/EU.

Secondly, it is possible to delay the opportunity for the defendant's lawyer to attend questioning or investigative acts in the pre-trial stage, whenever this is necessary in order to prevent serious consequences for the life, liberty or physical integrity of a person or, if this is necessary to prevent substantial jeopardy for the criminal proceedings (like the destruction or alteration of essential evidence or the interference with witnesses).⁵⁶ Contrary to the aforementioned derogations, authorities are allowed to question the defendant or to perform investigative acts in these circumstances, as long as they are only undertaken in order to avert the apprehended consequences and under the condition that the defendant was informed about his right to remain silent.⁵⁷ Such situations will often arise in specific fields of criminality, like terrorism.⁵⁸

Both types of temporary derogations apply only under the general condition that the derogation is (a) proportionate and necessary, (b) strictly limited in time, (c) not exclusively based in the seriousness of the alleged offence and (d) not affecting the overall fairness of the criminal proceedings.⁵⁹ The limiting decision has to be taken individually by a judicial or other competent authority, under the condition that this decision is submitted to judicial review. For the same reason, the decision should also be duly reasoned and recorded.⁶⁰

As far as the confidentiality of communication between lawyer and defendant is concerned, Recitals 33 and 34 contain detailed information about the possibilities and conditions of exceptions to this right. This includes situations in which the lawyer is suspected to have engaged in criminal activities himself, or special exceptions applicable if the defendant is deprived of his liberty. The latter concerns mainly measures to avoid illicit enclosures⁶¹ and incidental breaches of confidentiality in the context of lawful surveillance.⁶²

⁵⁶ Recital 32 Directive 2013/48/EU.

⁵⁷ Recital 31 Directive 2013/48/EU.

⁵⁸ Compare in this context, *Ibrahim and Others v United Kingdom* Appl nos 50541/08, 50571/08, 50573/08, 40351/09 (ECtHR, 13 September 2016).

⁵⁹ Art. 8 (1) Directive 2013/48/EU.

⁶⁰ Art. 8 (2) Directive 2013/48/EU.

⁶¹ Recital 33 Directive 2013/48/EU.

⁶² Recital 34 Directive 2013/48/EU.

5. Conclusions

It was the declared aim of Directive 2013/48/EU to contribute to the facilitation of mutual recognition and efficient cross-border cooperation in the EU and much progress has been made in this regard. However, for several issues, the chance to formulate clear conditions and underline details was missed.⁶³ Although the Directive 2013/48/EU is intended to harmonize the right to access a lawyer in criminal proceedings, thereby mitigating the limited impact of the ECHR on the national legal frameworks, shortcomings in wording will lead to the necessity to fall back on the interpretations of the Strasbourg Court. This might prevent the protection of the right to legal assistance to unfold itself directly, but may require both national courts and the CJEU to further clarify the content of the rights provided under the EU Directive. In this regard it is worth noting that Article 13 paragraph 1 of Directive 2013/48/EU requires national legislation to provide for ‘effective remedies’ against breaches of the rights to legal assistance. Additionally, the second paragraph of the same Article demands that breaches to the right should be taken under consideration in the assessment of statements or evidence that was obtained on the basis of such a breach or even in cases in which a temporal derogation was authorized.

In practice, the successful implementation of Directive 2013/48/EU relies on the willing cooperation of key stakeholders, specifically police and lawyers. This calls for professional training as well as changes in policies and judicial practice.⁶⁴ For instance, officers should be trained to deliver information about the right to legal assistance in a neutral manner and encourage defendants to take up this right.⁶⁵ Unfortunately, Directive 2013/48/EU remains silent on these points, leaving the success of its implementation to the sole discretion and good will of the Member States.

For a long time, the most common investigative policy prevailing in a large number of Member States was to keep lawyers as far as possible from criminal investigations. In this aspect, the enforcement of the right to legal assistance calls for an immediate change in the everyday

⁶³ Also critical in this regard, A Soo ‘Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel’ (2017) *European Journal of Crime, Criminal Law and Criminal Justice* 32 s.

⁶⁴ A Ogorodava, T Spronken (n 36) 204.

⁶⁵ E Cape, J Hodgson (n 44) 472 s.

practice of police officials. Lawyers' interventions can no longer be considered a danger to investigative success, but should rather be perceived as an asset for a fair trial.

A right to legal assistance should additionally entail prompt access to a competent lawyer, however regarding the quality of legal assistance provided Directive 2013/48/EU also relies on the commitment of the Member States. They should, however, ensure that sufficiently qualified and experienced lawyers are willing to accept urgent cases. It should also be ensured that lawyers are available on short notice and willing to attend interrogations and investigative measures even outside office hours. This could be established by ensuring adequate pay schemes for state-provided legal aid. Furthermore, an obligation for Member States to provide adequate duty-lawyer schemes for urgent cases could prove useful in rendering the right to legal access effective.⁶⁶

Directive 2013/48/EU, especially considering its interplay with the other ABC Directives, is to be welcomed as a milestone in the harmonization of procedural rights among the EU Member States. Although it represents a major step forward in the protection of defence rights, much is still to be done, if defence rights are to be protected in a comprehensive and effective way.

⁶⁶ A Ogorodava, T Spronken (n 36) 205.

PART II

**EFFECTIVE REMEDIES FOR EFFECTIVE RIGHTS
IN THE EUROPEAN CRIMINAL JUSTICE AREA**

CHAPTER I

ENSURING THE EFFECTIVENESS OF DEFENCE RIGHTS: REMEDIAL OBLIGATIONS UNDER THE ABC DIRECTIVES

Valentina Covolo

TABLE OF CONTENTS: 1. Effective judicial protection *versus* national procedural autonomy. – 2. General obligation to provide an effective remedy. – 3. Right to challenge in accordance with procedures in national law. – 4. Restrictions on defence rights by judicial authorities or subject to judicial review. – 4.1 The concept of judicial authority. – 4.2 The timing of review. – 5. Right to a new trial. – 6. Conclusions.

1. Effective judicial protection *versus* national procedural autonomy

The effectiveness of defence rights granted by the ABC Directives does not simply rely on their correct implementation into national law. It greatly depends on the possibility for suspects and accused persons to have access to judicial review of the respect of procedural safeguards they are entitled to under Union law. In this light, the existence of effective control mechanisms within the Member States becomes a topical and contentious issue within the European criminal justice area.

The increasing number of EU instruments in the field of criminal law dramatically expands the potential impact the right to an effective remedy may have on the national criminal justice systems. The judgments delivered by Court of Justice of the European Union (CJEU) in this field are early indicators of this. The case law does not solely encompass landmark decisions related to the European Arrest Warrant (EAW), such as *Jeremy F*,¹

¹ Case C-168/13 PPU *Jemery F*. EU:C:2013:358.

*Melloni*², *Radu*³ and *LM*.⁴ It is worth noting that the first preliminary reference concerning the interpretation of EU directives on defence rights in criminal proceedings called into question the right to appeal against a penalty order.⁵

These examples point strongly to the need for an in-depth analysis of the right to an effective judicial remedy in a European and comparative perspective. To what extent does this fundamental guarantee, enshrined in Article 47 of the Charter, compel the domestic legal orders to interpret national procedures, modify or create *ex-novo* remedies for securing the effectiveness of Union law within the European criminal justice area? And to what extent do the new directives harmonizing defence rights foster this need of effectiveness?

The right to effective judicial protection finds expression in a set of provisions under the ABC Directives which require the Member States to provide remedies against breaches of the defence rights that Union law confers to suspects and accused persons. Such remedial obligations conflict *a fortiori* with national procedural autonomy. The latter is a manifestation of national sovereignty, which preserves the freedom of the Member States to legislate independently on procedural rules governing their domestic justice system, where, and so long as, EU law has not pre-empted this discretion.⁶

The balance between effectiveness of Union law and national procedural autonomy has long been a source of litigation before the CJEU. Since the mid-1970s, the Court has consistently held that national procedural autonomy reaches its limits – even in the absence of EU procedural rules – in the effective judicial protection of rights guaranteed by the Union legal order.⁷ Originally emerging as a general principle of EU law,⁸ the requirement of effective judicial protection is nowadays enshrined in Article 19(1), paragraph 2 TEU, according to which, ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. As the CJEU recently stressed, the provision ‘gives concrete expression to the value of the rule of law’, whose essence lies in the

² Case C-399/11 *Melloni* EU:C:2013:107.

³ Case C-396/11 *Radu* EU:C:2013:39.

⁴ Case C-216/PPU, *LM* EU:C:2018:586.

⁵ Case C-216/14 *Covaci* EU:C:2015:686, para 42.

⁶ W Van Gerwen, *Of Rights, Remedies and Procedures* (2000) 37 CMLR 501.

⁷ Case 33/76 *Rewe-Zentralfinanz*, para 5.

⁸ Case 222/84 *Johnston* EU:C:1986:206, para 18.

‘very existence of effective judicial review designated to ensure compliance with EU law’ within each the Member State.⁹

The principle of effective judicial protection entails two constitutive elements. On the one hand, the principle of equivalence requires that ‘detailed procedural rules governing actions for safeguarding an individual’s right under [Union] law must be no less favorable than those governing similar domestic actions’.¹⁰ In other words, national procedure should not offer a lower level of judicial protection when the case presents an extraterritorial element (for instance, where the defendant is a non-resident¹¹) and thereby introduce a form of discrimination when EU rights are at stake.

On the other hand, the principle of effectiveness means that national procedural rules must ‘not render practically impossible or excessively difficult the exercise of rights conferred by Union law’.¹² This second element of the principle reflects the effectiveness requirements that judicial remedies must fulfill under Article 47 of the Charter.¹³ Over the years, the CJEU has progressively given priority to the principle of effective judicial protection over the Member States procedural autonomy.¹⁴ The case law has even admitted that the former may imply, albeit under exceptional circumstances, the introduction of new proceedings where ‘no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual’s rights under Community law’.¹⁵

Would the CJEU adopt a similarly demanding approach in criminal matters? In other words, what room do the ABC Directives leave to the procedural autonomy of national criminal justice systems? The answer will mainly depend on the number and stringency of requirements set forth under the different remedial obligations at issue. Indeed, national procedural autonomy is limited by the presence of specific procedural provisions under Union law and, conversely, is strongest in absence of

⁹ Case C-64/16, *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, para 32 and 36.

¹⁰ Case C-432/05 *Unibet* EU:C:2007:163, para 43.

¹¹ See for instance Case C-216/14 *Covaci*, para 42.

¹² Case C-432/05 *Unibet*, para 43.

¹³ Art. 47(1) EU Charter.

¹⁴ A Arnall, ‘The principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) 36 *ELRev* 52.

¹⁵ Case C-432/05 *Unibet*, para 41. In a similar way, ‘Article 47 of the Charter (...) is not intended to change the system of judicial review laid down by the Treaties and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union’. Case C-583/11 P *Inuit* EU:C:2013:625, para 97.

such rules.¹⁶ Based on this, the following sections will subsequently analyse the different categories of remedial obligations set forth under the ABC Directives.

2. General obligation to provide an effective remedy

The 2013 Directive on the right to access a lawyer and the 2016 Directive on certain aspects of the presumption of innocence lay down general remedial obligations. The latter constitute the mere transcription of the right to an effective remedy and, therefore, entail the requirements set forth by Article 47 of the Charter. In particular, Article 12 of Directive 2013/48/EU requires the Member States to ‘ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive’.¹⁷ In a similar way, Article 10 Directive 2016/343/EU states that national law must provide suspects and accused persons with ‘an effective remedy if their rights under this Directive are breached’.¹⁸ The wording of both provisions stresses the ancillary nature of the right to an effective remedy, while preserving the largest margin of discretion that Member States enjoy in implementing the Directive.¹⁹

Provisions relating to the use of evidence gathered in breach of the right to access a lawyer, the right to remain silent or the right not to incriminate oneself equally reflect the wish of the EU legislature not to interfere with national systems of nullities and exclusionary rules. Article 12 (2) of Directive 2013/48/EU and Article 10(2) of Directive 2016/343/EU require the Member States to ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the above mentioned procedural safeguards, ‘the rights of the defence and the fairness of the proceedings are respected’. However, both provisions explicitly state

¹⁶ V Couronne, ‘L’autonomie procédurale des Etats membres de l’Union européenne à l’épreuve du temps’ (2010) 3-4 Cahiers de droit européen 273, 291 ff.

¹⁷ Art. 12(1) Directive 2013/48/EU.

¹⁸ Art. 10(1) Directive 2016/343/EU.

¹⁹ As regards the lack of specific requirements in the 2013 Directives, see A Soo, ‘Article 12 of the Directive 2013/48/EU: A starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to a Counsel’ (2017) 1 European Journal of Crime, Criminal Law and Criminal Justice 31.

that such an obligation is '[w]ithout prejudice to national rules and systems on the admissibility of evidence'. It follows that the ABC Directives do not intend to harmonize rules governing the use of evidence, nor sanctions provided under national law against violations of defence rights.

Nonetheless, the right to an effective judicial protection implies the duty on domestic courts to ascertain 'whether the criminal proceedings as a whole, including the way in which the evidence was obtained, were fair'.²⁰ In other words, Articles 12(2) of Directive 2013/48/EU and Article 10(2) of Directive 2016/343/EU must be understood as guaranteeing the 'right to a fair use of evidence'.²¹ According to the ECtHR case law, judicial review of evidence gathered in breach of defence rights during the pre-trial stage of proceedings shall ensure that the use of such evidence does not impair the fairness of proceedings as a whole. As a result, the remedial obligations set forth in the ABC Directives leave room for a balancing test that, according to the ECtHR case law, weighs the gravity of the norm violated, the probative value of the evidence obtained in breach of fundamental rights and, to a certain extent, the gravity of the crime being prosecuted.²²

3. Right to challenge in accordance with procedures in national law

Among the remedial obligations set forth in the ABC Directives is the right to challenge restrictions to defence rights 'in accordance with procedures in national law'. This applies to decisions finding that there is no need for interpretation²³ or translation.²⁴ Likewise, where linguistic assistance has been provided, Directive 2010/64/EU requires the Member States to provide the defendant with the possibility of complaining that the quality of the interpretation²⁵ or translation²⁶ was not sufficient to safeguard the fairness of the proceedings.

²⁰ *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010).

²¹ P Ölçer, 'The European Court of Human Rights: The Fair Trial Analysis under Article 6 of the European Convention of Human Rights' in S Thaman (ed), *Exclusionary Rules in Comparative Law* (2013, Springer) 371 ff.

²² *Ibid* 375.

²³ Art. 2(5) Directive 2010/64 EU.

²⁴ Art. 3(5) Directive 2010/64/EU.

²⁵ Art. 2(5) Directive 2010/64 EU.

²⁶ Art. 3(5) Directive 2010/64/EU.

Finally, Article 8(2) Directive 2012/13/EU compels the Member States to ‘ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive’.

Although the above-mentioned provisions focus on particular acts taken by the national competent authorities, they do not require the Member States to provide specific judicial remedies. On the contrary, they simply refer to applicable procedural rules under national law, while preserving a maximum margin of discretion for the Member States. Recital 25 of Directive 2010/64/EU confirms the significant leeway given to the national legislator: the remedial obligations resulting from Articles 2(5) and 3(5) do ‘not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged’.²⁷ A similar statement can be found in the preamble of Directive 2012/13/EU with regard to the right to challenge the failure to provide information.²⁸

The lack of specific procedural requirements under the EU Directives leaves room for different levels of protection in the Member States, a protection that first relies on the promptness with which the suspect or accused person in criminal proceedings can access a court with the jurisdiction to review decisions violating the right to translation, interpretation or information. In particular, the rights enshrined in Directive 2010/64/EU apply during the pre-trial stage of proceedings, most notably during questioning for the right to interpretation²⁹ and, for the right to translation, with respect to decisions depriving a person of his liberty, any charge or indictment or materials of the case file that are considered essential documents for the preparation of defence.³⁰ Yet, the possibility of appealing a decision denying linguistic assistance would imply the existence of a procedure – specific or not – which enables the suspect or accused person to enforce, in due time, the rights he derives from the ABC Directives. Thus, national law would provide a maximum degree of judicial protection where it allows the defendant to directly challenge, in the pre-trial stage of the criminal proceedings and in front of a

²⁷ Recital 25 Directive 2010/64/EU.

²⁸ Recital 36 Directive 2012/13/EU.

²⁹ Art. 2(1) Directive 2010/64/EU.

³⁰ Art. 3(2) Directive 2010/64/EU

Court within the meaning of Article 47 of the Charter, the decision that allegedly breaches his defence rights.

The implementation *a minima* of the remedial obligations in question would consist of a system in which the decision that allegedly encroached on the right to translation, interpretation or information would be subject to judicial review, but only at the trial stage of the criminal proceedings.

This minimum level of judicial protection is – unfortunately – in line with the case law of the ECtHR. The latter has consistently held that trial courts are the ‘ultimate guardians of the fairness of the proceedings, encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant’.³¹ According to the Strasbourg Court, the scope of review encompasses the effective and practical character of the rights to interpretation and translation, including ‘a degree of subsequent control over the adequacy of the interpretation provided’.³²

In a similar way, the right to challenge refusals or failures to provide information under Directive 2010/64/EU refers to both restrictions and the quality of the interpretation and translation provided.³³ As for the latter, it is worth noting that, in *Covaci*, the CJEU surprisingly refrained from interpreting the ‘essential character’ of documents, and passages thereof, which must be accompanied by a written translation according to Article 3 Directive 2010/64/EU.³⁴ It has merely reiterated that it is for the national judge to ascertain whether, in the light of the proceedings concerned and the circumstances of the case, a document, of which translation has been requested, constitutes an essential document within the meaning the EU Directive.

The same observations equally apply to the remedial obligation enshrined in Article 8(2) of Directive 2012/13/EU. Indeed, the right to information about procedural rights³⁵ and the right to information about the accusation³⁶ shall be provided *promptly* in order to allow the effective exercise of those safeguards and to

³¹ *Katrtsch v France* App no 22575/08 (ECtHR, 4 November 2010) para 41.

³² *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) para 70.

³³ Art. 2(5) and 3(5) Directive 2010/64/EU.

³⁴ Art. 3 Directive 2010/64/EU states that ‘essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment’. However, the provision leaves to the national competent authorities to decide whether, in a given case, any other document is essential.

³⁵ Art. 3 Directive 2012/13/EU.

³⁶ Art. 6 Directive 2012/13/EU.

guarantee adequate time necessary for the preparation of defense. The effectiveness of the right to be informed must be subject to judicial review, at the latest, by trial courts, particularly in light of the principle of equality of arms.³⁷ However, requirements of judicial review stemming from Article 5 ECHR may influence the timing of the judicial protection afforded by national law where EU defence rights benefit persons under arrest or pre-trial detention. Indeed, the right to information of the arrested person³⁸ is part of the review undertaken by the judicial authority competent to rule on the lawfulness on detention in the pre-trial stage of criminal proceedings.

4. Restrictions on defence rights by judicial authorities or subject to judicial review

4.1 The concept of judicial authority

The third category of remedial obligation requires that decisions restricting defence rights be taken by judicial authorities, or at least be subject to subsequent judicial review. A first example can be found in Article 7(4) of Directive 2012/13/EU as regards decisions whereby the national competent authority refuses access to certain material of the case file. In a similar way, Article 8(2) of Directive 2013/48/EU requires that temporary derogations from the right to access a lawyer ‘may be authorized only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review’. With a similar wording, Article 8(3) of Directive 2013/48/EU requires the intervention of a judicial body when the restriction relates to the right to have a third party informed about the arrest.

It should be firstly noted that the Directives do not compel the Member States to provide remedies before a court or a tribunal,³⁹ but merely refer to ‘judicial authorities’. However, the term ‘judicial’ is open to different interpretations depending on the

³⁷ As regards the access to evidence see, for instance, *Foucher v France* App no 222209/93 (ECtHR, 18 March 1997) para 32 ff.

³⁸ Art. 4 Directive 2012/13/EU.

³⁹ Such remedial obligation would have implied judicial proceedings before a court within the meaning of Art. 267 TFEU. See for instance, Case C-506/04 *Wilson*, para 47 ff.

context in which it is used.⁴⁰ In the field of cross-border cooperation, such as for instance proceedings for the execution of the EAW, it may encompass prosecutorial authorities.⁴¹ By contrast, the term is to be understood in a narrow sense when it refers to judicial scrutiny. This second interpretation is of relevance as regards the remedial obligation enshrined in Article 7(4) of Directive 2012/13/EU. The provision refers to judicial review or, alternatively, prior authorisation by judicial authorities that consequently can exercise judicial powers. According to the case law of the CJEU, among the inherent features of adjudication under Article 47 of the Charter is the concept of independence.⁴² The latter entails, as regards its internal aspect, impartiality of the reviewing authority in order to ensure ‘a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings’.⁴³

Thus, the decision restricting defence rights shall be adopted, or at least reviewed, by an authority providing guarantees of independence and impartiality in order for the judicial protection afforded by national law to be effective. The argument endorses the interpretation adopted by the ECtHR of the terms ‘judge or other officer authorised by law to exercise judicial power’ under Article 5(3) of the Convention. Although the provision does not require the supervision of pre-trial detention by a court, the competent authority must offer comparable guarantees, among which are independence and impartiality. It follows that national prosecutors cannot be regarded as authorities having judicial powers,⁴⁴ as they do not have judicial status⁴⁵ and, conversely, have to be considered as a party to the criminal proceedings.⁴⁶ In sum, the decision limiting the right of access to materials of the case and access to a lawyer must be taken either by an independent and impartial body

⁴⁰ Z Đurđević, ‘Judicial Control in the Pre-trial Criminal Procedure Conducted by the European Public Prosecutor’s Office’ in K Ligeti (ed), *Towards a Prosecutor for the European Union*, Vol I (Hart Publishing 2013) 989, 989 – 990.

⁴¹ Case C-453/16 PPU *Özçelik* EU:C:2016:860.

⁴² Case C-64/16, *Associação Sindical dos Juizes Portugueses*, para 41 ff.

⁴³ Case C-175/11 *H. I. D. and B. A. v Refugee Applications Commissioner* EU:C:2013:45, para 95 – 96.

⁴⁴ *Nikolova v Bulgaria* App no 31195/96 (ECtHR, 25 March 1999) para 49 – 50.

⁴⁵ *Ibid*, para 53.

⁴⁶ *Assenov v Bulgaria* App no 24760/94 (ECtHR, 28 October 1998) para 149 – 150.

or by an authority that does not meet such requirements, for instance a public prosecutor, provided that national law enables a court to subsequently review that decision.

4.2 The timing of review

The effectiveness of the judicial protection guaranteed under domestic law does not exclusively depend on guarantees provided by the reviewing body. It further relies on the time within which the remedy is available. In the absence of specific timelines, the question arises of whether Article 7(4) of Directive 2012/13/EU and Article 8(2) of Directive 2013/48/EU require a specific remedy against decisions refusing access to the case file or delaying access to a lawyer during the pre-trial phase or, conversely, whether it would suffice that such a decision is reviewed at a later stage of the proceedings by the trial court.

A teleological interpretation of both Directives supports this second hypothesis. While the preamble of Directive 2013/48/EU explicitly states that ‘the temporary derogation can be assessed by a court, at least during the trial stage’,⁴⁷ according to Directive 2012/13/EU the right to challenge a decision denying access to documents ‘does not entail the obligation for the Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure may be challenged’.⁴⁸ From this perspective, national law complies with the ABC Directives so far as decisions delaying legal assistance, or refusing access to certain materials, are adopted by a non-judicial authority but subsequently scrutinized by the court competent for reviewing the merits of the accusation. Hence, a Member State may grant sufficient judicial protection through the review undertaken by a judge at the trial stage of criminal proceedings on the admissibility and use of evidence collected in breach of defence rights. As for temporary derogations of the right to access a lawyer, the ECtHR stressed that even though such limitations are justified in exceptional circumstances for compelling reasons, ‘it may nonetheless be necessary, in the interests of fairness, to exclude from any subsequent criminal proceedings any statement made

⁴⁷ Recital 38 Directive 2013/48/EU.

⁴⁸ Recital 36 Directive 2012/13/EU.

during a police interview in the absence of a lawyer'.⁴⁹ Similarly, judicial protection of the right of access to the case file is achieved where the competent court undertakes the adversarial assessment of evidence.

The CJEU case law does not speak against such an interpretation. On the one hand, where EU Directives leave room for the procedural autonomy of the Member States, who enjoy a margin of discretion for implementing remedial obligations, it is for the national judge to interpret and apply domestic legal provisions in conformity with fundamental rights guaranteed by the Charter. On the other, the availability of an alternative remedy under national law meets the requirements of Article 47 of the Charter, unless such a remedy makes it impossible to ensure, even indirectly, respect for an individual's rights under Union law.⁵⁰ Consequently, judicial review of the merits of the accusation undertaken by first instance tribunals is deemed sufficient as far as it encompasses procedural irregularities committed during preliminary inquiries with the aim to ensure the fairness of the proceeding as a whole.⁵¹

It thus follows that depending on the structure of the national criminal justice system and the judicial remedies available to the defendant, the effectiveness of the judicial protection afforded may vary from one Member State to another. National criminal procedures at the pre-trial stage which provide the possibility of appealing against a decision refusing access to the case file guarantee greater effectiveness of judicial protection: where the suspect or accused person has the opportunity to immediately challenge restrictions on defence rights, he is able to enforce the rights he derives from EU law at the initial stage of criminal proceedings. The effective remedy would thus consist of the invalidation of the decision restricting the right and the consequent provision of the requested documents to the defence before the submission of the merits of the accusation to the judgment of a court.⁵²

⁴⁹ *Ibrahim v United Kingdom* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 December 2014) para 195.

⁵⁰ Case C-432/05 *Unibet*, para 41.

⁵¹ Art. 12(2) Directive 2013/48/EU.

⁵² Art. 7(3) Directive 2012/13/EU.

5. Right to a new trial

Besides the remedial obligations aimed to ensure the effectiveness of defence rights harmonized by EU law, a specific duty applies with respect to remedies available under national criminal procedure against convictions rendered *in absentia*. Article 8(2) of Directive 2016/343/EU allows Member States to hold a trial that results in a decision of guilt or innocence in the absence of the accused in two cases: where the accused does not appear in person despite being informed, in due time, of the trial and of the consequences of non-appearance, or when, having been informed of the trial, he is represented by a lawyer. If the above-mentioned conditions are not fulfilled, the trial held in the absence of the accused leads to a conviction rendered *in absentia* and, consequently, triggers the right to a new trial. Indeed, Article 9 of Directive 2016/343/EU requires the Member States to ensure that, in such circumstances, the accused has ‘the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed’.

It should first be noted that the provision does not set forth specific requirements as to the structure of the judicial remedy to be provided under national law. The right to a new trial may amount to the possibility for the accused to lodge an appeal against judgments delivered *in absentia* with a court of the same instance or to institute other judicial actions with a court of higher instance. Nonetheless, the scope of the review undertaken by the competent tribunal must comply with the specific requirements set forth under Article 9 of Directive 2016/343/EU. First, the provision does not grant the right to a new trial against any conviction delivered *in absentia*. In line with the ECtHR, the guarantee does not benefit *ratione personae* the duly informed accused who had waived his right to appear and defend himself in person,⁵³ nor to the accused who could not be located despite reasonable efforts having been made by the competent authorities, for instance because the person had fled or absconded.⁵⁴ Second, pursuant to the ECtHR case law, the right to a new trial shall guarantee the person convicted *in absentia* the opportunity, with sufficient certainty, of obtaining access to a court. As for the scope of

⁵³ Art. 8(2) Directive 2016/343.

⁵⁴ Recital 39 Directive 2016/343.

the review, the latter implies a fresh determination of the merits of the charges by a tribunal that has heard the accused.⁵⁵ With regard to the new trial, ‘Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence’.⁵⁶

6. Conclusions

In light of the foregoing analysis, the ABC Directives leave significant leeway for the Member States to secure effective control over alleged breaches of defence rights in criminal proceedings. The remedial obligations, as analysed above, do not lay down detailed procedural requirements governing the structure, scope and timing of judicial scrutiny. They simply echo the duty incumbent upon the Member States to provide remedies sufficient to ensure effective legal protection of individual rights granted by Union law,⁵⁷ or codify minimum standards of judicial protection already recognized by the ECtHR case law.⁵⁸ Hence, the ABC Directives have very little to no direct impact on the design of judicial remedies in criminal proceedings, which primarily fall within the competence of the Member States. Indeed, the structure of judicial remedies lies at the heart of the national constitutional traditions and among the fundamental aspects of the Member States’ criminal justice systems, to which the EU legislature must have regard.⁵⁹

This does not rule out, however, any further restriction that the ABC Directives may entail as regards national procedural autonomy in criminal matters. Despite the lack of harmonization, national remedies available to suspects and accused persons must still meet the effectiveness requirements stemming from Article 47 of the Charter and the general principle of effective judicial protection. An illustration thereof are the recent preliminary rulings of the CJEU interpreting the ABC Directives. In *Sleutjes*, the Court emphasized

⁵⁵ *Sanader v Croatia* App no 66408/12 (ECtHR, 12 February 2015) paras 84 and 95.

⁵⁶ Art. 9 Directive 2016/3434/EU.

⁵⁷ Art 19 (1) TEU.

⁵⁸ This holds true for both the right to a fair use of evidence and the right to a new trial against convictions rendered *in absentia*.

⁵⁹ Art 82 TFEU.

that the accused who does not understand the language of the proceedings cannot effectively challenge in front of a court a penalty order if he is not provided with a written translation of the said act.⁶⁰ Likewise, the Court underlined in *Tranca* that national rules governing the notification of decisions imposing a criminal sanction cannot be interpreted in such a way that would deprive the accused of any possibility to access a court.⁶¹ It thus follows that the ABC Directives do not only require the Member State to provide effective remedies against breaches of defence rights. First and foremost, they grant procedural safeguards, which enable suspects and accused persons to exercise their right of defence before a court and to effectively institute judicial actions available throughout national criminal proceedings. How can the defendant challenge a decision in front of the competent court without having been informed of it in due time, without access to documents necessary for the preparation of defence or without being able to understand the language of the proceedings? It is precisely the potential violation of defence rights provided under the ABC Directives that may bring national systems of judicial remedies in criminal proceedings under the scrutiny of the CJEU.

⁶⁰ Case C-278/16 *Sleutjes* EU:C:2017:757, para 33.

⁶¹ Joined Cases C-124/16, C-188/16 and C-213/16 *Tranca* EU:C:2017:228, para 45.

CHAPTER II

JUDICIAL REVIEW AS A FUNDAMENTAL RIGHT: ARTICLE 47 OF THE CHARTER

Silvia Allegrezza

TABLE OF CONTENTS: 1. The autonomous and multilayered meaning of right to an effective remedy under EU law. – 2. Scope of application. – 2.1 Judicial protection of rights conferred by Union law. – 2.2. Only when the Member States are implementing Union law. – 2.2.1. National rules enacting EU instruments of police and judicial cooperation in criminal matters. – 2.2.2. National criminal law performing Member States' obligations set out by EU law. – 3. Institutional and procedural requirements inherent to the structure of judicial review. – 3.1. Right to access a tribunal previously established by law. – 3.2. Independence and impartiality of the reviewing body. – 3.3. Procedural fairness. – 3.3.1. Equality of arms and adversarial proceedings. – 3.3.2. Specific procedural safeguards. – 3.4. Time requirements. – 4. Requirements related to the function of judicial scrutiny: scope and powers of review. – 4.1. Full judicial review. – 4.2. Evidence gathered in breach of individual rights. – 4.3. Duty to state reasons. – 4.4. Powers of review. – 5. Limitations on the right to access a court. – 6. Conclusions.

1. The autonomous and multilayered meaning of right to an effective remedy under EU law

In the EU, judicial review carried out by national courts constitutes a tool ensuring the primacy and direct effect of Union law within the Member States.¹ Indeed, given the absence of a complete system of judicial remedies at the supranational level, the enforcement of Union

¹ H Hofmann, 'Article 47. Specific provisions' in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1211, 1212.

law primarily relies on the national justice systems,² which must provide ‘direct and immediate protection of rights arising from the Union legal order’.³ Hence, the duty for the Member States to provide effective remedies in the fields covered by EU law is the necessary corollary of the fundamental right to an effective judicial protection.

Against this background, one might soon realize the complex meaning that the right to an effective remedy has within the EU multi-level legal order. This complexity is also reflected in the separate, but complementary, legal sources providing for such right.⁴ The general principle of effective judicial protection acknowledged by the CJEU since the 1970’s⁵ finds expression in the obligation for the Member States to establish a sufficiently complete system of judicial remedies under Article 19 TEU.⁶ A second constitutional basis has to be found in Article 47 of the Charter.⁷ The provision requires both the EU institutions and the Member States, when they are implementing Union law, to guarantee the right to an effective remedy before a tribunal and to fair trial.⁸

One should bear in mind that Article 47 of the EU Charter also echoes fundamental guarantees of judicial protection already provided under other corpus of human rights. In particular, the CJEU interprets Article 47 of the Charter in line with the European Convention of Human Rights (ECHR)⁹ as well as with the common constitutional traditions of the Member States.¹⁰ The minimum level of effective judicial protection under the provision shall correspond to the standards developed by the European Court of Human Rights (ECtHR) in interpreting the meaning and scope of Articles 6(1) and 13 of the Convention, without precluding the possibility for the EU to

² W Van Gerven, ‘Of Rights, Remedies and Procedures’ (2000) 37 CMLRev 501, 521.

³ H Hofmann (n 1).

⁴ M Safian, D Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU’ (2014) 33 Yearbook of European Law 3, 4.

⁵ K Lenaerts, I Maselis, K Gutman, *EU Procedural Law* (2015, Oxford University Press) 111 ff.

⁶ Art. 19(1), para 2 TEU. H Hofmann (n 1).

⁷ On the relation with Article 47, M Safian, D Düsterhaus (n 4) 3ff.

⁸ It is worth noting that despite the multiple legal sources, the CJEU has usually addressed the right to an effective remedy and the effective judicial protection of individual rights jointly. M Safian, D Düsterhaus (n 4) 15.

⁹ Art. 52(3) of the Charter.

¹⁰ Art. 52(4) of the Charter.

provide more extensive protection.¹¹ Despite the parallels, Article 47 of the Charter has gradually ‘acquired a separate identity and substance (...) which are not the mere sum’ of the above-mentioned provisions of the ECHR.¹² As emphasized by Advocate General Cruz Villalón in *Samba Diouf*, the right to an effective remedy:

[O]nce it is recognised and guaranteed by the European Union [...] goes on to acquire a content of its own, the definition of which is certainly shaped by the international instruments on which that right is based, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question stems.¹³

Two arguments support this statement. First, Article 47 of the Charter has a specific scope of application that only includes situations in which Member States are implementing Union law.¹⁴ Second, the right to an effective remedy acquires a multilayered meaning within the EU composite legal order, since it encompasses both the horizontal and vertical implementation of Article 47 of the Charter. As mentioned above, the provision applies in a vertical perspective to remedies and procedural rules governing claims before national courts that are based on Union law. Given the lack of a centralized enforcement system within the Union, it is indeed for the Member States to ‘designate the courts having jurisdiction and determine procedural conditions governing actions intended to ensure the protection of those rights’ that citizens derive from EU law.¹⁵ An illustration of this duty are the remedial obligations that the ABC Directives impose on the Member States with the aim of ensuring the enforcement of defence rights conferred by Union law. As for the horizontal implementation, different standards of effective judicial protection in the Member States may conflict with EU legal instruments governing cross-border cooperation. From this perspective, the right to an effective remedy enshrined in Article 47 of the Charter shall be interpreted in the light of the constitutional

¹¹ Art. 52(3) of the Charter.

¹² Case C-69/10 *Samba Diouf*, Opinion of AG Cruz Villalón EU:C:2011:102, para 39.

¹³ *Ibid* para 39.

¹⁴ Art. 51(1) of the Charter.

¹⁵ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989, para 5.

principle of mutual trust,¹⁶ which forms the basis of EU rules enacting mutual recognition of judicial decisions.

Both scenarios bring into play the effective judicial protection of fundamental rights and its relationship with the effectiveness of Union law. What guarantees does Article 47 of the Charter trigger within the EU criminal justice area? To answer this question, one should first define its scope of application.

2. Scope of application

2.1 Judicial protection of rights conferred by Union law

The right to an effective remedy guaranteed by Article 47 of the Charter has a twofold delimitation. The provision first grants judicial protection to ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated’.¹⁷ Thus, the fundamental right in question is of an ancillary nature: the scope of Article 47 of the Charter relies on the existence of other rights conferred on a litigant by EU law.¹⁸ In this respect, the wording of Article 47(1) of the Charter mirrors Article 13 of the ECHR,¹⁹ which makes the right to an effective remedy contingent upon an arguable claim that a right set forth in the Convention is violated.²⁰ Unlike the latter, the corresponding EU right to an effective remedy does not solely apply in combination with other provisions of the Charter itself.²¹ Rights and freedoms referred to in Article 47(1) encompass individual guarantees afforded also by other provisions of primary and secondary law. In this sense, the provision is the expression of the right to effective judicial protection that individuals can invoke in front of national courts in order to exercise rights they enjoy by virtue of Union law.²²

¹⁶ As regards the constitutional value of the principle of mutual trust, see K Lenaerts, ‘La vie après l’avis: Exploring the Principle of Mutual (Yet not Blind) Trust’ (2017) 54 CMLRev 805, 813.

¹⁷ Art. 47(1) EU Charter.

¹⁸ H Hofmann (n 1) 1215.

¹⁹ Explanations relating to the Charter of Fundamental Rights [2007] JO C303/29.

²⁰ *Kaya v Turkey* App no 22535/93 (ECtHR, 28 March 2000) para 124.

²¹ D Shelton, ‘Source of Article 47 Rights’ in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1210.

²² Indeed, the principle of effective judicial protection was first acknowledged by the Court of Justice in *Rewe* as a corollary of the duty of sincere cooperation. According to the ruling, the Member States shall ‘designate the courts having

When applied in the field of criminal law, Article 47 of the Charter consequently entails the effective judicial protection of rights arising from the EU legal order against European and national penal provisions (*ubi ius ubi remedium*).²³ Considering the possible interactions between Union law and national criminal legislation, one could distinguish two sets of guarantees. On the one hand, EU law and, more specifically, the Charter, confer fundamental rights that suspects and accused persons typically claim against the arbitrary use of force and the power to sanction within the criminal realm such, for instance, defence rights,²⁴ the right to liberty and security in case of imprisonment,²⁵ the right not to be tried twice for the same offence,²⁶ the right to privacy and protection of personal data²⁷ where law enforcement authorities carry out intrusive investigative measures, such as house searches or phone tapping.²⁸ On the other hand, the right to an effective remedy of Article 47 Charter also protects freedoms of movements that European citizens enjoy under Union law against unjustified and disproportionate restrictions resulting from national criminal provisions.²⁹ This indirect and negative interaction implies the obligation for the national judge to ‘disapply’ a national criminal provision that entails unjustified and disproportionate restrictions to EU fundamental freedoms. Scholars identify this legal phenomenon as the ‘neutralizing effect’.

jurisdiction and determine procedural conditions governing actions intended to ensure protection of the rights which citizens have from direct effect of Community law’. See Case 33/76, *Rewe-Zentral*, para 5. Thus defined, the right to effective judicial protection “adds flesh to the skeleton of primacy, direct effect and state liability” of Union law. A Arnulf, ‘The principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) 36 *ELRev* 51.

²³ According to Article 51(1) EU Charter, the latter is legally binding for both EU institutions, bodies, offices and agencies and for the Member States when they are implementing Union law.

²⁴ Art. 48 EU Charter.

²⁵ Art. 6 EU Charter.

²⁶ Art. 50 EU Charter.

²⁷ Art. 7 and 8 EU Charter.

²⁸ In a similar way, a close relation between the above mentioned rights and judicial review emerges from the case law of the ECtHR. The judicial protection is not only a core element of Article 5 and 6 of the Convention. The recent case law further emphasizes the key role of judicial scrutiny over investigative measures that encroach the right to privacy under Art. 8 of the ECHR. See for instance, *Gutsanovi v Bulgaria* App no 34529/10 (ECtHR, 15 October 2013) para 220 ff.

²⁹ L Arroyo Zapatero, M Muñoz de Morales Romero, ‘Le contrôle des choix de la pénalisation: effets directs et indirects’ in G Giudicelli-Delage, S Manacorda (eds), *Cour de Justice et justice pénale en Europe* (SLC, 2010) 23.

2.2 Only when the Member States are implementing Union law

A claim alleging violations of fundamental rights granted by EU law is not sufficient *per se* to infer the applicability of Article 47 of the Charter. Indeed, the latter establishes in its Article 51(1) a second condition: the Member States have the duty to observe the rights enshrined in the Charter ‘only when they are implementing the Union law’.³⁰ According to the Explanations relating to the Charter, this wording is not intended to reverse the long-standing case law of the CJEU concerning the applicability of fundamental rights stemming from the EU legal order.³¹ Therefore, the term ‘implementation’ encompasses situations in which the Member States ‘act in the scope of Union law’.³² The meaning of Article 51(1) of the Charter is particularly contentious when considering the sensitive question it underlies. As pointed out by Advocate General Cruz Villalón, the applicability of the Charter presupposes a link between the subject matter of the dispute and Union law, which legitimates the transfer of the responsibility for guaranteeing fundamental rights from the national to the supranational level.³³ Consequently, the right to an effective judicial remedy provided by Article 47 of the Charter applies where a domestic legal provision interferes with fundamental rights and freedoms that an individual enjoys by virtue of the EU legal order, provided that a connection can be established between the national criminal proceedings in issue and the scope of Union law.³⁴ Conversely, the right to an effective legal remedy under Article 47 of the Charter cannot be invoked in front of national courts if the subject-matter of the dispute in the main proceedings is not connected in any way with situations contemplated by EU law.

The Court outlined a range of criteria for interpreting the concept of ‘implementing Union law’. In *Siragusa*, the Court referred to the questions of ‘whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is

³⁰ Art. 51(1) EU Charter.

³¹ Case 5/88 *Wachauf* [1989] ECR 2609, para 19; Case C-260/89, *ETR* [1991] ECR I-2925, para 42.

³² Explanations relating to the Charter of Fundamental Rights (n 18) 32.

³³ Case C-617/10 *Åkerberg Fransson*, Opinion of AG Cruz Villalón, EU:C:2013:105.

³⁴ For instance, Case C-457/09 *Chartry v Belgian State* [2011] ECR I-00819, para 25.

capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'.³⁵ As emphasized by the legal doctrine, however, the CJEU does not refer in a systematic and consistent way to the above mentioned criteria.³⁶ Although the same difficulties in defining the meaning of Article 51(1) arise in criminal matters, the case law seems to distinguish two situations.

2.2.1 National rules enacting EU instruments of police and judicial cooperation in criminal matters

In its narrower sense, the 'implementation of Union law' referred to under Article 51(1) of the Charter corresponds to the transposition of EU legal instruments into the domestic legal orders. This excludes at the outset the so-called 'purely internal situations'. The latter arise where neither the subject matter of the dispute in the main proceedings is connected in any way with EU law, nor the national legislation in dispute lies within the scope of Union law.³⁷ An illustration can be found in *Chalakov*.³⁸ The national court referred a preliminary ruling regarding the interpretation of the right to liberty and security enshrined in Article 6 of the Charter with respect to a national arrest warrant issued by the Bulgarian authorities against a Bulgarian citizen, who refused to present his identity documents in violation of national criminal provisions. The CJEU declined its competence after observing that no EU legal instrument applied to the dispute in the main proceedings, nor did the arrested person intend to exercise his right to free movement.³⁹

The Court put forward similar arguments to preclude the application of Articles 47 and 48 of the Charter in *Vinkov*.⁴⁰ The facts in the main proceeding called into question the absence of the right to a judicial remedy against a decision imposing a financial penalty and the

³⁵ Case C-206/13 *Siragusa*, EU:C:2014:126, para 25. See also Case C-40/11, *Iida*, EU:C:2012:691, para 79.

³⁶ For instance, M Dougan, 'Judicial review of Member State Action under the General Principles and the Charter: Defining the scope of Union law' (2015) 52 CMLRev 1201; E Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 CMLRev 1411.

³⁷ Case C-299/95 *Kremzow* [1997] ECR I-02629, para 15.

³⁸ Case C-14/13 *Cholakova* EU:C:2013:374.

³⁹ *Ibid* paras 25 - 26.

⁴⁰ C-27/11 *Vinkov* EU:C:2012:326, para 55 ff.

deduction of points from a driving license after the commission of minor road traffic offences. The purely internal character of the case resulted once again from the lack of a cross-border dimension of the facts, which did not fall within the scope of EU instruments of mutual recognition applicable to road traffic offences.⁴¹ In addition, the Court stressed that the applicability of the Charter cannot result from provisions of the Treaties that exclusively aim at establishing the legislative competences of the Union. Hence, Article 82 TFEU is solely directed to confer to EU institutions the power to harmonize national criminal procedures and thereby was not in relation to the facts of the main action.⁴²

By contrast, the CJEU interprets instruments adopted under Article 82 TFEU in the light of Article 47 of the Charter when the national law aims to implement those instruments within the Member States. This was notably the case as regards domestic criminal proceedings for the execution of the EAW in the well-known cases *Radu*⁴³, *Melloni*⁴⁴ and *Jeremy F.*⁴⁵ Besides the instruments of mutual recognition in criminal matters, the newly-adopted directives harmonizing defence rights of the suspect and accused persons in criminal proceeding constitute a topical area for the implementation of the right to an effective remedy. The implementation of the ABC Directives into national legal systems dramatically expands the justiciability of the rights deriving from the Charter before national criminal courts. This is all the more true considering their scope of application. Indeed, the Directives on the right to interpretation and translation⁴⁶, the right to information⁴⁷, the right of access to a lawyer⁴⁸ and certain aspects of

⁴¹ Ibid para 53.

⁴² Ibid paras 41 – 43.

⁴³ C-396/11 *Radu* EU:C:2013:39.

⁴⁴ C-399/11 *Melloni* EU:C:2013:107.

⁴⁵ C-168/13 PPU *Jeremy F.* EU:C:2013:358.

⁴⁶ Art. 1(2) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁴⁷ Art. 2(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

⁴⁸ Art. 2(1) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 [2013] OJ L294/1.

the presumption of innocence⁴⁹ cover almost the entirety of criminal proceedings: they apply from the investigation stage and more specifically from the moment a person is suspected or accused of having committed a criminal offence, until the conclusion of the proceedings including sentencing and resolution of any appeal. In this regard, it is worth recalling that Union law does not guarantee the right to appeal against conviction and sentences.⁵⁰ Nonetheless, appellate courts in criminal proceedings shall protect the rights that defendants derive from the ABC Directives. Second, the ABC Directives set forth remedial obligations, whereby the Member States must provide effective remedies and judicial review mechanisms available to the defendant against violation of EU procedural safeguards. Such remedial obligations shall be interpreted in the light of the right to an effective judicial protection afforded by Article 47 of the Charter. This holds also true for the rights conferred to victims of crimes by the 2012 Directive, in so far as the right to obtain a decision on compensation by the offender⁵¹ and the role of the victim in the criminal proceeding are examined, respectively, in the light of the guarantees of an effective remedy and fair trial.⁵²

Besides EU instruments in the field of criminal procedures, it is worth asking whether secondary law adopted on the basis of Article 83 of the TFEU might also constitute a sufficient link entailing the applicability of the Charter. In other words, would it be possible to invoke the right to an effective remedy provided by Article 47 with the purpose of challenging, for instance, the independence of a tribunal that decides upon a criminal charge when the offence and the related sanction have been subject to harmonization under Union law?

⁴⁹ Art. 2 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1.

⁵⁰ Indeed, neither the EU Charter nor the EU Directives provide for a right to appeal correspondent to the guarantee enshrined in Article 2 Protocol 7 ECHR.

⁵¹ Art. 16 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

⁵² Indeed, the procedural rights enshrined under Article 13 and Article 6(1) of the Convention also benefit the victim in criminal proceedings. Given that Article 47 EU Charter must be interpreted in the light of the ECHR and the related jurisprudence, the CJEU might potentially be confronted with the interpretation of Directive 2012/29 in the light of Article 47 of the Charter.

The scenario is not purely hypothetical. In *Kremzov*, a national Court referred to the CJEU a preliminary ruling concerning an imprisonment sentence imposed on a European citizen, who was found guilty for murder and illegal possession of firearms under Austrian law⁵³. The question focused on the lawfulness of a national custodial sanction in the light of Articles 5 and 6 of the ECHR,⁵⁴ the Charter not being adopted at the time of the facts. The applicant nonetheless claimed that the competence of the EU judges for ascertaining respect of fundamental rights, given that the imprisonment measure constitutes a restriction on the freedom of movement European citizens enjoy by virtue of the EU Treaties. The Court declined its competence whilst stressing that ‘a purely hypothetical prospect of exercising [the right to free movement] does not establish a sufficient connection with Community law’.⁵⁵ In addition, the national legal provisions defining the offence ‘were not designed to secure compliance with rules of Community law’.⁵⁶

Would the Court adopt a different solution if the criminal charge in the main proceedings would refer to offences under national criminal law, the definition of which has been subject to EU harmonization? In other words, would the sole harmonization of a criminal offence justify the applicability of the EU Charter to national criminal proceedings? Yet, the Charter must be interpreted in the light of the principle of conferral of powers⁵⁷ and, consequently, cannot have the effect of extending the competences and tasks conferred to the Union.⁵⁸ In this regard, neither Article 83 TFEU nor the harmonizing directives adopted on its basis intend to confer individual rights. They merely allow for the approximation of substantive criminal law to the extent necessary to combat serious cross-border crimes on a common basis.⁵⁹ Although these considerations advocate for a negative answer, the CJEU acknowledged that the Charter also applies where the disputed national rules contribute to meet obligations incumbent on the Member States by virtue of the EU Treaties.

⁵³ Case C-299/95 *Kremzov* [1997] ECR I-02629.

⁵⁴ *Ibid* para 12.

⁵⁵ *Ibid* para 16.

⁵⁶ *Ibid* para 17.

⁵⁷ Case C-14/13 *Cholakova* EU:C:2013:374, para 31.

⁵⁸ Art. 51(2) EU Charter. See also Explanations relating to the Charter of Fundamental Rights, (n 18) 32.

⁵⁹ Art. 83(1) TFEU.

2.2.2 National criminal law performing Member States' obligations set out by EU law

A second scenario calls into question domestic penal provisions, which contribute to securing EU objectives and interests, without however constituting implementing measures of Union legislation in the narrowest sense.⁶⁰ This may be the case of European provisions compelling the Member States to adopt effective, dissuasive and proportionate sanctions or any appropriate measure in order to secure the effectiveness of Union law. Such link was at the core of the well-known *Åkerberg Fransson* ruling.⁶¹ The facts in the main proceedings concerned the cumulation of administrative sanctions and criminal penalties imposed by the Swedish authorities for the breach of the obligation to declare VAT. The national Court referred a question for preliminary ruling regarding the compliance of national law with the *ne bis in idem* principle enshrined in Article 50 of the Charter. Some Member States, as well as the Commission, argued that the situation in dispute was purely internal, considering that national penalties and criminal proceedings for tax evasion were not intended to enact or execute specific provisions of Union law.⁶²

The CJEU adopted a much wider interpretation of Article 51(1) of the Charter. On the one hand, the Court stressed that European Directives compel the Member States to take appropriate measures for ensuring collection of VAT.⁶³ On the other, securing collection of such taxes also results from the duty of national authorities to protect the financial interests of the EU, as required by Article 235 TFEU.⁶⁴ The Court thereby concluded that tax penalties and criminal proceedings for VAT evasion actually implement Union law.⁶⁵ Thus, the applicability of the Charter does not solely result from 'mandating rules', namely obligations for the national authorities to undertake a specific activity.⁶⁶ It is further triggered by 'optioning rules' that

⁶⁰ Case C-617/10 *Åkerberg Fransson* EU:C:2012:340, Opinion of AG Cruz Villalón, para 60.

⁶¹ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

⁶² *Ibid* para 16.

⁶³ *Ibid* para 25.

⁶⁴ *Ibid* para 26.

⁶⁵ *Ibid* para 27 – 28.

⁶⁶ D Sarmiento, 'Who is afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CML Rev 1267, 1280 ff.

leave margin of discretion to the Member States in implementing EU law.⁶⁷

In sum, the implementing function of the criminal penalties in the main proceedings stems from the fact that such national sanctions perform obligations for the Member States arising from Union law.⁶⁸ The same reasoning may advocate for the applicability of Article 47 of the Charter to criminal proceedings and penalties aiming to sanction and deter other forms of EU fraud. Pursuant to the case law, the scope of application of the Charter is not dependent upon an actual implementation or execution of an exclusive or shared competence by the EU legislature.⁶⁹ In protecting the Union financial interests by means of criminal law, the Member States are implementing Union law - more specifically obligations stemming from Article 325 TFEU – and, thereby, they must comply with the fundamental rights guaranteed under the Charter. Consequently, the defendant charged with EU fraud offences in national proceedings may claim a breach of Article 47 of the Charter, provided that the alleged lack of effective judicial protection hinders the effective enforcement of other rights conferred to him by Union law.⁷⁰ In the criminal law field, such accessory rights correspond above all to procedural guarantees and the right to presumption of innocence enshrined in Article 48 of the Charter and harmonized by the ABC Directives. In sum, ‘fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law’,⁷¹ including where the national provisions in question perform positive obligations for the Member States.

The Court adopted the same reasoning in *Delvigne*.⁷² The facts referred to sanctions imposed by a French Court consisting in the removal from electoral roll and loss of the right to vote in elections to the European Parliament after conviction for a criminal offence. The

⁶⁷ Ibid 1281. In a similar way, the Court held in *N.S.* that the discretionary powers Member States enjoy in implementing EU legal provisions do not hinder the applicability of Article 47 EU Charter. Case C-411/10 *NS* EU:C:2011:865, para 66.

⁶⁸ Case C-650/13 *Delvigne*, Opinion of AG Cruz Villalón.

⁶⁹ V Scalia, ‘Protection of Fundamental Rights and Criminal Law. The Dialogue between the EU Court of Justice and the National Courts’ (2015) 3 *Eu crim* 100 – 111, 104.

⁷⁰ Art. 47(1) EU Charter.

⁷¹ Case C-617/10 *Åkerberg Fransson*, para 19; Case C-265/13 *Torrallbo Marcos* EU:C:2014:187, para 29.

⁷² Case C-650/13 *Delvigne* EU:C:2015:648.

defendant claimed that the imposition of such penalties violated, on the one hand, the right conferred by Article 39 of the Charter to vote and stand as a candidate at the elections of the European Parliament and, on the other, the retroactive effect of more lenient criminal law under Article 49 of the Charter.⁷³ The Court first recalled that it is for the Member States to define the persons entitled to the right to vote in the elections to the European Parliament.⁷⁴ Nonetheless, in exercising this competence, national authorities are under the obligation provided under the Treaties to ensure that the election is by direct universal suffrage, free and secret.⁷⁵ Therefore, the facts in the main proceedings were governed by EU law.

The difference with *Åkerberg Fransson* lies in the effect national criminal sanctions have vis-à-vis the objectives fulfilled by EU legal obligations. In the first judgment, national penalties contributed positively to the protection of Union's financial interests.⁷⁶ By contrast, the penalties imposed to Mr. Delvigne did not perform any EU legal obligation for the Member States to punish or to adopt appropriate sanctions in order to ensure the effectiveness of European policies. Rather, they affect the way in which national authorities implement the duty to ensure democratic elections of the European Parliament, thereby restricting specific rights and freedoms European citizens enjoy by virtue of EU law.⁷⁷

3. Institutional and procedural requirements inherent to the structure of judicial review

3.1. Right to access a tribunal previously established by law

From a substantive point of view, the right to an effective remedy under Article 47(2) of the Charter has the same meaning of the corresponding right enshrined in Article 6(1) of the Convention.⁷⁸ Thus, its components will be primarily identified through a cross-analysis of the CJEU and the ECtHR case law,⁷⁹ laying special

⁷³ Ibid para 20.

⁷⁴ Ibid para 31.

⁷⁵ Ibid para 32.

⁷⁶ Case C-617/10 *Åkerberg Fransson*, para 26.

⁷⁷ Case C-650/13 *Delvigne*, Opinion of AG Cruz Villalón, para 82.

⁷⁸ Art. 52(3) EU Charter. Explanations relating to the Charter of Fundamental Rights (n 18) 30.

⁷⁹ It should however be recalled that in interpreting the rights guaranteed under

emphasis on the EU case law related to criminal and punitive administrative proceedings.⁸⁰ As regards the structure of judicial scrutiny, Article 47 of the Charter entails both institutional and procedural requirements. The provision first guarantees the right to access an independent and impartial tribunal previously established by law. The institutional requirements set forth in the provision encompass the ‘task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by the law’.⁸¹ Similarly to Article 6(1) ECHR,⁸² the notion of ‘tribunal’ under Article 47 of the Charter has an autonomous meaning.⁸³ Under EU law, the term is to be understood as corresponding to the definition of ‘court or tribunal’ entitled to refer preliminary questions under article 267 TFEU.⁸⁴ According to the long-standing case law of the CJEU, the formal classification provided under national law is not decisive. A national authority that domestic legal provisions define as a court, is not necessarily a tribunal within the meaning of Article 267 TFEU.⁸⁵ Conversely, bodies that are not usually classified as tribunals may exceptionally be accorded such status under Union law.⁸⁶ The Court held, for instance, that an examining magistrate who is competent to proceed by indictment (*juge d’instruction*) constitutes a judicial authority capable of referring questions for preliminary ruling.⁸⁷ By contrast, a Public Prosecutor cannot be regarded as court or tribunal within the meaning of Article 267 TFEU, considering that

the Charter, the CJEU also refers to the common constitutional traditions of the Member States, according to Article 52(4) EU Charter.

⁸⁰ It is worth recalling however, that unlike Article 6 ECHR the right to access ‘an independent and impartial tribunal previously established by law’ under Article 47 of the Charter is not confined to disputes relating to civil rights and obligations. Explanations relating to the Charter of Fundamental Rights (n 18) 30.

⁸¹ Case 14/86 *Pretore di Salò* EU:C:1987:275, para 7.

⁸² *Belilios v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) para 64; *Coëme and others v Belgium* App no 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 22 June 2000) para 99.

⁸³ L Pech, ‘Article 47(2)’ in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1250 ff.

⁸⁴ *Ibid.* For a detailed analysis of the definition of ‘court or tribunal’ under article 267 TFEU, N Fenger, M Broberg, *Le renvoi préjudiciel à la Cour de justice de l’Union européenne* (2013, Larcier) 85 ff.

⁸⁵ See for instance, Case C-24/92 *Corbiau* [1993] ECR I-1277, para 15 – 16.

⁸⁶ This might be the case, for instance, of certain arbitral bodies. Case 61/65 *Vaassen-Göbbels* [1966] ECR 377.

⁸⁷ Case 65/79 *Chatain* EU:C:1980:108 ; Case 54/80 *Wilner* EU:C:1980:282 ; Case C-235/02 *Criminal proceedings against Saetti and Frediani* EU:C:2004:26, para 23.

his role ‘is not to rule on an issue in complete independence but (...) to submit that issue, if appropriate, for consideration by the competent judicial body’.⁸⁸

As for the substance, the definition of ‘tribunal’ relies on a range of factors corresponding to those developed by the ECtHR. In *Dorsch Consult*, the CJEU outlined the characteristic features to be considered, namely the questions of ‘whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent’.⁸⁹ In particular, the CJEU verifies whether the organization, the establishment of a tribunal, as well as the appointment and remuneration of its members are regulated by legislative statutes.⁹⁰

Moreover, the essential feature of a tribunal under Union law is the exercise of a judicial function. The latter consists in the capacity to solve a dispute⁹¹ and to adopt a decision, which acquires force of *res judicata*.⁹² In conducting proceedings intended to lead to decisions of a judicial nature, a tribunal applies rules of law.⁹³ Thus, a judicial body does not settle the dispute according to principles of fairness,⁹⁴ on the contrary, it applies legally binding rules and gives reasons in fact and law for its decisions.⁹⁵ Such a definition is in line with the case law of the ECtHR related to Article 6(1) of the Convention. Accordingly, a tribunal is characterized in a substantive sense by its judicial function,⁹⁶ namely the capacity to determine matters within its competence after proceedings conducted in a prescribed manner.⁹⁷

It is worth recalling that Article 47 of the Charter ‘affords an individual a right of access to a court or a tribunal but not to a number of levels of jurisdiction’.⁹⁸ Pursuant to this interpretation, the CJEU ruled in *Samba Diouf* that the principle of effective judicial

⁸⁸ Case C-74/95 *Criminal proceedings against X* EU:C:1996:491, para 19.

⁸⁹ Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 23.

⁹⁰ Case C-175/11 *H. I. D. and B. A. v Refugee Applications Commissioner and Others* EU:C:2013:45, para 46.

⁹¹ C-182/00 *Lutz GmbH and Others* EU:C:2002:19, para 14.

⁹² C-363/11 *Epitropos tou Elegktikou Synedriou* EU:C:2012:825, para 26 – 28.

⁹³ Case 61/65 *Vaassen-Göbbels* [1966] ECR 377.

⁹⁴ L Pech (n 87) 1255.

⁹⁵ Joined Cases C-110/98 and C-147/98 *Gabalfrisa* [2000] ECR I-1571, para 38.

⁹⁶ *Belilos v Switzerland* App no 10328/83 (ECtHR, 29 April 1988) para 64.

⁹⁷ *Coëme and others v Belgium* App no 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 22 June 2000) para 99.

⁹⁸ Case C-69/10 *Samba Diouf* EU:C:2011:524, para 69.

protection does not require the Member States to guarantee access to Appellate Courts.⁹⁹ In a similar way, the ECtHR consistently held that Article 6(1) of the Convention does not compel the Contracting States to provide appeals in civil or criminal proceedings.¹⁰⁰ Nonetheless, the full range of procedural rights to a fair trial enshrined in that provision apply to national Courts of second instance, irrespective of whether the country ratified Article 2 of Protocol 7 of the ECHR, affording the right to appeal against convictions and sentences.¹⁰¹ Although a corresponding provision is not included in the Charter, the same conclusion would likely apply with respect of Article 47. Theoretically, the CJEU may be asked to examine whether national appeal proceedings comply with the requirements of effective judicial protection and fair trial, provided that judicial review on appeal concerns alleged violations of rights and freedoms guaranteed by virtue of Union law.¹⁰²

3.2. *Independence and impartiality of the reviewing body*

The definition of ‘tribunal’ under Article 47 of the Charter further implies the independence¹⁰³ and impartiality of the reviewing body.¹⁰⁴ The requirements are closely intertwined and, therefore, reviewed jointly by both the ECtHR¹⁰⁵ and the CJEU.¹⁰⁶ As pointed out by Advocate General Stix-Hackl, ‘there is a functional connection between independence and impartiality, the former being a necessary condition of the latter’.¹⁰⁷ The CJEU defines an independent judicial body as ‘an authority acting as a third party in relation to the

⁹⁹ Ibid; Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099, para 36.

¹⁰⁰ *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970) Series A no 11, para 25.

¹⁰¹ *Lalmahomed v The Netherlands* App no 26036/08 (ECtHR, 22 February 2011) para 38.

¹⁰² Art. 47(1) EU Charter.

¹⁰³ Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 23 related to Article 267 TFEU, but define *mutatis mutandis* to the independent ‘tribunals’ under Article 47 EU Charter.

¹⁰⁴ Case C-17/00 *De Coster* EU:C:2001:651, para 17.

¹⁰⁵ *Findlay v United Kingdom* App no 22107/93 (ECtHR, 25 February 1997) ECHR 1997-I, para 73.

¹⁰⁶ See for instance Case C-506/04 *Wilson* EU:C:2006:587, para 52.

¹⁰⁷ Case C-506/04 *Wilson*, Opinion of AG Stix-Hackl EU:C:2006:311, para 75.

authority which adopted the decision forming the subject-matter of the proceedings'.¹⁰⁸

In *Wilson*, the CJEU further outlined its constituent elements, while distinguishing two aspects. The first one, which is *external*, presumes that the body is protected against external intervention or pressures liable to jeopardise the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office. The second aspect, which is *internal*, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law'.¹⁰⁹

Although the structure of the reasoning adopted by the CJEU slightly differs from the one developed by the ECtHR,¹¹⁰ the substantive elements are almost identical. First, the *Wilson* judgment explicitly refers to the ECtHR case law as regards the freedom from external intervention or pressures.¹¹¹ Second, the factors to be considered in assessing the independence and impartiality are the same under Union law and the Convention, namely 'the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members'.¹¹² Third, the CJEU seeks to examine whether national legislation provides sufficient guarantees 'to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.¹¹³ The wording used by the Court is clearly reminiscent of the importance attached by the ECtHR to the appearance of independence and impartiality. Indeed, Article 6(1) is violated where there is a legitimate

¹⁰⁸ Case C-24/92 *Corbiau*, para 15.

¹⁰⁹ Case C-506/04 *Wilson*, para 51 - 52 (emphasis added).

¹¹⁰ In particular, the CJEU case law does not explicitly distinguish between objective and subjective impartiality, a distinction that the ECtHR developed in interpreting Article 6(1) of the Convention. See for instance *Kyprianou v Cyprus* App no 73797/01 (ECtHR, 15 December 2015) para 119.

¹¹¹ Case C-506/04 *Wilson*, para 51.

¹¹² *Ibid* para 53.

¹¹³ *Ibid* para 51.

reason, which is objectively justified, to fear that the reviewing body lacks independence or impartiality.¹¹⁴

3.3. Procedural fairness

According to the CJEU case law, ‘the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented’.¹¹⁵ Thus, procedural fairness constitutes both a prerequisite for an effective judicial review as well as the object of judicial scrutiny. As for its first function, fairness implies equality of arms and adversarial proceedings, which entail in turn specific criminal-headed guarantees.

3.3.1. Equality of arms and adversarial proceedings

The principle of equality of arms, together with the principle *audi alteram partem*, form the corollary of the very concept of a fair hearing.¹¹⁶ As regard to the former, the definition adopted by the CJEU is identical to the one formulated by the ECtHR:¹¹⁷ ‘each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.¹¹⁸ In other words, the Court verifies whether the domestic law provides a person with a reasonable opportunity to take legal action based on rights deriving from Union law in conditions that do not place him in a clearly less advantageous position than the other parties to the dispute.¹¹⁹ In assessing the equality of arms, specific attention is paid to any imbalance between the procedural rights available to parties.¹²⁰ This

¹¹⁴ For instance *Clarke v United Kingdom* (dec) App no 23695/02 (ECtHR, 28 August 2005); *Padovani v Italy* App no 13396/87 (ECtHR, 26 February 1993) para 27.

¹¹⁵ Case C-199/11 *Europese Gemeenschap v Otis NV and Others* EU:C:2012:684, para 48.

¹¹⁶ Case C-169/14 *Sánchez Morcillo and Abril García* EU:C:2014:2099, para 49.

¹¹⁷ *Klimentyev v Russia* App no 46503/99 (ECtHR, 16 November 2006) para 95.

¹¹⁸ Case C-199/11 *Europese Gemeenschap v Otis NV and Others* EU:C:2012:684, para 71.

¹¹⁹ Case C-539/14 *Sánchez Morcillo and Abril García* EU:C:2015:508, para 48.

¹²⁰ Case C169/14 *Sánchez Morcillo and Abril García* para 46.

includes for instance the possibility to examine and challenge any document submitted to the court. The case law specifies, however, that the alleged lack of balance must, as a rule, be proven by the person who has suffered it.¹²¹

The equality of arms overlaps with the adversarial principle. Indeed, the CJEU defined the latter as the possibility for the parties to the proceeding to take position on the facts and documents on which the judicial decision is based, as well as the opportunity to discuss evidence and arguments submitted to the judge and pleas raised on his own motion that the court intends to rely upon in its decision.¹²² Thus, the principle of *audi alteram partem* is complied with where a person is able to lodge submissions and evidence in support of his claim,¹²³ particularly in order to contest the grounds on which the impugned act is based and, therefore, to put forward an effective defence.¹²⁴ The right to an adversarial hearing implies for instance, the possibility to raise objections to admissibility.¹²⁵ Conversely, the CJEU held that subsequent extensions of procedural time limits afforded without adversarial debate do not jeopardize the fairness of the proceedings.¹²⁶

The adversarial requirement deriving from Article 47 of the Charter is not absolute. Similarly to the ECtHR,¹²⁷ the CJEU acknowledges restrictions justified on grounds of State security, including threat for the life, health or freedom of persons, as well as the need to keep the methods of investigation specifically used by national authorities secret when the disclosure of such information would seriously impede, or even prevent, future performance of the tasks of those authorities.¹²⁸ Restrictions must be strictly necessary: the judge ensures to the greatest possible extent compliance with the adversarial principle and more specifically defence rights that constitute its components.¹²⁹ With regard to restrictive measures enacted in the field of Common Foreign Security Policy (CFSP), the CJEU

¹²¹ Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, para 72.

¹²² Case T-26/14 P *Schönberger v Court of Auditors* EU:T:2014:887, para 23.

¹²³ Joined Cases C-110/98 and C-147/98 *Gabfrisa*, para 37.

¹²⁴ Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363, para 65.

¹²⁵ Case F-82/09 *Nolin v Commission* EU:F:2010:154, para 96.

¹²⁶ Case F-212/07 *Strack v Commission* EU:F:2011:3, para 39.

¹²⁷ Case C-300/11 *ZZ v Secretary of State for the Home Department*, para 65.

¹²⁸ *Ibid* para 66.

¹²⁹ *Ibid* para 65.

emphasized the crucial importance of judicial review where restricted access to documents and information undermines the right to be heard and, thereby, the effective judicial protection.¹³⁰ As regards the role of national courts, the Court held in *ZZ*:

The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views. However, if, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision (...) by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.¹³¹

According to the Court's rulings in *Kadi*¹³² and *Kadi II*,¹³³ the same reasoning stands for the judicial scrutiny undertaken by the EU Courts.¹³⁴ Judges must base their decision solely on the materials that has been disclosed to them by the competent authority. If the reasons

¹³⁰ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Kadi* EU:C:2013:518, para 119 ff.

¹³¹ Case C-300/11 *ZZ v Secretary of State for the Home Department*, para 56 – 57.

¹³² Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* EU:C:2008:461, para 337 ff. The Court particularly stressed that '[o]bservance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature, and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty'.

¹³³ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Kadi* EU:C:2013:518, para 125 ff.

¹³⁴ M Safian, D Dusterhaus (n 4) 27 – 28.

invoked for precluding disclosure of evidence or information are insufficient in the Court's view, judicial review will be based only on the materials, which have been disclosed to the person subject to restrictive measures. If, by contrast, the reasons put forwards by the EU authority do indeed preclude that disclosure, it is for the Court:

to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union [and therefore to] assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence'.¹³⁵

3.3.2. *Specific procedural safeguards*

As the CJEU stressed, among the constituent elements of the effective judicial protection guaranteed under Article 47 of the Charter are defence rights.¹³⁶ It should however be underlined that the wording of the latter provision does not contain a detailed list of procedural safeguards applicable in criminal proceedings as Article 6, paragraphs 2 and 3 ECHR does. The latter are echoed in article 48 of the Charter¹³⁷ that broadly refers to the presumption of innocence¹³⁸ and the rights of defence of anyone who has been charged.¹³⁹

Nonetheless, Article 47 of the Charter incorporates two specific guarantees, namely the right to be advised, defended and represented¹⁴⁰ as well as the right to legal aid that, in line with the ECHR, shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.¹⁴¹ The latter has been interpreted notably in the landmark judgment *DEB*. The CJEU acknowledged that national rules must not

¹³⁵ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Kadi*, para 127 – 128.

¹³⁶ Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, para 48.

¹³⁷ Explanations relating to the Charter of Fundamental Rights (n 18) 30.

¹³⁸ Art. 48(1) EU Charter.

¹³⁹ Art. 48(2) EU Charter.

¹⁴⁰ Art. 47(2) EU Charter.

¹⁴¹ Art.47(3) EU Charter.

preclude a legal person from the benefit of legal aid, even if the relevant EU secondary law does not provide for such a right.¹⁴² Indeed, the right to legal aid should be understood as an ancillary guarantee of the right to an effective remedy, since denial of legal aid may affect the very essence of the principle of effective judicial protection when it amounts to an obstacle for the parties' access to court.¹⁴³ While quoting the ECtHR case law, the CJEU recalled, however, that legal aid shall be guaranteed only in as far as necessary for ensuring access to a court and a fair hearing. For that purpose, the granting of legal aid 'must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively', in particular as regards his financial capacity.¹⁴⁴ In such circumstances, legal aid encompasses both assistance by a lawyer and dispensation from payment of the costs of proceedings.¹⁴⁵ In *GREP*, The CJEU confirmed that the right to legal aid enshrined in Article 47(3) EU Charter benefits also legal persons.¹⁴⁶ Accordingly, national legal provisions cannot make it impossible for a legal person to obtain legal aid where the latter is necessary for contesting before a court the cross-border enforcement of measures based on EU regulations concerning the recognition and enforcement of judgments in civil and commercial matters.¹⁴⁷

The CJEU further emphasized the twofold relation between defence rights and effective judicial protection while interpreting the ABC Directives. It clearly emerges from the case law that the procedural guarantees of suspects and accused persons do not only determine the fairness of the proceedings that lead to a court's decision. Their violation may directly jeopardize the right of access to a court guaranteed under Article 47 of the Charter.¹⁴⁸ An illustration thereof is the preliminary ruling whereby the CJEU

¹⁴² Case C-279/09 *DEB* EU:C:2010:811.

¹⁴³ Likewise *Airey v Irland* App no 6289/73 (ECtHR, 9 October 1979).

¹⁴⁴ *Ibid* para 46.

¹⁴⁵ *Ibid* para 48.

¹⁴⁶ Case C-156/12 *GREP* EU:C:2012:342.

¹⁴⁷ It is worth recalling that legal aid is granted under the same conditions to the applicant who challenges before the EU Court the validity of an act in order to prevent him of being deprived of effective access to justice. This is the case, for instance, of persons who are subject to restrictive measures, notably freezing of funds.

¹⁴⁸ Case C-216/14 *Covaci* EU:C:2015:686, para 42.

interpreted the right to translation and interpretation in *Covaci*. The facts in the main proceedings called into question the *sui generis* character of penal order procedure under German law. Accordingly, the competent court can issue, upon application by the public prosecutor and without holding a hearing, a penalty order that imposes a sanction against a person accused of having committed a minor offence. Thus, '[t]he only possibility the accused person has of obtaining a trial *inter partes*, in which he can fully exercise his right to be heard, is to lodge an objection against that order'.¹⁴⁹ In the light of this, the Court held that national law should guarantee the free legal assistance of an interpreter enshrined in Article 2 Directive 2010/64/EU to the person who orally and without assistance of a lawyer lodges an objection against the penalty order at the registry of the competent court.¹⁵⁰ By contrast, Article 3 of the Directive does not require the Member States to guarantee the right of a written translation of such an objection, 'provided that the competent authorities do not consider (...), in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document'.¹⁵¹

The Court adopted a similar approach in *Sleutjes*, by acknowledging the right to a written translation of a penalty order whereby the competent authorities both inform the accused about the charges against him, and impose a fine.¹⁵² Given the simplified national proceedings at issue, denying the benefit of such right would entail a denial of justice.¹⁵³ The ruling particularly stressed indeed that:

Where a penalty order such as that at issue in the main proceedings is addressed to an individual only in the language of the proceedings in question even though the individual has no command of that language, that individual is unable to understand what is alleged against him, and cannot therefore exercise his rights of defence effectively if he is not provided with a translation of that order in a language which he understands.¹⁵⁴

In a similar way, the right to information about the accusation can

¹⁴⁹ Ibid para 41.

¹⁵⁰ Ibid para 42.

¹⁵¹ Ibid para 51.

¹⁵² Case C-278/16 *Sleutjes* EU:C:2017:757.

¹⁵³ Case C-278/16 *Sleutjes*, Opinion of AG Wahl EU:C:2017:366, para 34.

¹⁵⁴ Case C-278/16 *Sleutjes*, para 33.

be understood as a precondition for instituting judicial actions. Yet, it is for the legal system of each Member State to determine rules governing the notification of decisions imposing criminal sanctions as well as the admissibility of judicial actions against those decisions.¹⁵⁵ However, the Court stressed in *Tranca* that:

[T]he objective of Article 6 of Directive 2012/13 (...) is manifestly infringed if the addressee of a penalty order (...) which has become final and enforceable, could no longer object to it, even though he had not been aware of the existence and content of that order at a time when he could have exercised his rights of defence, in so far as, for want of a known place of residence, it was not served on him personally.¹⁵⁶

Lastly, it is worth recalling that the European Courts adopt the same approach in determining whether breaches of specific procedural safeguards amount to the violation of the right to fair trial. Sticking to the ECtHR case law, the CJEU held in *Pupino* that national Courts are under the duty to interpret domestic criminal procedure in conformity with EU instruments conferring rights to vulnerable victims, in as far however as the measures therefore applied are not likely to make the criminal proceedings against defendant, considered as a whole, unfair within the meaning of Article 6 of the Convention.¹⁵⁷

3.4. Time requirements

Article 47 of the Charter further affords the right to be tried without excessive delays.¹⁵⁸ As for Article 6 of the ECHR, the period to be considered covers the whole of the proceeding at issue.¹⁵⁹ When the reasonable time requirement is subject to specific EU legal provisions, the Court verifies the reasonable length of investigations¹⁶⁰ as well as

¹⁵⁵ Joined Cases C-124/16, C-188/16 and C-213/16 *Tranca* EU:C:2017:228, para 44.

¹⁵⁶ *Ibid* para 45.

¹⁵⁷ Case C-105/03 *Criminal proceedings against Maria Pupino* EU:C:2005:386, para 60.

¹⁵⁸ Art. 47(2) EU Charter.

¹⁵⁹ *V. v United Kingdom* App no 24888/94 (ECtHR, 16 December 1999) para 109.

¹⁶⁰ For instance, as regard to OLAF investigations, Case T-48/05 *Franchet and Byk v Commission* EU:T:2008:257, para 270 ff.

the reasonableness of the period for delivering the judgment.¹⁶¹ The duration ‘is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities’.¹⁶² As for the appropriate remedy, the CJEU sanctions the unreasonable length of the proceeding when it affects the ability of the parties to defend themselves.¹⁶³ In particular, the judge shall prevent defence rights from being irremediably compromised on account of the excessive duration of the investigation phase and to ensure that the duration of that phase does not impede the establishment of evidence designed to refute the existence of conduct susceptible of rendering the person liable.¹⁶⁴ Thus, the failure to adjudicate within a reasonable time may lead to the annulment of the final decision imposing sanctions only when the length of proceedings may have had an effect on the outcome of the dispute.¹⁶⁵

Besides reasonable time requirements, the ECtHR case law repeatedly stressed that the speed of the proceedings shall not jeopardize the procedural guarantees of the parties¹⁶⁶ and most particularly the right to have adequate time for the preparation of defence.¹⁶⁷ In a similar way, EU case law refers to a period of time that ‘must be sufficient in practical terms to enable an effective objection to be prepared and submitted’.¹⁶⁸ The CJEU examines such a requirement with regard to the two components of the principle of effective judicial protection.

On the one hand, a judicial remedy is effective if the procedural rules governing actions for safeguarding an individual’s rights under Union law do not render ‘practically impossible or excessively

¹⁶¹ Case C-385/07 P *Der Grüne Punkt v Commission* EU:C:2009:456, para 176 ff.

¹⁶² Joined Cases C238/99 P, C244/99 P, C245/99 P, C247/99 P, C250/99 P to C252/99 P and C254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* EU:C:2002:582, para 187.

¹⁶³ Case C-105/04 P *Nederlandse Federatieve Vereniging v Commission* EU:C:2006:592, para 49.

¹⁶⁴ *Ibid* para 50.

¹⁶⁵ Case C-385/07 P *Der Grüne Punkt v Commission*, para 193

¹⁶⁶ *OAO Neftyanaya Kompaniya Yukos v Russia* App no 14902/04 (ECtHR, 20 September 2011) para 540.

¹⁶⁷ The European Courts assess the adequate time for the preparation of defence in the light of the specific circumstances of the case. See for instance *Iglin v Ukraine* App no 39908/05 (ECtHR, 12 January 2012) para 65.

¹⁶⁸ Case C-418/11 *Texdata Software* EU:C:2013:588, para 80.

difficult' the exercise of such rights.¹⁶⁹ The CJEU held for instance that the late disclosure of the grounds for a restrictive measure may infringe the applicant's rights of defence and his right to effective judicial protection in that he was not notified in good time of the adoption of such sanction.¹⁷⁰ Indeed, the right to information in due time entails the communication of the grounds for a restrictive measure as well as the access of the relevant information and evidence on which the impugned decision is based.¹⁷¹ The notification shall intervene rapidly in order to afford the person concerned the opportunity to effectively make known his view¹⁷² and sufficient time within which assessing the validity of the impugned measure¹⁷³ and bringing an action against it.¹⁷⁴

On the other hand, the CJEU examined time limits for instituting judicial proceedings in the light of the principle of equivalence. According to the latter, national procedures governing actions for safeguarding an individual's rights under Union law 'must be no less favourable than those governing similar domestic actions'.¹⁷⁵ Indeed, the adequate time requirement raises questions with regard to specific notification procedures under national law that apply to persons whose place of residence or habitual abode is in another Member State.¹⁷⁶ A similar question was addressed to the CJEU in *Covaci*. According to German law, the persons who is subject to a penalty order has a period of two weeks to lodge an objection against it, with that period running from the service of the order. However, if the convicted person is a non-resident of the country, he is required to appoint a person authorized to accept service of the judicial decisions. In the light of this, the Court held that:

Both the objective of enabling the accused person to prepare his defence and the need to *avoid any kind of discrimination* between (i) accused persons with a residence within the jurisdiction of the national law concerned and (ii) accused persons whose residence

¹⁶⁹ Case C-432/05 *Unibet* EU:C:2007:163, para 43.

¹⁷⁰ Case T-496/10 *Bank Mellat v Council* EU:T:2013:3, para 105.

¹⁷¹ *Ibid* para 85.

¹⁷² Case T-493/10 *Persia International Bank v Council* EU:T:2013:398, para 84.

¹⁷³ Case T-256/11 *Ezz and Others v Council* EU:T:2014:93, para 181.

¹⁷⁴ Joined cases T-174/12 and T-80/13 *Syrian Lebanese Commercial Bank v Council* EU:T:2014:52, para 64.

¹⁷⁵ Case C-432/05 *Unibet*, para 43.

¹⁷⁶ See for instance Case C-325/11 *Alder* EU:C:2012:824, para 34 ff.

does not fall within that jurisdiction, who alone are required to appoint a person authorised to accept service of judicial decisions, require the whole of that period to be available to the accused person. (...) [I]f, as in the present case, that period begins to run from the service of the penalty order on the person authorised by the accused person, the latter can effectively exercise his right of defence and the trial is fair only if he has the benefit of that period in its entirety, that is to say without the duration of that period being reduced by the time needed by the authorised person to transmit the penalty order to its addressee.¹⁷⁷

4. Requirements related to the function of judicial scrutiny: scope and powers of review

4.1. Full judicial review

Among the characteristic features of a court having jurisdiction in criminal matters, the CJEU identified its unlimited jurisdiction.¹⁷⁸ As underlined by Advocate General Bot in *Baláz*, a court having competence for reviewing financial penalty decisions ‘must be one whose constitution, procedures and scope of review secure the minimum guarantees applicable under Articles 47 and 48 of the Charter when a person is charged with a criminal offence’.¹⁷⁹ This entails, *inter alia*, ‘proper judicial review’ of the sanctioning decision, which requires ‘review on the facts, not merely on the law, and may involve the attendance and examination of witnesses’.¹⁸⁰

The case law related to EU antitrust proceedings provides further clarifications as regards the guarantee of full judicial review arising from Article 47 of the Charter. In particular, the CJEU stressed that judicial scrutiny of decisions imposing penalties within the meaning of Article 6 of the ECHR encompasses ‘the correctness in law and in fact of any accusation’.¹⁸¹ Thus, as opposed to a restricted review aimed at verifying the ‘procedural legality’ of an act,¹⁸² unlimited

¹⁷⁷ Case C-216/14 *Covaci*, para 65 – 67 (emphasis added).

¹⁷⁸ Case C-60/12 *Baláz* EU:C:2013:733, para 39.

¹⁷⁹ Case C-60/12 *Baláz* Opinion of AG Bot, para 56.

¹⁸⁰ *Ibid* para 63.

¹⁸¹ Joined cases T-56/09 and T-73/03 *Saint-Gobain Glass Franecce e.a. v Commission*, para 84 et seq.

¹⁸² *Ibid* para 79.

jurisdiction ‘entails an exhaustive review of both the Commission’s substantive findings of facts and its legal appraisal of those facts’.¹⁸³ On the one hand, the review of legality under Article 263 TFEU includes ‘the power to assess the evidence, annul the decision and to alter the amount of the fine’.¹⁸⁴ On the other hand, the full jurisdiction granted to EU Courts by Regulation 1/2003 allows the European judge to review the proportionality of the sanction imposed ‘by examining all the complaints raised by the appellants, based on issues of fact and law, seeking to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement’.¹⁸⁵ In similar terms, the Court outlined the requirement of full jurisdiction with respect to disciplinary sanctions imposed to EU officials. By reference to the case law of the ECtHR, a judicial authority having full jurisdiction must be able to examine all questions of law and facts relevant to the dispute brought before it, including in case of a disciplinary sanction the competence to review the proportionality between the misconduct and the penalty.¹⁸⁶

Nonetheless, the case law stressed that the principle of effective judicial protection does not dictate *ex-officio* review.¹⁸⁷ In field of antitrust proceedings, the CJEU recalled that, with the exception of pleas involving public policy (e.g. failure to state reasons), it is for the applicant ‘to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded’.¹⁸⁸ This results from the very essence of actions for annulment taken before the EU Courts, namely an *inter partes* procedure¹⁸⁹ which ‘has neither the object nor the effect of

¹⁸³ P. Van Cleynenbreugel, ‘Efficient justice in the service of justiciable efficiency? Varieties of comprehensive judicial review in a modernized EU competition law enforcement context’ (2014) 10 *CompLR* 35, 37.

¹⁸⁴ Case C-295/12 P *Telefónica SA et Telefónica de España SAU v Commission* EU:C:2014:2062, para 53.

¹⁸⁵ *Ibid* para 204.

¹⁸⁶ Case T-184/11P, *Nijs v Court of Auditors* EU:T:2012:236, para 85; Case T-17/08 P *Andreasen v Commission* EU:T:2010:374, para 146.

¹⁸⁷ Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission* EU:C:2011:815, para 66; Case C-194/14 P *AC-Treuhand AG v Commission* EU:C:2015:717, para 75.

¹⁸⁸ Case C-272/09 P *KME Germany AG, KME France SAS et KME Italy SpA v Commission* [2011] ECR I-12789, para 105.

¹⁸⁹ Joined cases C-239/11 P, C-489/11 P and C-498/11 P *Siemens, Mitsubishi Electric Corp. and Toshiba Corp. v Commission* EU:C:2013:866, para 335.

replacing a full investigation of the case' by the Commission¹⁹⁰. Thus, the scope of judicial scrutiny relies on the pleas in law put forward by the applicant, provided that 'the way in which [they] are formulated determines the extent to which the Court will be obliged to respond to them'.¹⁹¹ This does not preclude compliance with Article 47 of the Charter, provided that the principle of effective judicial protection 'does not require that the General Court (...) should be obliged to undertake of its own motion a new and comprehensive investigation of the file'.¹⁹²

4.2. Evidence gathered in breach of individual rights

The unlimited jurisdiction undertaken by EU Courts entails the task of establishing whether the evidence relied upon for the imposition of penalties is factually accurate, reliable and consistent.¹⁹³ Thus, the effective judicial protection implies the power of the reviewing judge to substitute his own assessment of the evidence, facts and circumstances justifying the adoption of measures adversely affecting a person.¹⁹⁴ As under Article 6 of the ECHR,¹⁹⁵ Article 47 of the Charter does not include specific rules on the admissibility of evidence. However, the CJEU has consistently held that the right to an effective remedy prevents an authority from imposing penalties for misconduct established on the basis of evidence unlawfully collected.¹⁹⁶ Indeed, according to the case law related to EU anti-trust proceedings, judicial control of legality does not exclusively encompass the power to assess evidence¹⁹⁷ that is excluded if not subject to an adversarial debate.¹⁹⁸ The EU judges further verify

¹⁹⁰ Case C-510/11 P *Kone Oyj and Others v Commission* EU:C:2013:696, para 26.

¹⁹¹ P Van Cleynenbreugel (n 183) 41.

¹⁹² Case C-295/12 P *Telefónica SA et Telefónica de España SAU v Commission*, para 55.

¹⁹³ Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, para 59.

¹⁹⁴ Case T-181/08 *Tay Za v Council* EU:T:2010:209, para 144.

¹⁹⁵ *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007) para 84.

¹⁹⁶ Case C-583/13P *Deutsche Bahn AG and Others v Commission* EU:C:2015:404, para 41 – 46.

¹⁹⁷ Case C-295/12 P *Telefónica SA et Telefónica de España SAU v Commission*, para 53.

¹⁹⁸ See, for instance, the case law of the CJEU regarding restrictive measures referred to under Section 4.3.1 'Equality of arms and adversarial procedure'.

whether procedural irregularities during preliminary inquiries irremediably compromised the ability of the accused to defend himself,¹⁹⁹ in particular with regard to those investigative acts that are decisive in providing evidence of the unlawful conduct.²⁰⁰ In such circumstances, a breach of defence rights during the investigation can vitiate the entire proceeding and therefore lead to the annulment of the final decision imposing sanctions where ‘latter could have had a different outcome if the rules had been observed’.²⁰¹ Thus, like the ECtHR case law, the CJEU pays attention on whether the illegally obtained evidence was ‘an integral and significant part of the probative evidence upon which the conviction was based’ and, thereby, rendered the trial as a whole unfair.²⁰²

In the same way, the CJEU has clarified the scope of judicial scrutiny national judges must undertake with regard to evidence gathered in breach of fundamental rights guaranteed under Union law. In *WebMindLicences*, the Court was called upon to rule on the use, by national tax authorities, of evidence gathered without the taxable person’s knowledge in the course of parallel criminal proceedings.²⁰³ With regard to the review carried out by the competent domestic court, the judgment stressed:

In order for the judicial review (...) to be effective, the court reviewing the legality of a decision implementing EU law must be able to verify whether the evidence on which that decision is founded has been obtained and used in breach of the rights guaranteed by EU law and, especially, by the Charter. That requirement is satisfied if the court (...) is empowered to check that the evidence upon which that decision is founded, deriving from a parallel criminal procedure that has not yet been concluded, was obtained in that criminal procedure in accordance with the rights guaranteed by EU law or can at least satisfy itself, on the basis of a review already carried out by a criminal court in

¹⁹⁹ Case C-105/04 P *Nederlandse Federatieve Vereniging v Commission*, para 50.

²⁰⁰ Joined cases 46/87 and 227/88 *Hoechst AG v Commission* EU:C:1989:337, para 15.

²⁰¹ Case T-210/01 *General Electric Company v Commission* EU:T:2005:456, para 632.

²⁰² *Ibrahim v United Kingdom* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 December 2014) para 309.

²⁰³ Case C-419/14 *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* EU:C:2015:832.

an *inter partes* procedure, that that evidence was obtained in accordance with EU law. If that requirement is not satisfied and, therefore, the right to a judicial remedy is not effective, or if another right guaranteed by EU law is infringed, the *evidence obtained (...) must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, the decision has no basis.* ²⁰⁴

The same judgment reiterates that the right for private life enshrined in Article 7 of the Charter does not require any *ex-ante* judicial review of intrusive investigative measures. ²⁰⁵ In line with the ECtHR case law, ²⁰⁶ the CJEU nonetheless acknowledged that absence of a prior judicial warrant increases risks of arbitrariness. ²⁰⁷ Therefore, it must be counterbalanced by the availability to the person concerned of an effective *ex post factum* judicial review relating to both the legality and necessity of such investigative act. ²⁰⁸

4.3. Duty to state reasons

According to Article 41 of the Charter, the duty to state reasons is one of the guarantees stemming from the right to a good administration. ²⁰⁹ The latter implies the obligation for the EU institutions to give reasons for their decision, including acts that impose sanctions or affect the right of the person to whom the decision is addressed. Although it is not explicitly enshrined in Article 47 of the Charter, the case law has acknowledged that the duty to state reasons is also incumbent upon the European institutions as a component of the right to an effective remedy. ²¹⁰ In the field of antitrust proceedings, the Court has underlined that the decision of the Commission imposing a fine ‘must be particularly clear and precise’ in order to enable the undertaking held liable ‘to understand and to

²⁰⁴ Ibid paras 87 – 89 (emphasis added).

²⁰⁵ Case C-419/14 *WebMindLicenses*, para 77; Case C-583/13P, *Deutsche Bahn AG and Others v Commission*, para 25.

²⁰⁶ *Gutsanovi v Bulgaria* App no 34529/10 (ECtHR, 15 October 2013) para 220 ff.

²⁰⁷ Case C-419/14 *WebMindLicenses*, para 77.

²⁰⁸ Ibid para 78. Similarly, *Smirnov v Russia* App no 71362/01 (ECtHR, 7 June 2007) para 45.

²⁰⁹ Art. 41(2) EU Charter.

²¹⁰ Case T-67/11 *Martinair Holland v Commission* EU:T:2015:984, para 31.

contest that imputation of liability and the imposition of those penalties, as set out in the wording of that operative part' of the impugned decision.²¹¹

Accordingly, the CJEU adopts the same interpretation of the obligation to state reasons as the ECtHR under Article 6 of the Convention. First, the authority imposing a penalty is not required to answer every argument raised by the parties.²¹² Nonetheless, the decision must at least set out the facts and considerations having decisive importance as to enable the person sanctioned to understand such decision and bring an appropriate and effective appeal.²¹³ Second, the same arguments have led the CJEU to verify whether the grounds on which the decision is based are sufficiently clear and precise.²¹⁴ Third, the adequate reasoning of decisions imposing penalties shall be assessed according to the nature of such decision and in the light of the circumstances of the case.²¹⁵

4.4. Powers of review

As outlined above, the extent of judicial powers granted to a tribunal called upon to impose or review a penalty is strictly related to its unlimited jurisdiction. With regard to EU competition proceedings, the CJEU consistently held that full judicial review entails the power to assess evidence and alter the amount of the fine or repeal it altogether, on the basis of an independent assessment of the circumstances of the case.²¹⁶ In doing so, EU judges enjoy the power to substitute their own assessment of the case for the findings of the Commission.²¹⁷ Thus, the right to an effective remedy

²¹¹ Ibid.

²¹² *Van de Hurk v The Netherlands* App no 16034/90 (ECtHR, 19 April 1994) para 61.

²¹³ Case T-67/11 *Martinair Holland v Commission*, para 27. Similarly, *Boldea v Rumania* App no 19997/02 (ECtHR, 15 February 2007) para 30.

²¹⁴ Case T-67/11 *Martinair Holland v Commission*, para 31; *Hadjianastassiou v Greece* App no 12945/87 (ECtHR, 16 December 1992) para 33.

²¹⁵ Case C-619/10 *Trade Agency* EU:C:2012:531, para 60; *Ruiz Torija v Spain* App no 18390/91 (ECtHR, 09 December 1994) para 29.

²¹⁶ Case C-272/09 P *KME Germany AG, KME France SAS et KME Italy SpA v Commission*, para 102; Case C-386/10 P *Chalkor AE Epexergasias Metallon v Commission*, para 62.

²¹⁷ Joined cases T-56/09 and T-73/03 *Saint-Gobain Glass Franeece e.a. v Commission*, paras 84 ff.

presupposes the powers of the reviewing Court to adopt a legally binding judgment annulling the impugned decision that imposes penalties.²¹⁸ It is worth noting that the latter requirement is part of the very definition of a tribunal. While the ECtHR requires Courts under Article 6 of the Convention to give binding decisions,²¹⁹ which may not be altered by a non-judicial authority, the CJEU refers to the power of adopting decisions that acquire force of *res judicata*.²²⁰

5. Limitations on the right to access a court

According to the EU case law, the right of access to a court is not absolute. It therefore may be subject to restrictions that pursue an objective of general interest (i.e. lightening of the burden on the court system) and do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference, which infringes upon the very substance of the rights guaranteed.²²¹ As for the other rights enshrined in the Charter, limitations to the effective judicial protection guaranteed under Article 47 must be provided for by law.²²² However, the CJEU allows some implicit limitations aimed at ensuring the proper administration of justice. Notably, the existence of an interest in bringing a judicial action forms an essential and fundamental prerequisite for any legal proceedings and consequently does not affect the very essence of the right of access to a court.²²³

In particular, the CJEU acknowledges restrictions to the right of access to a first instance tribunal in case of penalties that do not form part of hard-core criminal law. By reference to the case law of the ECtHR,²²⁴ the EU judges have consistently held that the right to an effective judicial protection does ‘not preclude a ‘penalty’ from being

²¹⁸ Case C-295/12 P *Telefónica SA et Telefónica de España SAU v Commission*, para 53.

²¹⁹ *Findlay v United Kingdom* App no 22107/93 (ECtHR, 25 February 1997) para 77.

²²⁰ C-363/11 *Epitropos tou Elegktikou Synedriou* EU:C:2012:825, para 26 – 28.

²²¹ Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia* EU:C:2010:146, para 63 – 64.

²²² Art. 52(1) EU Charter. See also, Case C-407/08 P *Knauf Gips v Commission* EU:C:2010:70, para 91; Case T-234/07 *Koninklijke Grolsch v Commission* EU:T:2011:476, para 37 – 38.

²²³ Case T-19/06 *Mindo Srl v Commission* EU:T:2011:56, para 97 – 99.

²²⁴ *Menarini Diagnostic v Italy* App no 43509/08 (ECtHR, 27 September 2011) para 58 – 59.

imposed by an administrative authority with the power to impose penalties in competition law matters, provided that the decision adopted by that authority is amenable to subsequent review by a judicial body exercising unlimited jurisdiction'.²²⁵ Likewise, the ECtHR adopted the same reasoning with regard to minor road traffic offences.²²⁶ It is worth noting that such a restriction finds expression in the EU Directives concerning the rights of the suspect and accused persons in criminal proceedings. Indeed, their scope of application encompasses the proceedings before a court following an appeal against a decision imposing sanctions for minor offences by an authority other than a tribunal having jurisdiction in criminal matters.²²⁷ The underlying justification for a restricted access to court lies in demands of flexibility and efficiency of the justice system²²⁸ that overweight procedural defects of the administrative stage of proceedings.²²⁹

By contrast, legal provisions that provide limitations on the exercise of the rights recognised by the Charter must not impair the very essence of those rights. The requirement laid down in Article 52 (1) EU Charter finds an illustration in *Schrems*. The CJEU held that:

*[L]egislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter (...) The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.*²³⁰

²²⁵ Joined cases T-56/09 and T-73/03 *Saint-Gobain Glass Franeece e.a. v Commission*, paras 77 – 79; Case T-138/07 *Schindler Holding e.a. v Commission*, para 35.

²²⁶ *Öztürk v Germany* App no 22479/93 (ECtHR of 21 February 1984) Series A no 73, para 56. The Court adopted the same approach as regards tax surcharges. See for instance *Bendenoun v France* App no 12547/86 (ECtHR, 24 February 1994) para 46.

²²⁷ For instance, Art. 1(3) Directive 2010/64/EU.

²²⁸ *Le Compte, Van Leuven and De Meyere v Belgium* App no 6878/75 and 7238/75 (ECtHR, 23 June 1981) Serie A no 54, para 51.

²²⁹ D Slater, S Thomas, D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' (2008) 1 College of Europe Research Paper in Law <https://www.coleurope.eu/study/european-legal-studies/research-activities/research-papers-law>, 21.

6. Conclusions

At first glance, the protection afforded under Article 47 of the Charter is more extensive than under Articles 13 and 6 ECHR. On the one hand, its first paragraph expressly refers to remedies ‘before a tribunal’,²³¹ while Article 13 of the Convention does not necessarily require the intervention of a judicial authority in the strict sense.²³² On the other, the scope of Article 47(2) of the Charter is wider than the field of application characterizing Article 6(1) of the ECHR: under Union law, the right to access ‘an independent and impartial tribunal previously established by law’ is not confined to disputes relating to civil rights and obligations, nor to the determination of a criminal charge.²³³ Consequently, Article 47 of the Charter also applies to administrative proceedings, without the need to establish whether that they lead to the imposition of penalties according to the *Engel* criteria.²³⁴ Nonetheless, the CJEU has consistently held, in line with the ECtHR case law,²³⁵ that the criminal-headed guarantees, more specifically the right to access a court and defence rights, do not necessarily apply with their full stringency in punitive administrative proceedings, which do not form part of the ‘hard core’ of criminal law.²³⁶

It is precisely the effective protection of defence rights that opens up a new field of interaction between the CJEU and the abundant case law of the ECtHR related to Article 6 of the Convention. Not only shall the Luxembourg Court interpret the meaning and scope of the procedural guarantees the ABC Directives grant to suspect and accused persons in line with the corresponding rights enshrined in the ECHR.²³⁷ The newly-adopted Directives also raise questions as to the level of judicial protection of defence rights that Article 47 of the Charter provides within the EU criminal justice area.²³⁸

²³⁰ Case C-362/14, *Schrems v Data Protection Commissioner* EU:C:2015:650, para 95 (emphasis added).

²³¹ Art. 47(1) EU Charter.

²³² *Silver and others v United Kingdom* App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) para 113.

²³³ Explanations relating to the Charter of Fundamental Rights (n 18) 30.

²³⁴ The CJEU referred explicitly to the *Engel* criteria for the definition of penalties within the meaning of Article 6 ECHR in Case C489/10 *Bonda* EU:C:2012:319, para 37.

²³⁵ *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006) XIV-2006-XIV, para 43.

²³⁶ Case T-138/07 *Schlindler Holding e.a. v Commission* EU:T:2011:362, para 52.

²³⁷ Art. 52 (3) EU Charter.

²³⁸ M Caianiello, ‘Giudice imparziale preconstituito e tutela effettiva dei diritti in

materia penale' in R Mastroianni, O Pollicino, S Allegrezza, F Pappalardo, O Razzolini (eds), *Carta dei diritti fondamentali dell'Unione europea* (2017) Giuffrè 902, 911.

CHAPTER III

GUARANTEES OF JUDICIAL PROTECTION UNDER THE ECHR: WHAT INTERACTIONS WITH EU LAW?

Valentina Covolo

TABLE OF CONTENTS: 1. Reconciling autonomy and consistency. – 2. Mapping the guarantees of judicial review under the Convention. – 2.1. Right to an effective remedy and access to court. – 2.2. *Habeas corpus* and right to a fair trial. – 2.3. Right to appeal and fair trial guarantees. – 2.4. Judicial review of investigative measures. – 3. Defence rights and judicial review. – 3.1. A two-way path. – 3.2. To counterbalance or not to counterbalance? – 4. Implementing ECHR guarantees in the field of Union law. – 4.1. Preliminary rulings and the duty to state reasons. – 4.2. *Habeas corpus* and fair trial rights in the execution of a EAW. – 5. Conclusions.

1. Reconciling autonomy and consistency

As the time limits for implementing the ABC Directives expire, national criminal courts will presumably refer to the CJEU an increasing number of questions for preliminary rulings. This brings under the jurisdiction of the EU judicature a new set of legal issues that are among the key areas of the prolific case law of the ECtHR: the interpretation of the rights of suspects and accused persons in criminal proceedings.¹ Such parallelism inevitably leads the CJEU to take into consideration the case law of the Strabourg Court when interpreting both the substance of defence rights and the duty for the Member States to provide effective remedies against alleged breaches

¹ This corresponds to a general trend towards an increasing number of cases in which the CJEU plays the role of human right adjudicator. See G de Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 Maastricht J. Eur. & Comp. L. 168.

of those rights.² Indeed, EU primary law lays down a set of rules that aims to prevent conflicting interpretations of fundamental rights by the CJEU and the ECtHR. The first historical one is rooted in Article 6(3) TEU: fundamental rights recognised by the ECHR constitute general principles of Union law.³ All the more crucial are the general provisions of the Charter that strive to clarify its relationship with the Convention. Pursuant to Article 52(3) of the EU Charter, the meaning and scope of the fundamental rights it enshrines ‘shall be the same’ as those corresponding to rights laid down by the Convention, ‘without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union’.⁴ Further rules useful for interpretation focus on the level of protection the Charter must provide. According to Article 53, the EU Charter cannot be interpreted ‘as restricting or adversely affecting human rights and fundamental freedoms’ recognized by the ECHR. Where it otherwise, the Member States would be required to implement lower standards to protect fundamental rights in violation of the Convention, to which all Member States are party. This does not prevent, however, Union law from providing more extensive protection.⁵

The above-mentioned provisions remain nonetheless controversial. To what extent shall and will the CJEU show deference to the rulings of the ECtHR? Will the case law of the Strasbourg Court substantially influence the interpretation given by the EU judges of the rights of suspects and accused persons in criminal proceedings? Considering that the ABC Directives are largely based on the jurisprudence of the ECtHR under Article 5 and 6 of the Convention,⁶ one would expect the CJEU to take it into careful consideration. However, the Luxembourg Court repeatedly emphasized in the last years the

² References to the case law of the ECtHR can be found in the very first preliminary ruling on interpretation of the ABC Directives. See Case C-216/14 *Covaci* EU:C:2015:686, para 39

³ Since the 1980’s, the CJEU acknowledged the ‘particular significance’ of the ECHR for interpreting fundamental rights within the EU legal order. See for instance Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* EU:C:1989:337, para 13.

⁴ Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 33.

⁵ Art. 52 (3) EU Charter.

⁶ The preambles of all ABC Directives make explicit reference to the ECHR and the Strasbourg case law. See for instance Recitals 5 and 14 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

autonomous content of the rights enshrined in the Charter,⁷ including the right to an effective remedy and fair trial of Article 47.⁸

This approach led the CJEU to take a particular strong stance vis-à-vis the undermining effect that the accession of the EU to the Convention could have had on mutual recognition of judicial decisions within the EU criminal justice area.⁹ More recently, the Court emphasized the autonomy of Union law while undertaking a ‘Charter-centered’ interpretation of the *ne bis in idem* principle.¹⁰ Indeed, the case law of the Luxembourg Court repeatedly stresses that the Convention ‘does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law’.¹¹ Thus, as the CJEU underlined in *Orsi and Baldetti*, questions on the interpretation of EU law must be examined ‘solely in the light of the fundamental rights guaranteed by the Charter’.¹² In *Menci*, Advocate General Campos Sánchez-Bordona takes a step further when arguing that ‘the case-law of the ECtHR should be disregarded where, in the case of rights laid down in the Charter which are similar in content to those laid down in the ECHR and the protocols thereto, the interpretation of the Court of Justice establishes a higher level of protection, provided that this is not detrimental to another right guaranteed by the Charter’.¹³ Although the preliminary ruling in *Menci* does not substantially depart from the judgment of the ECtHR in *A and B versus Norway*, it is significant to note that the CJEU interpreted the *ne bis in idem* principle exclusively by reference to Union law. Nonetheless, the autonomy did not prevent the Court from verifying in a second step

⁷ In particular, the CJEU has put special emphasis on the autonomy of Union law since the negotiations on the accession of the EU to the ECHR. See for instance, C Eekes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76 Mod L Rev 254, 258 ff.

⁸ Case C-69/10 *Samba Diouf*, Opinion of AG Cruz Villalón EU:C:2011:102, para 39.

⁹ Opinion 2/13 EU:C:2014:2454, para 192. Criticism against the opinion was expressed for instance by S Peers, ‘The EU’s Accession to the ECHR: The Dream Becomes a Nightmare’ (2015) 16 German Law Journal 213. *Contra* K Lenaerts, ‘La vie après l’avis: Exploring the Principle of Mutual (Yet not Blind) Trust’ (2017) 54 CMLRev 805.

¹⁰ Case C-524/15 *Menci* EU:C:2018:197, para 23.

¹¹ Case C-617/10 *Åkerberg Fransson* EU:C:2013:105, para 44.

¹² Case C-217/15 *Orsi and Baldetti* EU:C:2017:264, para 15.

¹³ Case C-524/15 *Menci*, Opinion of AG Campos Sánchez-Bordona EU:C:2017:667, point 75.

of its reasoning whether such autonomous interpretation does not conflict with the minimum level of protection guaranteed under the ECHR, as required by Article 53 of the Charter.¹⁴

A similar trend is even more accentuated in some recent judgments whereby the CJEU interpreted the right of defendants to access an independent and impartial court or the duty incumbent upon the Member States to provide suspects and accused persons with effective remedies against breaches of defence rights. Despite the numerous references to the ECtHR case law in the Opinion of Advocate General Tanchev,¹⁵ the preliminary ruling in *LM* omits any reference to the ‘flagrant denial of justice’ as interpreted by the Strasbourg Court, even though the concept was at the very heart of the question asked by the national referring court.¹⁶ Even more striking is the silence of the CJEU about the Charter and the related rights under the Convention when called upon to interpret the requirements that the presumption of innocence would entail for the judicial review of detention pending trial.¹⁷

This approach does not solely bring into play the consistency between the EU right to an effective remedy of Article 47 of the Charter with the corresponding safeguards in Article 6 and 13 of the Convention.¹⁸ It touches upon the whole set of guarantees of judicial review provided by the ECHR in criminal proceedings. Among these is the right to challenge the lawfulness of a deprivation of liberty under Article 5 of the Convention, which finds a corresponding provision in Article 6 of the EU Charter.¹⁹ How will the CJEU interpret for instance the right to access documents essential to challenge arrest and detention guaranteed by Article 7(1) Directive 2012/13/EU? Would the Luxembourg Court simply ignore the ECtHR case law related to defence rights at the appeal stage of criminal proceedings, given that the EU Charter does not guarantee the right to appeal against convictions and sentences enshrined in Article 2 Protocol 7 ECHR?²⁰ To answer those questions, it is first necessary

¹⁴ Case C-524/15 *Menci*, para 62.

¹⁵ Case C-216/PPU *LM*, Opinion of AG Tanchev EU:C:2018:517.

¹⁶ Case C-216/PPU *LM* EU:C:2018:586.

¹⁷ Case C-310/18 PPU *Milev* EU:C:2018:732.

¹⁸ Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 29 – 30.

¹⁹ *Ibid* 19 – 20.

²⁰ Case C-69/10 *Samba Diouf* EU:C:2011:524, para 69.

to map the different guarantees of judicial scrutiny and their relationship under the Convention.

2. Mapping guarantees of judicial review under the Convention

Although the ECHR and the Strasbourg case law do not acknowledge properly speaking a ‘right to judicial review’, judicial scrutiny is at the heart of different and overlapping fundamental rights that protect suspects and accused persons in criminal proceedings. In particular, judicial review is a core element of the right to liberty and security,²¹ the right to access an independent and impartial tribunal and fair trial,²² the right to an effective remedy²³ and the right to appeal against convictions or sentences.²⁴ In addition, although judicial control does not appear among the formal requirements laid down in Article 8 of the Convention, the ECtHR assigns an overriding importance to mechanisms of *ex-ante* judicial scrutiny aimed to prevent disproportionate encroachments on the right to privacy.²⁵

The analysis of the abundant case law highlights a set of common requirements that judicial remedies must fulfill in criminal proceedings: effective access to court; guarantees of independence and impartiality of the reviewing body; a scope of review that enables the competent authority to ascertain breaches and thereby secure the substance of rights enshrined in the Convention; the power to sanction those breaches and provide appropriate relief by means of legally-binding decisions; a decision rendered within adequate time; a reasoned decision that enables the defendant to understand the reasons for it and to lodge subsequent available remedies.²⁶ However, the requirements inherent to the structure and function of judicial review may vary depending on the fundamental right at issue, the specific

²¹ In particular Art. 5(3) and (4) ECHR.

²² Art. 6 ECHR.

²³ Art. 10 ECHR.

²⁴ Art. 2 Protocol 7 ECHR.

²⁵ N Hervieu, ‘Droits et garanties de la procédure pénale (Art. 3, 5, 8 et 13 CEDH) : Un spectaculaire resserrement de l’état européen sur les perquisitions et les privations de liberté’ (2013) Lettre ‘Actualités Droits-Libertés’ du CREDOF <<https://revdh.wordpress.com/2013/10/18/procedure-penale-etat-europeen-perquisitions>> accessed 22 November 2017.

²⁶ V Covolo, ‘Judicial Scrutiny in Criminal Proceedings: Related Rights under the ECHR’ (2018) forthcoming.

characteristics of the criminal proceeding in question and the peculiar circumstances of the case. The variable standards of judicial protection find an illustration in the relationship between the above-mentioned provisions under the Convention.

2.1. *Right to an effective remedy and access to court*

Article 5, 6 and 13 ECHR afford procedural safeguards, which form part of the backbone of the proper administration of criminal justice in democratic societies. Even though the underlying common objective is to combat the arbitrary exercise of States' coercive powers, the fundamental rights in question differ in their nature and scope. First, the right to an effective remedy under Article 13 ECHR has an ancillary character: the provision intends to guarantee effective mechanisms by which the applicant can claim a violation of a substantive right set forth in the Convention and the Protocols thereto.²⁷ Consequently, a breach of Article 13 presupposes an arguable claim that invokes a violation of a fundamental right stemming from the ECHR.²⁸ Similarly, the duty on the Contracting States to provide effective remedies is contingent upon the scope of the substantive right allegedly violated.²⁹ By contrast, Articles 5 and 6 of the Convention grant autonomous safeguards, which do not require the ECtHR to find prior infringements of other fundamental rights.

Second, Article 13 ECHR entails less stringent requirements in comparison with Article 5 (3) and (4) and Article 6. In particular, an effective remedy under the former does not necessarily imply judicial scrutiny, whilst the latter provisions explicitly refer to tribunals,³⁰ judges or officers authorized by law to exercise judicial power.³¹ Due to the different level of protection provided, Articles 5 and 6 must be regarded as '*lex specialis* in relation to Article 13 of the Convention'.³² Therefore, the established violation of Articles 5 and 6

²⁷ C Grabenwarter, *European Convention of Human Rights. Commentary* (Beck, Hart, Nomos, 2014) 328.

²⁸ W Schabas, *The European Convention of Human Rights. A Commentary* (Oxford University Press, 2015) 551.

²⁹ C Grabenwarter (n 19) 329.

³⁰ Art. 6 (1) ECHR.

³¹ Art. 5 (3) ECHR.

³² C Grabenwarter (n 19) 329 ff.

may make the accompanying complaint under Article 13 superfluous. In this regard, two situations should be distinguished. Where the safeguards enshrined in Articles 5 and 6 of the Convention overlap and absorb those of Article 13, there is no legal interest in re-examining the same subject matter under the less stringent requirements of the latter provision.³³ In such circumstances, the Court consistently held that it is not necessary to rule on the absence of effective remedies under Article 13 ECHR. However, a violation of reasonable time requirements under Article 6 does not necessarily prevent the ECtHR to examine separately the accompanying complaint made under Article 13.³⁴ Accordingly, the Court held in *Kudła versus Poland* that the provisions may relate to separate legal issues, given that ‘the issue to be determined before the Article 6 § 1 ‘tribunals’ was the criminal charges brought against the applicant, whereas the complaint that he wanted to have examined by a ‘national authority’ for the purposes of Article 13 was the separate one of the unreasonable length of the proceedings’.³⁵

The supporting arguments derive from both the spirit of the provision and legal practice. On the one hand, the Court explicitly underlined that nothing can be found ‘in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the “right to a court” embodied in Article 6 § 1. Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history’.³⁶ On the other hand, the ECtHR ruling stressed the constantly increasing number of legal actions claiming a failure to ensure a hearing within a reasonable time in breach of Article 6 (1) of the Convention.³⁷

2.2. Habeas corpus and right to a fair trial

Likewise, Article 5 and 6 of the Convention have different scopes of application. The former guarantees the right to have any detention or

³³ *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000) para 146.

³⁴ *Ibid* para 147.

³⁵ *Ibid*.

³⁶ *Ibid* para 151.

³⁷ *Ibid* para 148. Similarly, the Court accepted to examine separately the lack of effective domestic remedies within the meaning of Article 13 of the Convention in respect of non-enforcement or delayed enforcement of judgments against the Contracting States. See for instance *Burdov v Russia* (no 2) App no 33509/04 (ECtHR, 15 January 2009) para 98 ff; *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009) para 65 ff.

arrest order judicially reviewed as to its lawfulness in order to prevent individuals from being arbitrarily deprived of their liberty. On the other hand, the guarantees enshrined in Article 6 apply to any proceedings for the determination of the criminal charge within the autonomous meaning of the provision.³⁸ Yet, the procedural safeguards enshrined in Article 6 ECHR also apply in the pre-trial stage of criminal proceedings ‘as far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them’,³⁹ from the moment an individual is notified ‘by the competent authority of an allegation that he has committed a criminal offence’.⁴⁰ Nonetheless, proceedings that do not result in a criminal charge fall outside the scope of Article 6.⁴¹ For instance, judicial scrutiny of detention on remand does not result from the application of that provision, but is required under Article 5 of the Convention.⁴² Similarly, extradition proceedings⁴³ and proceedings for the execution of a European Arrest Warrant (EAW)⁴⁴ do not fall in principle within the scope of Article 6. However, the provision applies if transfer proceedings and criminal proceedings are exceptionally closely connected so that the former have to be regarded as an integral part of the latter.⁴⁵

Moreover, Articles 5 and 6 ECHR encompass similar requirements and procedural rights.⁴⁶ The former provision grants for instance the right of the arrested person to be brought promptly before ‘a judge or judicial officer’.⁴⁷ A literal interpretation of the provision suggests that the two authorities are not identical. By adopting this view, the ECtHR initially held in *Schiesser* that the ‘officer’ may also include

³⁸ *Engel and others v The Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72 (ECtHR, 8 June 1976).

³⁹ *Imbrioscia v Switzerland* App no 13972/88 (ECtHR, 24 November 1993) para 36; *Salduz v Turkey* [GC] App no 36391/02 (ECtHR, 27 November 2008) para 50; *Schatschaschwili v. Germany* [GC] App no 9154/10 (ECtHR, 15 December 2015) para 104.

⁴⁰ *Deweert v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 46.

⁴¹ C Grabenwarter (n 19) 112.

⁴² *Neumeister v Austria* App no 1936/63 (ECtHR, 27 June 1968) para 23.

⁴³ *Pañafiel Salgado v Spain* App no 65964/01 (ECtHR, 16 April 2002).

⁴⁴ *Monedero Angora v Spain* (dec) App no 41138/05 (ECtHR, 7 October 2008).

⁴⁵ *Smith v Germany* App no 27801/05 (ECtHR, 1 April 2010) para 41.

⁴⁶ In particular, the ECtHR held that ‘proceedings conducted under Art. 5 (4) should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial as guaranteed by Art. 6’. *Albrechtas v Lithuania* App no 1886/06 (ECtHR, 19 January 2016) para 73.

⁴⁷ Art. 5 (3) ECHR.

officials in public prosecutors' departments provided that they enjoy the 'necessary guarantees of independence'.⁴⁸ Over time, however, the case law increasingly emphasized the need to ensure that the 'officer' must provide the arrested person with guarantees similar to the ones which would be provided by a judicial authority within the meaning of Article 6 of the Convention. This led the Court to reverse the *Schiesser* ruling,⁴⁹ by excluding public prosecutors from the authorities entitled to hear promptly the arrested person within the meaning of Article 5(3) ECHR.⁵⁰ Indeed, the 'officer', like the judge, must be independent from the executive and the parties.⁵¹ According to consistent case law, 'this does not mean that the 'officer' may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence'.⁵² However, independence and impartiality may appear undermined if the officer in charge of reviewing the lawfulness of detention is entitled to intervene in the subsequent proceedings on behalf of the prosecuting authorities.⁵³

Despite the similarities, however, the exact substance of the procedural safeguards provided under Article 5 does not necessarily correspond to the one under Article 6 ECHR.⁵⁴ The cross-analysis of the case law under the two provisions raises some difficulties given that the assessment of procedural fairness shall be based on the specific circumstances of the case. Indeed, Article 5 requires procedures that have 'a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question'.⁵⁵ Similarly, the manner in which the fair trial guarantees referred to in Article 6 §3 apply to the preliminary stage of criminal proceedings 'depends on the special features of the proceedings involved and on the circumstances of the case'.⁵⁶

⁴⁸ *Ibid* para 33.

⁴⁹ S Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006) 508 ff.

⁵⁰ See for instance *Moulin v France*, App. no 37104/06 (ECtHR, 23 November 2010); *Nikolova v Bulgaria*, App. no 31195/96 (ECtHR, 25 March 1999) para 49.

⁵¹ *Nikolova v Bulgaria* App no 31195/96 (ECtHR, 25 March 1999) para 49.

⁵² *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) para 31.

⁵³ *Hood v United Kingdom* App no 27267/95 (ECtHR, 18 February 1999) para 57; *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) para 31.

⁵⁴ C Grabenwarter (n 19) 94.

⁵⁵ *Idalov v Russia* App n 5826/03 (ECtHR, 22 May 2012) para 161.

⁵⁶ *Murray v United Kingdom* App no 18731/91 (ECtHR, 8 February 1996) para 62.

2.3. *Right to appeal and fair trial guarantees*

Further guarantees of judicial review can be found in Article 2 Protocol No 7 to the Convention. The provision enshrines the right to appeal in criminal proceedings, which consists in the possibility for a person convicted of a criminal offence to have his conviction or sentence reviewed by a higher tribunal. The notions of ‘criminal offence’ and ‘tribunal’ correspond respectively to the autonomous concepts of ‘criminal charge’ and ‘tribunal’ within the meaning of Article 6 (1) of the Convention.⁵⁷ Despite their overlapping scope of application, the Court explicitly recalled that Article 2 Protocol 7, ‘has to be regarded as an addition to the Convention’.⁵⁸ In particular, Article 6 (1) ECHR guarantees the right of access to an independent and impartial tribunal, but it does not compel States to provide appeals in civil or criminal proceedings.⁵⁹ In a similar way, the CJEU stressed that Article 47 of the EU Charter ‘affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction’.⁶⁰

Yet, there is no provision under the Charter that guarantees a right to appeal against convictions and sentences corresponding to the one enshrined in Article 2 Protocol No 7 ECHR. Nonetheless, the Strasbourg Court consistently held that the full range of procedural safeguards enshrined in Article 6 of the Convention apply before appellate courts, irrespective of whether the Contracting Parties have ratified Protocol 7, which imposes the obligation to provide the defendant with the opportunity to appeal.⁶¹ Thus, the right to appeal in criminal proceedings under Protocol 7 does not prejudice nor limit the scope of fair trial guarantees enshrined in Article 6 of the Convention at the appeal stage of criminal proceedings.⁶² In the same way, guarantees inherent to a fair trial under Articles 47 and 48 of the Charter also apply in criminal proceedings before appellate courts and all the more so as the ABC Directives and the defence rights they harmonize apply from the initial stage of the proceedings until the

⁵⁷ C Grabenwarter (n 19) 429.

⁵⁸ *Ekbatani v Sweden* App no 10563/83 (1988) Series A no 134, para 26.

⁵⁹ *Delcourt v Belgium* App no 2689/65 (1970) Series A no 11, para 25.

⁶⁰ Case C-69/10 *Samba Diouf* EU:C:2011:524, para 69.

⁶¹ *Lalmahomed v The Netherlands* App no 26036/08 (ECtHR, 22 February 2011) para 38.

⁶² *Ibid.*

final determination of guilt or innocence, including the resolution of any appeal.⁶³

Hence, like the ECtHR, the CJEU could be called upon to rule, via the preliminary ruling procedure, upon the interpretation of defence rights at the appeal stage of criminal proceedings.⁶⁴ In this event, rulings whereby the ECtHR interprets the substance of defence rights at the appeal stage of criminal proceedings under Article 6 of the Convention are of relevance. In this regard, it is worth recalling that the manner in which the provision is to be applied in relation to appeal proceeding depends upon the special feature of the proceedings involved, with particular regard to the role of appellate courts, the function and scope of the judicial review they undertake.⁶⁵ For instance, the personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for a trial hearing. Leave-to-appeal proceedings and proceedings involving only questions of law comply with Article 6 of the Convention even if the defendant did not appear in person before the appeal court, provided that a public hearing was held at first instance.⁶⁶ Nonetheless, where the appellate court undertakes a full assessment of the issue of guilt or innocence, both as to facts and law, the defendant must be afforded with the right to appear in person and give evidence in person.⁶⁷

2.4. *Judicial review of investigative measures*

In addition to the above-analyzed provisions, the ECtHR examines the structure and functions of the judicial control undertaken by national

⁶³ See notably Art. 1 (2) Directive 2010/64/EU; Art. 2 (1) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1; Art. 2(1) Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 [2013] OJ L 294/1.

⁶⁴ See notably Case C-270/17 PPU *Tupikas* EU:C:2017:628, where the Court has referred to the ECHR case law on defence rights, in particular the attendance of the defendant, at appeal stage, in order to interpret a ground for refusing the execution of a EAW.

⁶⁵ *Ekbatani v Sweden* App no 10563/8326 (ECtHR, 26 May 1988) para 27.

⁶⁶ *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006).

⁶⁷ *Popovici v Moldova* App nos 289/04 and 41194/04 (ECtHR, 27 November 2007); *Tierce and others v San Marino* App no 69700/01 (ECtHR, 17 June 2003).

judiciary where coercive investigative measures interfere with other fundamental guarantees enshrined in the Convention. This is typically the case with regards to house searches and seizures, which encroach on the right to respect for private and family life, home and correspondence.⁶⁸ Judicial scrutiny itself is not part of the requirements that any interference with the right to privacy must meet under Article 8 (2) of the Convention. In particular, the case law expressly stresses that the provision does not require *ex-ante* judicial authorization for house searches.⁶⁹ It allows restrictions to the right to privacy, provided that they are implemented according to the law, pursue a legitimate aim and are necessary in a democratic society.

Nonetheless, the recent case law emphasizes the importance of judicial review to prevent arbitrary and disproportionate restrictions on the right to privacy.⁷⁰ In examining the quality of national rules governing house searches, the Court ascertains whether the relevant legislation and practice afford individuals ‘adequate and effective safeguards against abuse’.⁷¹ Among those safeguards, prior judicial review required by domestic criminal procedures is of major importance. In *Gutsanovi vs Bulgaria*, the Court found that in the absence of prior authorization by a judge and of retrospective review of a house search, the procedure had not been attended by sufficient safeguards to prevent the risk of an abuse of power by the criminal investigation authorities.⁷² The judgment adopts a similar reasoning with regard to the alleged violation of Article 3 of the Convention resulting from the manner in which the police operation at the applicant’s home was carried out;

[T]he lack of prior judicial review of the necessity and lawfulness of the search left the planning of the operation entirely at the discretion of the police and the criminal investigation bodies and did not enable the rights and legitimate interests of [the applicant] (...) to be taken into consideration. In the Court’s view, such prior judicial review, in the specific circumstances of the present case, would have enabled their legitimate interests to be weighed

⁶⁸ Art. 8 ECHR.

⁶⁹ *Funke v France* App no 10828/84 (ECtHR, 25 February 1993) para 50.

⁷⁰ *N Hervieu* (n 17).

⁷¹ *Camenzind v Switzerland* App no 21353/93 (ECtHR, 16 December 1997) para 45.

⁷² *Gutsanovi v Bulgaria* App no 34529/10 (ECtHR, 15 October 2013) para 220 ff.

against the public-interest objective of arresting persons suspected of committing a criminal offence.⁷³

In the absence of *ex-ante* judicial scrutiny, the Court verifies whether the lack of a judicial warrant ‘was, to a certain extent, counterbalanced by the availability of an *ex post factum* judicial review’.⁷⁴ The latter implies the possibility to make a complaint to a court, which has competence to review both the lawfulness of and justification for the search warrant.⁷⁵ It thus follows that judicial review is ‘one of the fundamental principles of a democratic society’ based on the rule of law that aims to protect the individual against arbitrary interferences by the law enforcement authorities with his rights and liberties.⁷⁶

3. Defence rights and judicial review

3.1. A two-way path

Among the fundamental guarantees enshrined in the Convention, the right to access a court and to a fair trial is the ultimate and most detailed expression of requirements that judicial scrutiny must fulfill in criminal proceedings. The prolific case law related to Article 6 ECHR perfectly illustrates the two-way path between defence rights and judicial review.

On the one hand, the rights of suspected and accused persons in criminal proceedings form a set of procedural preconditions that guarantee the fairness of judicial proceedings. An illustration thereof is the right of the accused to be informed about the charges against him. Indeed, the notification of the accusation to the defendant constitutes ‘an essential prerequisite for ensuring that the proceedings are fair’.⁷⁷ The Court consistently stressed that the right guaranteed

⁷³ Ibid para 133.

⁷⁴ *Smirnov v Russia* App no 71362/01 (ECtHR, 7 June 2007) para 45.

⁷⁵ Ibid; *Brazzi v Italie* App no 57278/11 (ECtHR, 27 September 2018) para 44. The Court further emphasized that a system of *ex post* judicial scrutiny shall be particularly efficient where the contested measure affects lawyers and journalists. See respectively, *Heino v Finland* App no 56720/09 (ECtHR, 15 February 2011); *Sanoma Uitgevers B.V. v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010).

⁷⁶ *Brogan and others v the United Kingdom* App nos 11209/84, 11234/84, 11266/84 and 11386/85 (1988) Series A no 145 para 58.

⁷⁷ *Dallos v Hungary*, App no 29082/95 (ECtHR, 1 March 2001) para 47.

under Article 6 paragraph 3 (a) aims to provide the defendant with sufficiently detailed information in order to fully understand the charges against him and prepare his defence. Hence, the right to information covers ‘not only of the “cause” of the accusation, that is to say, the acts he is alleged to have committed and on which the accusation is based, but also of the “nature” of the accusation, that is, the legal characterisation given to those acts’.⁷⁸

The ECtHR put the same emphasis on the actual and effective ability of the accused to defend himself in case of recharacterization of the facts in the course of the criminal proceedings. In this event, the accused must be duly and fully informed of any changes in the accusation.⁷⁹ Nonetheless, reclassification of the offence is sufficiently foreseeable if it concerns ‘an element intrinsic to the initial accusation’, so that the chances for the accused to defend himself in respect of the new element of the charges were not impaired.⁸⁰ Defects in the notification of the charge may however be counteracted if the accused has the possibility to advance his defence in respect of the reformulated charges and to contest his conviction in respect of all relevant points of facts and law before appeal courts.⁸¹

On the other hand, judicial scrutiny constitutes the appropriate mean to ensure the effectiveness of defence rights afforded by the Convention. A striking example is the case law related to the right to free assistance of an interpreter. In interpreting Article 6 paragraph 3 (e), the ECtHR has repeatedly emphasized the role and obligations incumbent on domestic courts. National courts are ‘the ultimate guardians of the fairness of the proceedings, encompassing, among other aspects, the possible absence of translation or interpretation for a non-national defendant’.⁸² Consequently, the competent judge ascertains in consultation with the defendant his need for interpretation services, which are aimed at preventing that the lack of interpretation prejudices the accused’s full involvement in a matter of crucial importance for him.⁸³ The assessment should consider the nature of the offence and any communications addressed to the

⁷⁸ *Penev v Bulgaria* App no 20494/04 (ECtHR, 7 January 2010) para 33 (emphasis added).

⁷⁹ *Mattoccia v Italy* App no 23969/94 (ECtHR, 25 July 2000) para 61.

⁸⁰ *Juha Nuutinen v Finland* App no 45830/99 (ECtHR, 24 April 2007) para 32.

⁸¹ *Zhupnik v Ukraine* App no 20792/05 (ECtHR, 9 December 2010) para 39 ff.

⁸² *Katritsch v France* App no 22575/08 (ECtHR, 4 November 2010) para 41.

⁸³ *Cuscani v United Kingdom* App no 32771/96 (ECtHR, 24 September 2002) para 38.

accused, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court.⁸⁴ In addition, domestic courts should ascertain whether the right to interpretation is practical and effective, which includes not only the appointment of an interpreter ‘but may also extend to a degree of subsequent control over the adequacy of the interpretation provided’.⁸⁵

3.2. *To counterbalance or not to counterbalance?*

The recent case-law related to the right of access to a lawyer further illustrates how the ECtHR develops requirements related to the scope and standards of judicial review that national criminal courts shall apply to ensure respect of defence rights enshrined in the Convention. In *Ibrahim versus United Kingdom*, the Court had the opportunity to further clarify the assessment that must be undertaken by the competent authorities of the Contracting States where they restrict the right of a person suspected of a terrorism offence to access a lawyer during police questioning. The Court noted firstly that the competent authority must ascertain on a case-by-case basis the existence of compelling reasons for delaying access to a lawyer, such as, for instance, the need to avert serious adverse consequences to life, liberty or physical integrity in a given case.⁸⁶ This stringent criterion is met only in exceptional circumstances, provided that the restriction is of a temporary nature and based on an individual assessment of the particular circumstances of the case.⁸⁷ Nonetheless, the absence of compelling reasons does not in itself entail a violation of Article 6 of the Convention. In this regards, the Court stressed that:

[A] holistic assessment of the entirety of the proceedings must be conducted to determine whether they were “fair” for the purposes of Article 6 § 1. As noted above, a similar approach is taken in Article 12 of EU Directive 2013/48/EU on, inter alia, the right of access to a lawyer, and a number of jurisdictions approach the question of admissibility of evidence by reference to its impact on the fairness or integrity of the proceedings.

⁸⁴ *Şaman v Turkey* App no 35292/05 (ECtHR, 7 July 2011) para 30.

⁸⁵ *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) para 70.

⁸⁶ *Ibrahim and Others v United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016).

⁸⁷ *Ibid* para 258.

Where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.⁸⁸

The above quotation calls for two remarks. Interesting to note is first the reference in the ruling to Directive 2048/13/EU, which lays down similar requirements governing temporary restrictions on the right to access a lawyer in the pre-trial stage of criminal proceedings. The reference thus confirms the relevance of the ECtHR case law for interpreting Article 3 (6) and Article 8 of the EU Directive.

Second, legal scholars have argued the ruling in *Ibrahim* gives greater importance to the ‘overall fairness test’ compared to the stringent approach previously adopted by the Court in *Salduz*.⁸⁹ In the latter case, the ECtHR held that the right of defence is ‘in principle irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for conviction’.⁹⁰ In *Ibrahim*, however, the Court seems to consider that violations of Article 6 may arise only when incriminating statements made by the suspect in the absence of legal assistance formed an ‘integral and significant part of the probative evidence upon which the conviction was based’.⁹¹ This approach confirms what Caianiello defines a ‘new-old-fashioned trend’, whereby the Court pays increasing attention to specific counterbalancing measures that cure breaches of defence rights in individualized cases.⁹²

Yet, references to the ‘overall fairness assessment’ can be found in several provisions of the ABC Directives. A telling example is precisely the assessment of statements made in breach of the right to access a

⁸⁸ *Ibid* para 264 -265.

⁸⁹ M Caianiello, ‘You Can’t Always Counterbalance What You Want’ (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 283, 293.

⁹⁰ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) para 55.

⁹¹ *Ibrahim and Others v United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016), para 309.

⁹² M Caianiello (n 86).

lawyer.⁹³ Given that the EU Directives do not set forth specific sanctions against breaches of defence rights, nor do they intend to harmonize national rules governing the use of evidence, the Strasbourg case law would provide national criminal courts with minimum standards of protection to be applied.⁹⁴ But will the CJEU adopt a similar approach when called upon to interpret Article 12 Directive 2013/48/EU?

To answer this question, one should take into consideration a fundamental difference between the CJEU and ECtHR. Questions for preliminary rulings enable the CJEU to interpret the rights of suspects and accused persons at an early stage of the criminal proceedings. By contrast, the Strasbourg Court intervenes after all domestic remedies have been exhausted and thus can itself ascertain whether breaches of defence rights did hamper the overall fairness of the criminal proceedings.⁹⁵ Conversely, preliminary rulings of the CJEU are only intended to provide national courts with guidance on how to interpret and implement Union law and this in the course of the proceedings. Given that structural difference in the judicial review carried out by the two Courts, it is hardly conceivable that the CJEU will develop a thorough interpretation of the ‘overall fairness’ test provided under the ABC Directives, in particular where it delivers a preliminary ruling at an initial stage of the proceeding. Let us image a national Court called upon to review the admissibility of statements gathered in breach of the right to access a lawyer before referring the case for trial or to exclude that evidence at the first instance trial stage. What guidance would the CJEU provide to the referring judge on how

⁹³ Art. 12 (2) Directive 2013/48/EU.

⁹⁴ A Soo, ‘Article 12 of the Directive 2013/48/EU: A starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to a Counsel’ (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 31.

⁹⁵ The Protocol enables the highest courts and tribunals of the Contracting States to request the ECtHR to deliver non legally-binding opinions ‘on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto’. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 214. This would enable the ECtHR interact with national courts in the course of the proceedings, through a mechanism that recalls the preliminary ruling procedure under Article 267 TFEU. For a detailed analysis, G Janneke, ‘Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal’ (2014) 21 *Maastricht J. Eur. & Comp. L.* 630.

should the latter interpret Article 12 Directive 2013/48/EU if compliance with the provision still relies on procedural sanctions that another national court can apply at a subsequent stage of the criminal proceedings? In the absence of in-depth interpretation by the EU judicature, wouldn't the 'overall fairness' criterion become a mere 'cup-out' that enables the referring court to refrain from sanctioning breaches of EU defence rights? Could the national court simply reject a request by the defence lawyer to submit a question to preliminary ruling to the CJEU on the ground that even if national law is not consistent with the EU Directives the resulting breach of defence rights does not affect the overall fairness of the proceedings?

4. Implementing ECHR guarantees in the field of Union law

The last question may arise when considering the recent rulings whereby the ECtHR acknowledges the duty of national courts to state reasons for refusing to refer a question for preliminary ruling to the CJEU.⁹⁶ One may argue that the cases referred to have a limited impact on the Member States judicial practice, above all because they only deal with domestic courts of last instance. Nonetheless, the ECtHR's rulings in *Dahbi*,⁹⁷ *Schipani*⁹⁸ and *Avotiņš*⁹⁹ are striking examples of another way Union law may interact with the Convention: what if a Member State breaches a fundamental right guaranteed under the ECHR when it is implementing Union law?

In this respect, the ECtHR consistently held that the transfer of competences to international organisations such as the EU does not affect the obligations incumbent upon the Member States under the Convention.¹⁰⁰ Such transfer of powers is therefore 'not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'.¹⁰¹ In *Bosphorus*, the Court formulated such requirement as a rebuttable presumption *vis-à-vis* the EU: 'if such equivalent protection is

⁹⁶ *Dahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014); *Schipani v Italy* App no 38369/09 (ECtHR, 21 July 2015).

⁹⁷ *Ibid.*

⁹⁸ *Schipani v Italy* App no 38369/09 (ECtHR, 21 July 2015).

⁹⁹ *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

¹⁰⁰ *Matthews v UK* App no 24833/94 (ECHR, 6 February 1999) para 32.

¹⁰¹ *M & Co v Federal Republic of Germany* App no 13258/87 (EComHR, 9 January 1990).

considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation'.¹⁰²

The approach taken by the ECtHR does not however rule out possible infringements of the Convention by the Member States when they are implementing Union law. This holds true in criminal matters and all the more so considering the increasing number of legal instruments that the EU has adopted over the last years in this field. The implementation into national law of the ABC Directives draws attention on two particular lines of case law: the right to access a court in the procedure for preliminary rulings in Article 267 TFEU on the one hand and, on the other, respect for the right to fair trial and habeas corpus in proceedings for the execution of a European Arrest Warrant (EAW).

4.1. Preliminary rulings and duty to state reasons

The ABC Directives are likely to tremendously increase the number of preliminary rulings that national criminal courts may refer to the CJEU. Preliminary rulings of interpretation thus promote the effective enforcement of EU defence rights in national criminal proceedings. A person suspected or accused of a criminal offence might claim a violation of the defence rights he enjoys by virtue of the EU Directives. The defence counsel may thus have the possibility to request the competent national tribunal to refer a question for interpretation to the Court of Justice. Yet, the proceedings under Article 267 TFEU does not constitute a judicial action that individuals can institute, but an interlocutory judicial procedure which can only be initiated upon decision by a national tribunal.¹⁰³ This does not imply however, that domestic – including criminal – courts can arbitrarily refuse to refer questions for preliminary rulings.

Several complaints brought in the last years have alleged a violation of Article 6 (1) ECHR resulting from a breach of Article 267 TFEU. The provision precisely requires national courts against whose decision there

¹⁰² *Bosphorus v Ireland* App no 45036/98 (ECHR, 30 June 2005) para 155.

¹⁰³ For a critical analysis of the preliminary ruling procedure in this respect see A Nieto Martin, 'Architectures judiciaires du droit pénal européen', in G Giudicelli-Delage, S Manacorda (eds), *Cour de Justice et Justice pénale en Europe* (Paris, Société de Législation comparée, 2010) 271 ff.

is no judicial remedy under national law to bring the matter before the CJEU if a question of validity or interpretation of EU acts is necessary to enable national tribunals to give judgment.¹⁰⁴ However, the obligation to submit a reference for a preliminary ruling can be set aside where the question in issue has already been interpreted by the CJEU (*acte éclairé*)¹⁰⁵ or leave no scope for any reasonable doubt (*acte clair*).¹⁰⁶

In *Ullens de Schooten and Rezabeck vs Belgium*, the ECtHR recalled first that it is primarily for the national courts to interpret and apply domestic law, if necessary in conformity with the engagements undertaken by the Contracting States.¹⁰⁷ Thus, the Strasbourg Court does not examine any errors that might have been committed by national judicial authorities in applying Union law.¹⁰⁸ Nonetheless, the refusal by domestic courts to grant a request for preliminary ruling might, in certain circumstances, infringe the right to a fair trial enshrined in Article 6 of the Convention¹⁰⁹. This would be the case where a domestic court of last instance fails to ‘give reasons for their refusal in the light of the exceptions provided for in the case-law of the Court of Justice’ in order to prevent any arbitrariness.¹¹⁰ In *Dhahbi versus Italy*, the Court found for the first time that a decision refusing to refer a question for preliminary ruling from the CJEU violated Article 6 §1 of the Convention, given that the impugned judgment contained no reference to the applicant’s request for a preliminary ruling nor to the reasons why the question raised did not warrant referral to the CJEU.¹¹¹ The same arguments led the Court to find a breach of the right to fair trial in *Schipani versus Italy*.¹¹²

In *Avotiņš*, the ECtHR takes a step further. For the first time, the Court was called upon to ‘examine observance of the guarantees of a fair hearing in the context of mutual recognition based on European Union law’.¹¹³ More precisely, the applicant claimed that a Latvian Court recognized and enforced a foreign judgment on the basis of

¹⁰⁴ Art. 267 §3 TFEU.

¹⁰⁵ Joined Cases 28, 29 and 30/62 *Da Costa* EU:C:1963:6.

¹⁰⁶ Case 283/81 *Cilfit* EU:C:1982:335.

¹⁰⁷ *Ullens de Schooten and Rezabek v Belgium* App nos 3989/07 and 38353/07 (ECtHR, 20 September 2011) para 54.

¹⁰⁸ *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) para 31.

¹⁰⁹ *Ullens de Schooten and Rezabek v Belgium* App nos 3989/07 and 38353/07 (ECtHR, 20 September 2011) para 59.

¹¹⁰ *Ibid* para 62.

¹¹¹ *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) paras 31 – 33.

¹¹² *Schipani v Italy* App no 38369/09 (ECtHR, 21 July 2015) para 69 – 72.

¹¹³ *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016) para 98.

Brussels I Regulation, although that judgment was rendered against him in violation of the right to be heard. The Court first recalled that ‘a decision to enforce a foreign judgment cannot be regarded as compatible with the requirements of Article 6 (1) of the Convention if it was taken without the unsuccessful party having been afforded any opportunity of effectively asserting a complaint as to the unfairness of the proceedings leading to that judgment, either in the State of origin or in the State addressed’.¹¹⁴ This holds true even when the impugned decision is recognized and enforced by a Contracting State when applying Union law.¹¹⁵ Nonetheless, being ‘mindful of the importance of compliance with the rule laid down in Article 52(3) of the Charter’¹¹⁶ as well as ‘of the mutual recognition mechanisms for the construction of the area of freedom, security and justice’,¹¹⁷ the ECtHR applied once again the so-called Bosphorus presumption.

In is in this respect that the ruling in *Avotiņš* marks a new step in the relationship between the CJEU and the ECtHR.¹¹⁸ The latter held that the presumption of equivalent protection sketched out in *Bosphorus* applies when two conditions are fulfilled: ‘the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law’.¹¹⁹ Although such considerations did not lead the Court to exclude the applicability of the Bosphorus presumption in *Avotiņš*, the ruling explicitly states that the failure by the national court hearing the case to ‘request a preliminary ruling from the CJEU is apt to preclude the application of the presumption of equivalent protection’ afforded by Union law.¹²⁰ Thereby, the ECtHR looks at the review undertaken by the CJEU as a guarantee for the effective and equivalent protection of fundamental rights within the EU, but it stills attentively examines on a case-by-case basis whether that presumed protection is manifestly deficient in the light of the Convention.

¹¹⁴ Ibid para 98.

¹¹⁵ Ibid para 101.

¹¹⁶ Ibid para 103

¹¹⁷ Ibid para 113.

¹¹⁸ L R Glas, J Krommendijk, ‘From Opinion 2/13 to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts’ (2017) 17 Human Rights Law Review, 567.

¹¹⁹ *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016) para 105.

¹²⁰ Ibid para 111.

4.2. Habeas corpus and fair trial rights in the execution of a EAW

Even though the ruling in *Avotiņš* deals with mutual recognition of judicial decision in civil matters, the reasoning of the ECtHR may apply *mutati mutandis* to criminal proceedings. Indeed, guarantees of judicial scrutiny enshrined in the Convention also raise questions as to their implementation where a Member State is requested to recognize and execute a EAW issued by a foreign judicial authority. An illustration thereof is the ruling in *Chylinski v The Netherlands*, which bears on the right to actively seek review of detention on remand within the EU system of judicial remedies.¹²¹ The judicial authorities of the executing Member State ordered and subsequently prolonged the applicant's detention on remand pending surrender. The detained persons claimed in front of the national Courts having jurisdiction to review the lawfulness of detention that the period of deprivation of liberty exceeded the time-limits for surrender set forth in the Framework Decision 2002/584/JAI. Therefore, they requested the national judge to refer a question for preliminary ruling to the CJEU, a request that the national court rejected. The complaint subsequently filed with the ECtHR raises the question of whether the refusal by the national judge to refer the case to the Court of justice amounts to a violation of Article 5 §4 ECHR.¹²²

Although the Strasbourg Court found the complaint manifestly ill-founded, the decision confirmed that the right to seek review of detention pending trial applies to proceedings for the execution of a EAW.¹²³ Noteworthy is the reference to the ruling in *Dhahbi*, which outlines the conditions under which the refusal to submit a preliminary ruling to the EU judge is consistent with the right of access to a court within the meaning of Article 6 (1) of the Convention.¹²⁴ It would therefore appear that the right to judicial review guaranteed by Article 5(4) must be interpreted in the light of the ruling in *Dhahbi*, which imposes a duty on the national Courts of last instance to give reasons for refusals to address question for preliminary rulings under Article 267 TFEU.¹²⁵ Accordingly, the Court pointed out in *Chylinski* that the

¹²¹ *Chylinski and others v The Netherlands* App nos 38044/12, 40958/12 and 50642/12 (ECtHR, 21 April 2015) para 42.

¹²² *Ibid.*

¹²³ *Ibid* para 49.

¹²⁴ *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014) para 31.

¹²⁵ *Chylinski and others v The Netherlands* App nos 38044/12, 40958/12 and 50642/12 (ECtHR, 21 April 2015) para 43 ff.

executing judicial authorities explained that ‘it was not necessary to seek a preliminary ruling from the CJEU in order to determine the lawfulness of the brief additional period of detention while awaiting the envisaged surrender of the applicants to the respective issuing States, there being adequate provision for such delays in domestic law’.¹²⁶ The ECtHR further noted that even if the national judge would have referred the case to the CJEU, the latter could not have delivered a ruling in time, nor could it have provided guidance to the national judge in deciding on the lawfulness of the applicants’ continued detention.¹²⁷

Few cases also raised questions on respect by the Member States of Article 6 of the Convention when implementing the Framework-Decision on the EAW. As mentioned above, extradition procedures as well as procedures for the execution of a EWA are not themselves subject to the requirements under Article 6 of the Convention, given that such proceedings do not concern the determination of a criminal charge.¹²⁸ However, the authority executing a request for extradition may exceptionally be held liable for violating the right to a fair trial where the individual ‘has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’.¹²⁹ In other words, the ECtHR verifies whether the alleged breach of Article 6 of the Convention ‘is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article’.¹³⁰ In doing so, the Strasbourg Court takes into consideration the foreseeable consequences of surrendering the applicant to the requesting State with regard to both the general circumstances in the latter country and the defendant’s personal situation. Examples of flagrant denial of justice include the use of incriminating statements obtained in breach of Article 3 of the Convention,¹³¹ conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge,¹³² a trial which was summary in nature and conducted with a total disregard for the rights of the defence,¹³³ and

¹²⁶ Ibid para 47.

¹²⁷ Ibid para 48.

¹²⁸ *Monedero Angora v Spain* App no 41138/05 (ECtHR Decision, 7 October 2008).

¹²⁹ *Soering v United Kingdom* App no 14038/88 (ECtHR, 07 July 1989) para 113.

¹³⁰ *Ahorugeze v Sweden* App no 37075/09 (ECtHR, 27 October 2011) para 115.

¹³¹ *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012) para 267.

¹³² *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006) para 84.

¹³³ *Bader and Kanbor v Sweden* App no 13284/04 (ECtHR, 8 November 2005) para 47.

a deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.¹³⁴

In a similar way the Member State executing a EAW might exceptionally be held liable according to the ‘flagrant denial of justice’ doctrine. In *Stapleton versus Ireland*, the Court underlined, however, that the executing judicial authority should not ‘go beyond the examination of a flagrant denial and determine whether there has been established a real risk of unfairness in the criminal proceedings in the issuing State’.¹³⁵ This is all the more true where the applicant’s complaints in relation to the alleged unfairness entail the examination of legal and factual issues, which would be more appropriately reviewed by the courts of the requesting State.¹³⁶

The ECtHR adopts a similar approach toward the review to be carried out by the State requested to execute a EAW that would expose the surrender person to inhuman and degrading treatment. In *Ignoua versus United Kingdom*, the Court confirmed that at the time of deciding whether to surrender the person, the executing authority shall take into careful consideration all relevant facts and evidence for the purpose of establishing a real risk of violation of Article 3 of the Convention.¹³⁷ In undertaking such an assessment, the requested State can rightfully accord some weight ‘to mutual trust and confidence underpinning measures of police and judicial cooperation among EU Member States’.¹³⁸ Thus, consideration must also be paid to guarantees and assurance given by the issuing State that, after surrender, the person will not be extradited onward to another country where he faces a real risk of inhuman and degrading treatment. It is therefore for the applicant to provide the ECtHR with reliable evidence rebutting the ‘Court’s own general assumption that the Contracting States of the Council of Europe will respect their international law obligation’.¹³⁹

¹³⁴ *Al-Moayad v Germany* App no 35865/03 (ECtHR, 20 February 2007) para 101.

¹³⁵ *Stapleton v Ireland* App no 56588/07 (ECtHR, 4 May 2010) para 27.

¹³⁶ *Ibid* para 29.

¹³⁷ *Habib Ignoua and Others v the United Kingdom* App no 46706/08 (ECtHR, 18 March 2014).

¹³⁸ *Ibid* para 55.

¹³⁹ *Ibid*.

5. Conclusions

Over the last years, the need for a consistent protection of fundamental rights at the European supranational level has given rise to tangible tensions in the relationship between the CJEU and ECtHR. This has led to a delicate judicial dialogue, whereby both Courts strive to avoid conflicting rulings, but firmly reiterate either the autonomy of Union law or the paramount duty for the Member States to respect the Convention. This balancing exercise involves in fact two separate although interrelated aspects.

From a substantive point of view, the ECHR provides for minimum standards of protection that must be respected and at least equally afforded by the corresponding provisions of the EU Charter.¹⁴⁰ Thus, the case law of the Strasbourg Court influences and will *volens nolens* have an impact on the interpretation of fundamental rights by the CJEU. Despite the increasing ‘Charter-centrism’ in the latter’s case law,¹⁴¹ neither the autonomy of Union law nor the fundamental importance of mutual trust prevented the Luxembourg Court from acknowledging limits – although exceptional – to the constitutional principle of mutual recognition,¹⁴² limits that clearly recall the rulings of the ECtHR.¹⁴³ On the other hand, even when scholars posit a ‘partial departure from the key principle of mutual trust’ in *Avotiņš*,¹⁴⁴ the ECtHR repeatedly underlines in the same ruling the special attention it attaches to the importance of both the equivalent protection of fundamental rights under the Charter¹⁴⁵ and mutual trust among the Member States for the EU integration process.¹⁴⁶

The quest for consistency should not however lead the CJEU and the ECtHR to impinge on each other’s jurisdiction. In *Kamberaj*, the EU judges stressed for instance that ‘the reference made by Article

¹⁴⁰ Art. 52 (3) and 53 Charter.

¹⁴¹ L R Glas, J Krommendijk (n 112) 573 ff.

¹⁴² For a detailed analysis see K Lenaerts (n 9).

¹⁴³ A striking example is the case law related to mutual recognition of judicial decisions that result in the violation of Article 4 of the Charter and Article 3 ECHR. See in particular Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198, which reflects the reasoning of the ECtHR in *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

¹⁴⁴ G Biagioni, ‘*Avotiņš v. Latvia*. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights’ (2016) 2 European Papers 579, 595.

¹⁴⁵ *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016) para 103.

¹⁴⁶ *Ibid* para 113.

6(3) TEU to the ECHR does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that convention directly, disapplying the provision of national law incompatible with the Convention'.¹⁴⁷ For its part, the ECtHR recalled that its role is confined to ascertaining whether the effects of decisions taken by national authorities, even when implementing Union law, are compatible with the Convention.¹⁴⁸

This second aspect casts light on the fundamental role the interlocutory procedure under Article 267 TFEU plays in the Europe-wide protection of fundamental rights. Decisions whereby a national court refers a question for preliminary ruling to the CJEU enable the latter to interpret Union law in the course of the proceedings and, thereby, give the EU judge the opportunity to prevent potential conflicts with the ECHR. By contrast, in case of unjustified refusals or failures by national courts to bring questions on the interpretation of EU law to the CJEU, the ECtHR may be called upon to review respect of fundamental rights by the Member States when implementing Union law even before the CJEU has been given the opportunity to rule on the matter.¹⁴⁹

In this perspective, one may wonder whether the entry into force of Protocol No. 16 to the ECHR¹⁵⁰ will indirectly impact the relationship between the European courts. Indeed, the highest tribunals of the Contracting States may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention.¹⁵¹ Compared to the preliminary ruling procedure of Article 267 TFEU, however, the advisory opinion of the ECtHR differs in two important aspects. First, it is not binding,¹⁵² unlike the judgments delivered by the CJEU. Second, only highest courts have the possibility to request the

¹⁴⁷ Case C-571/10 *Kamberaj* EU:C:2012:233, para 63

¹⁴⁸ *Ullens de Schooten and Rezabek v Belgium* App nos 3989/07 and 38353/07 (ECtHR, 20 September 2011) para 54.

¹⁴⁹ This aspect has been subject of discussion during the negotiations of the accession of the EU to the ECHR. The question arose on how the 'exhaustion of domestic remedies' under Article 35 of the Convention must take into account the questions for preliminary rulings that a national court could refer to the CJEU. See V Covolo, 'Et la judiciarisation de l'espace pénal de l'Union fut ... mais où se cache le juge pénal européen?' (2011) 47 *Cahiers de Droit européen* 103, 143.

¹⁵⁰ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.214, entered into force on 01.08.2018.

¹⁵¹ Art. 1 (1) Protocol No. 16 ECHR.

¹⁵² Art. 5 Protocol No. 16 ECHR.

advisory opinion under Protocol 16 to the Convention,¹⁵³ whilst any national tribunal may – and must in the case of courts of last instance - refer a question for preliminary ruling to the EU judges.¹⁵⁴ Irrespective of the practical implementation of Protocol 16, its entry into force further underlines the forefront role that national and most particularly supreme courts play in detecting potential violations of the ECHR that a wrong application of Union law is likely to entail. Let us hope that the need for a consistent protection of fundamental rights in Europe will push toward constructive judicial interactions and not a dialogue of the deaf.

¹⁵³ Art. 1 (1) Protocol No. 16 ECHR.

¹⁵⁴ Art. 267 para 3 and 4 TFEU.

CHAPTER IV

JUDICIAL REVIEW FOR THE PROTECTION OF DEFENCE RIGHTS IN INTERNATIONAL CRIMINAL JUSTICE: THE ICC AS A CASE STUDY

Anna Mosna

TABLE OF CONTENTS: 1. Introductory remarks. – 2. The right to appeal in front of the ICC. – 2.1. Judicial review of final decisions. – 2.1.1. Procedural error. – 2.1.2. Error of law. – 2.1.3. Any other ground that affects the fairness or reliability of the proceedings or the decision. – 2.1.4. Procedural aspects relating to appeals against final decisions. – 2.2. Judicial review of interim decisions. – 2.2.1. Interlocutory appeal, as of right, of a decision with respect to jurisdiction or admissibility. – 2.2.2. Interlocutory appeal, as of right, of a decision granting or denying release. – 2.2.3. Interlocutory appeal, with leave of the court, pursuant to Article 82(1)(d) ICCSt. – 2.2.4. Procedural aspects of interlocutory appeals. – 3. Concluding remarks.

1. Introductory remarks

The right to judicial review in criminal proceedings, in its different manifestations, aims at ensuring trial fairness and guaranteeing defence rights. It is not only instrumental to safeguard the effectiveness of defence rights, but, according to Article 14 (5) of the International Covenant on Civil and Political Rights¹ (ICCPR) and Article 2 of Protocol 7² of the European Convention on Human Rights³ (ECHR), it is also expressly considered a fundamental right in its manifestation as the right to appeal a conviction.

The right to judicial review in criminal proceedings is also crucial

¹ Adopted by the General Assembly of the United Nations on 19 December 1966.

² Adopted in Strasbourg on 22 November 1984.

³ Signed on 4 November 1950 in Rome, entered into force on 3 September 1953.

with regard to international criminal justice. International criminal justice can be defined as the system held up by international justice organs which were established to address the most serious crimes of international concern, such as the commission of war crimes, crimes against humanity and genocide.⁴

International criminal justice evolved together with the development of the scope and nature of international criminal tribunals and courts. The first evolution to be mentioned is the development of international judicial institutions from having an *ad hoc* nature (International Military Tribunals of Nuremberg⁵ and Tokyo,⁶ International Criminal Tribunal for the former Yugoslavia⁷ (ICTY), International Criminal Tribunal for Rwanda⁸ (ICTR)) to institutions having a permanent nature, like the International Criminal Court⁹ (ICC).

Further, while the first *ad hoc* tribunals were so-called 'victor's courts', established by the victors of WW-II (Nuremberg and Tokyo), the *ad hoc* tribunals instituted at the end of the 20th century can now be defined as impartial courts, established by the Security Council of

⁴ As far as the ICC is concerned, according to Article 5 ICCSt, also the crime of aggression is included in the jurisdiction of the Court.

⁵ International Military Tribunal for the trial and punishment of the major war criminals of the European Axis, established by the London Agreement, which entered into force together with the Charter of the International Military Tribunal, 82 U.N.T.S. 280 on 8 August 1945.

⁶ International Military Tribunal for the Far East, established by an executive decree of the Supreme Commander for the Allied Powers in Japan, American General Douglas MacArthur of 19 January 1946. The same day, also the Charter of the International Military Tribunal for the Far East was approved. It was amended on 26 April 1946.

⁷ International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991, established 25 May 1993 by resolution Sc/RES/827 of the Security Council, acting under Chapter VII of the Charter of the United Nations.

⁸ International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed on the Territory of Neighbouring States, between 1 January and 31 December 1994, established on 8 November 1994 by resolution Sc/RES/955 of the Security Council, acting under Chapter VII of the Charter of the United Nations.

⁹ Established by a majority of the Member States of the United Nations during the Rome 'UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court', from 15 June to 17 July 1998.

the United Nations (ICTY and ICTR). The ICC can be seen as another progression, since it is an impartial court, the result of a treaty¹⁰ ratified by State parties.¹¹

Representing the most recent development of a branch of law still ‘under construction’,¹² the ICC is an ideal subject of study with regard to the protection of the right to judicial review and other defence rights in international criminal justice. Like other international criminal justice organs, the ICC presents specific features that influence its concept of a fair trial and of the rights this principle entails. The ICC distinguishes itself from national criminal courts in so far as the system in which it operates is a criminal law system, but with humanitarian law as its subject matter. The interplay between the field of international criminal law and international humanitarian law involves the difficulty of reconciling the main concerns of the respective branches of international law. The first field focuses mainly on the rights of the accused and thus on the fair trial principle. The latter, on the contrary, has its focal point in the protection of victims, and more precisely on victims as a group.¹³ The main concern is therefore the efficiency of the international criminal justice system, so that violations of humanitarian law are brought to justice. The contrast between the hierarchy of values established respectively in criminal and humanitarian law is reflected in the dilemma of fairness and efficiency of justice.¹⁴ This is a dilemma that international criminal courts and tribunals have to face frequently because of the complexity

¹⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

¹¹ R Haveman, ‘Introduction: A System Sui Generis’ in R Haveman, O Kavran, J Nicholls, *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003) 3.

¹² ICTY, *Prosecutor v Blaškić*, Case N° IT-95-14-PT, Trial Chamber, Decision on the Objection of the Republic of Croatia to the issuance of *Subpoenae Duces Tecum*, 18 July 1997, paras 60-61: ‘the terms used therein carry their own specific meaning, suited for an international judicial institution with criminal jurisdiction [...] [t]erminology utilized which originates in one or another domestic legal system does not convey its full meaning in the International Tribunal’s context’; see also R Haveman (n 11) 5; Id, ‘The Context of the Law’ in R Haveman, O Kavran, J Nicholls, *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003) 22.

¹³ M Sassoli, ‘Humanitarian Law and International Criminal Law’ in A Cassese, *International Criminal Justice* (Oxford University Press, 2009) 119; R Haveman, ‘The Context of the Law’ (n 12) 32.

¹⁴ C Safferling, *International Criminal Procedure* (Oxford University Press, 2012) 63, according to whom requiring from a justice system to be both fair and efficient is not necessarily a contradiction. To this end, ‘efficiency’ of criminal

of their cases. Full protection of due process principles is costly and time-consuming and it often requires compromises relating to the efficiency of the procedure.¹⁵ Conversely, the practice of the international criminal courts demonstrates that in balancing the importance of ‘smooth prosecutions’ and applying fair trial principles, the tendency is to prefer the former.¹⁶

Furthermore, international criminal justice is the result of a particular combination of civil law and common law tradition, i.e. of accusatorial (adversarial) and inquisitorial elements.¹⁷ The cohabitation of elements from different systems and philosophies raises problems in relation to the different understanding of “fairness”. Although every system is, in principle, consistent and fair in itself, this consistency might be lost when single elements from different systems are melded into a new legal order.¹⁸ A new and unique international procedural order¹⁹ has to find a new balance and core concepts such as that of a fair trial need to be reassessed in this specific context. The hybrid nature of international criminal law and its justice system does not allow any simple referral to national systems when it comes to interpretation of its rules and principles.²⁰

The ICC presents an increased consciousness about the importance of affirming and protecting fundamental rights, and hence also the right to a fair trial: Article 21 (3) ICCSt expressly provides that the interpretation of law must be consistent with ‘internationally

justice is not to be equalled to the concept of a quick and easy trial. Rather, efficiency is to be understood as the ability to solve the conflict in a sustainable way.

¹⁵ C Buisman, ‘Defence and Fair Trial’, in R Haveman, O Kavran, J Nicholls, *Supranational Criminal Law: a System Sui Generis* (Intersentia, 2003) 182.

¹⁶ Ibid 234.

¹⁷ G P Fletcher, ‘The Influence of the Common Law and Civil Law Traditions on International Criminal Law’, in A Cassese, *International Criminal Justice* (Oxford University Press, 2009) 104-107, who concludes by asserting ‘the general part of the Rome Statute reveals a greater debt to common law modes of thinking and drafting, but there is room within the Statute for incorporating civilian doctrines and achieving a greater balance between the two systems’; K Ambos, ‘International criminal procedure; “adversarial”, “inquisitorial” or mixed?’ (2003) 3 *International Criminal Law Review* 5; along these lines see also ICTY, *Prosecutor v Blaškić*, Case N° IT-95-14-PT, Trial Chamber, Decision on the Objection of the Republic of Croatia to the issuance of *Subpoenae Duces Tecum*, 18 July 1997, para 60.

¹⁸ R Haveman, ‘The Context of the Law’ (n 12) 36; C Deprez, ‘Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors’ (2012) *International Criminal Law Review* 725.

¹⁹ C Safferling (n 14) 58.

²⁰ ICTY, *Prosecutor v Erdemović*, Case N° IT-96-22-A, Appeals Chamber, Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para 2.

recognized human rights'. More generally, according to Article 21 ICCSt, the ICC is required to aspire to the highest standards set by international human rights treaties, customary international law and general principles of law.²¹ The Rome Statute contains an exhaustive set of rights for both the suspect and the accused, codifying fundamental rights laid down in international human rights conventions, such as the ICCPR and the ECHR, mostly in the broader interpretation conferred on them by the case law of the European Court of Human Rights (ECtHR). However, this 'internal' safeguard of consistency with human rights is not accompanied by a corresponding 'external' safeguard. No international human rights review is foreseen for proceedings of the ICC. Just as the *ad hoc* tribunals, also the ICC is fully autonomous, being any kind of appeal body for this court missing. The control is rather exercised from within, through the Appeals Chamber.²² An effective guarantee of trial fairness and defence rights depends mainly on the judicial remedies offered by the Rome Statute itself to accused persons for the case of violation of their defence rights.

2. The right to appeal in front of the ICC

The right to judicial review in front of the ICC is laid down in Articles 81 and 82 ICCSt on the appeal against decision of acquittal or conviction or against sentence and on appeal against other decisions, respectively. In accordance with these provisions, the defendant may appeal final decisions of the Trial Chamber and *interim* decisions of both the Trial and the Pre-Trial Chamber in order to claim a violation of his defence rights.

2.1. Judicial review of final decisions

The final decision of a Trial Chamber may be appealed on the

²¹ See ICTY, *Prosecutor v Milosevic*, Case N° IT-99-37-PT, Trial Chamber, Decision on Preliminary Motions, 8 November 2001, para 38; J K Cogan, 'International Criminal Courts and Fair Trials: Difficulties and Prospects' (2002) *The Yale Journal of International Law* 117.

²² This feature clearly derives from the common law tradition, where courts operate in a system of coordinate authority; see also G P Fletcher (n 17) 110; see also C Safferling 'The Rights and Interests of the Defence in the Pre-Trial Phase' (2011) *Journal of International Criminal Justice* 666.

grounds listed in Article 81 ICCSt. Accordingly, under Article 81 (1) (b) ICCSt, a convicted person, or the Prosecutor on that person's behalf, may lodge an appeal on the grounds of (i) a procedural error, (ii) an error of fact, (iii) an error of law or on (iv) any other ground that affects the fairness or reliability of the proceedings or decision. Depending on the details of the concrete case, grounds (i), (iii) and (iv) seem to constitute suitable vehicles to lodge an appeal on the basis of the violation of defence rights.

2.1.1. Procedural error

Appealing a decision on the ground of a procedural error, under Article 81 (1) (b) (i) ICCSt, refers to two possible scenarios. The first scenario is a situation in which a Chamber does not comply with a mandatory procedural requirement of the Statute and Rules of Procedure and Evidence. Given the provision of Article 64 on functions and powers of the Trial Chamber and the explicit mention, in paragraph 2, of the duty of the latter to 'ensure that a trial is fair and expeditious and is conducted with full respect of the rights of the accused', the failure to grant one or more of the rights enshrined under Article 67 constitutes a procedural error in the meaning of Article 81 (1) (b) (i) ICCSt. However, such a violation of the rights of the accused might not necessarily lead to the invalidation of the appealed decision. To this end, Article 83 ICCSt, regulating proceedings on appeal, requires in paragraph 2 that the procedural error had '*materially affected*' the final decision. This provision reflects the case law deriving from the Special Court for Sierra Leone²³ (SCSL), whose Statute was the first to mention also this category of error as a ground of appeal. According to the SCSL jurisprudence, 'not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness

²³ The Special Court for Sierra Leone was established on 16 January 2002 by an agreement between the Government of Sierra Leone and the United Nations' in order to 'prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law' committed in Sierra Leone after 30 November 1996 and during the Sierra Leone Civil War. After its closure in 2013, the Residual Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone to oversee the continuing legal obligations of the Special Court for Sierra Leone

of the trial. By the same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice'.²⁴

The second situation, in which such a procedural error can occur, is when a Chamber erroneously exercises its discretion. The review of the Appeals Chamber concerns the manner – correct or not – in which the Trial Chamber exercised its discretion. To this aim, it has to be assessed whether the exercise of the discretion is based on an erroneous interpretation of law, whether it is exercised on patently incorrect conclusion of fact, or whether the decision is so unfair and unreasonable so as to constitute an abuse of discretion. According to ICC case law, in this case the requirement of the decision being materially affected by the procedural error also applies.²⁵

2.1.2. Error of law

An error of law occurs when a Chamber's decision is based on an incorrect interpretation of the governing law. This includes the application of the wrong legal standard. This was the case in the *Al Bashir* case.²⁶ In this case, the Pre-Trial Chamber denied the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir for his alleged responsibility for the crime of genocide. For the issuance of an arrest warrant, Article 58 (1) (a) ICCSt requires the establishment of 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'. In evaluating the existence of this condition in relation to the existence of genocidal intent by way of proof of inference, the Pre-Trial Chamber stated that 'such a standard would be met only if the

²⁴ SCSL, *CDF Case*, Case N° SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008, para 35; see also A Hartwig, 'Appeal and Revision' in C Safferling (n 14) 535.

²⁵ ICC, *Situation in Uganda in the case of the Prosecutor v Joseph Kony and others*, Case N° ICC-02/04-01/05-408, Appeals Chamber, Judgment on the Appeal of the Defence against the 'Decision on the Admissibility of the Case under Article 19 (1) of the Statute', 10 March 2008, para 80; A Hartwig (n 24) 536.

²⁶ The present example refers to an error of law established in a decision on an interlocutory appeal. The applicability of the grounds of appeal listed in Article 81 ICCSt to both appeals against final decisions and appeals against other decisions seems to allow to draw on examples originating from one category to clarify concepts in relation to the other.

materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zagahawa groups'²⁷ In this interpretation the standard of proof imposed by Article 58 (1) (a) ICCSt would have resembled rather the considerably higher threshold of 'beyond reasonable doubt' than the one implied in the requirement of 'reasonable grounds to believe'. According to the Appeals Chamber, this reading led to the application of an erroneous standard of proof that resulted in an error of law that materially affected the decision not to issue a warrant of arrest in respect of the crime of genocide.²⁸ As can be seen from this case law, with respect to this ground for appeal, a material effect on the decision, required by Article 83 (2) ICCSt, is also necessary in order for the appeal to succeed.

When it comes to violation of rights of the accused, however, the similarity of the concepts of procedural error and error of law is particularly evident. An error of law could indeed derive from a wrong interpretation of procedural law, such as a misconception regarding the scope of the rights of the accused. In order to differentiate between the two categories, the error of law may only be applied as long as no formal violations of the Statutes or the Rule of Procedure and Evidence are concerned.²⁹

2.1.3. Any other ground that affects the fairness or reliability of the proceedings or the decision

Article 81 (1) (b) (iv) ICCSt contains a 'catch-all' provision. The vague and unspecified formulation, relating to 'any other ground that affects the fairness or reliability of the proceedings or decision',

²⁷ ICC, *Situation in Darfur, Sudan in the case of the Prosecutor v Omar Hassan Ahmad Al Bashir*, Case N° ICC-02/05-01/09, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against *Omar Hassan Ahmad Al Bashir*, 4 March 2009, para 158.

²⁸ ICC, *Situation in Darfur, Sudan in the case of the Prosecutor v Omar Hassan Ahmad Al Bashir*, Case N° ICC-02/05-01/09-73, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir', 3 February 2010, para 33, 39 and 41.

²⁹ A Hartwig (n 24) 537.

should allow the convicted person to exercise his right to appeal in an exhaustive manner.

Again, it does not seem easy to distinguish this ground for appeal from the procedural error under Article 81 (1) (b) (i) ICCSt. In this regard, it could be stated that procedural errors should refer to formal violations, while the residual ground for appeal under Article 81 (1) (b) (i) ICCSt includes violations of a substantive nature.³⁰

2.1.4. Procedural aspects relating to appeals against final decisions

The procedure for an appeal under Article 81 ICCSt is regulated by Article 83 ICCSt and Rules 150-153 ICC RPE. Accordingly, an appeal against a conviction or acquittal under Article 74 ICCSt may be filed within 30 days from the date on which the party filing the appeal is notified of the decision. The appeal is to be filed with the Registrar, who then transmits the trial record to the Appeals Chamber.³¹

The Appeals Chamber has the same powers of the Trial Chamber. If the Appeals Chamber decides to uphold the appeal of the convicted person, it may reverse or amend the decision or sentence or order a new trial before a different Trial Chamber. The Appeals Chamber may also remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue.³² It is important to note that the Rome Statute contains the principle of the prohibition of *reformatio in peius*. As the last period of Art. 83 (2) ICCSt states, '[w]hen the decision or sentence has been appealed only by the person convicted or by the prosecutor on that person's behalf, it cannot be amended to his or her detriment'. In this respect, the Rome Statute offers a more exhaustive protection than international human rights conventions, such as the ECHR and the ICCPR.

³⁰ Ibid 537.

³¹ Rules 150 and 151 ICC RPE.

³² In case of prosecutor filing the appeal according to Article 81 (1) (a) ICCSt, the Appeals Chamber may, if it considers to uphold the appeal, order a new trial before a different Trial Chamber, according to Article 83 (2) (b) ICCSt. This underlines the difference between appeals by prosecution and defence: the only relief the court can grant in an appeal by the Prosecutor form acquittal on a particular charge is an order for a retrial. It is not open for the Appeal Chamber itself to reverse or amend a decision of a Trial Chamber acquitting an accused on a given charge as distinct from annulling that decision as prelude to a new trial: see ILC, *Draft Statute for an International Criminal Court with commentaries*, 1994, 61.

As has already been pointed out, by virtue of Article 83 (2) ICCSt, in order to uphold an appeal, the Appeal Chamber must come to the conclusion that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error. In fact, a similar approach can already be seen in commentaries contained in the ILC Draft Statute for an International Criminal Court: '[n]ot every error at the trial need[s to] lead to reversal or annulment: the error had to be a significant element in the decision taken. This is expressed in paragraph 2 by the requirement that the proceedings must have been, overall, procedurally unfair or the decision must be vitiated by the error'.³³

To conclude, it can be stated that, although the wording of Article 81 (a) (b) ICCSt grants the defendant a very broad right to appeal, the provision under Article 83 (2) ICCSt might relativize this right considerably.

2.2. *Judicial review of interim decisions*

The defendant may file an interlocutory appeal against decisions of an *interim* nature, exhaustively listed in Article 82 ICCSt. Among the decisions that the defendant can appeal pursuant to the provision in question are (a) decisions with respect to jurisdiction and admissibility; (b) decisions granting or denying release of the person being investigated or prosecuted and (d) decisions that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³⁴

³³ ILC, *Draft Statute for an International Criminal Court with commentaries*, 1994, 61; A Hartwig (n 24) 540.

³⁴ Article 82 (1) (c) ICCSt further refers to decisions of the Pre-Trial Chamber to act on its own initiative under Article 56 (3) ICCSt. Although Article 82 (1) (c) ICCSt mentions this category of decisions among the decisions 'either party' may appeal, in light of the provisions of Article 56 (3) ICCSt, the restriction to the Prosecutor as the party entitled to appeal seems likely: Article 56 (3) (a) ICCSt rules on measures for the preservation of evidence essential for the defence at trial, taken by the Pre-Trial Chamber on its own initiative in cases, in which the failure by the Prosecutor to request such measures is deemed unjustified. With respect to these measures in favour of the defendant, Article 56 (3) (b) ICCSt rules that '[a] decision of the Pre-

As to the errors, on the basis of which the impugned decision may be appealed, it is recognized that the categories of errors listed in Article 81 (1) (a) ICCSt, and the interpretation thereof, apply within the scope of Article 82 ICCSt.³⁵ However, when it comes to the right to lodge an interlocutory appeal, a distinction must be made between decisions that can be appealed as of right (Article 82 (1) (a) and (b) ICCSt) and decisions that can only be appealed with leave of the Chamber of first instance (Article 82 (1) (d) ICCSt).

2.2.1. Interlocutory appeal, as of right, of a decision with respect to jurisdiction or admissibility

According to Article 82 (1) (a) ICCSt, the defence is entitled to appeal, as of right, any decision with respect to jurisdiction or admissibility. This reference encompasses decisions the Pre-Trial or Trial Chamber issued on the basis of a challenge to jurisdiction or admissibility under Article 19 (6) ICCSt. This rule provides explicitly that the decisions at issue ‘may be appealed to the Appeals Chamber in accordance with Article 82’.

It also seems that decisions issued in accordance with Part 2 of the Rome Statute as a whole, including decisions relating to Article 21 ICCSt, are included by the reference to jurisdiction and admissibility. The Appeals Chamber held that applications *sui generis* as atypical motions could, under certain circumstances, be acknowledged. As a result, in light of Article 21 (3) ICCSt, a violation of defence rights, of the right to a fair trial and, more in general, of human rights, could constitute a ground for appeals under Article 82 (1) (a) ICCSt.³⁶ This is what occurred in the *Lubanga* case, where the defence disputed the jurisdiction of the Court by reference to the ‘doctrine of abuse of

Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor’. Therefore, the present analysis will not deal with the (apparently only formal) right of the defendant to appeal this kind of decisions.

³⁵ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-568 OA3, Appeals Chamber, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, para 19; *Prosecutor v Bemba*, Case N° ICC-01/05-01/08-962 OA3, Appeals Chamber, Judgment on the Appeal of M. Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, 19 October 2010, para 63; see also A Hartwig (n 24) 542.

³⁶ A Hartwig (n 24) 543-544.

process' and on the basis of the violation of the fundamental rights of the accused. The Appeals Chamber stated that the doctrine of abuse of process 'had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him to justice [...] More importantly, Article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights'.³⁷ In this sense, the ICC Appeals Chamber stated that the deprivation of fundamental fair trial guarantees may outweigh the interest of the world community in the conduct of the trial and thus may proceed to discontinue the proceedings: '[w]here the breaches of the rights of the accused are such as to make it impossible for him to make his defence within the framework of his rights, no fair trial can take place and the proceedings can be stopped'.³⁸ In other words, the Appeals Chamber acknowledges that questions relating to Article 21 (3) ICCSt and, thus, also to defence rights, may affect the jurisdiction of the Court and may, therefore, form the basis for an appeal pursuant to Article 82 (1) (a) ICCSt.

To conclude, it should be considered that even though Article 83 ICCSt explicitly refers only to proceedings under Article 81 ICCSt, the ICC case law has come to the conclusion that the standard provided by Article 83 (2) ICCSt applies also to 'other appeals' pursuant to Article 82 ICCSt.³⁹ In fact, in *Katanga and Ngudjolo Chui*, the Appeals Chamber held that in case of an interlocutory appeal, as a prerequisite, the error relied upon by the appellant also must have materially affected the decision.⁴⁰ In introducing this

³⁷ ICC, *Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para 36.

³⁸ ICC, *Situation in the Democratic Republic of Congo in the case of the Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, para 39.

³⁹ A Hartwig (n 24) 545.

⁴⁰ ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Case N° ICC-01/04-01/07-

restrictive condition, the Appeals Chamber reversed the previous jurisprudence according to which the application of the standard in question was excluded for appeals pursuant to Article 82 ICCSt.⁴¹

2.2.2. Interlocutory appeal, as of right, of a decision granting or denying release

Article 82 (1) (b) ICCSt establishes the right to appeal a decision granting or denying release of the suspect or accused. The “*decision*” referred to in Article 82 (1) (b) ICCSt relates to a decision issued in accordance with Article 60 ICCSt. The sensitivity of the fundamental freedom at stake in proceedings under Article 60 ICCSt makes the importance of the respect of the rights of the accused even more evident.

It is not a coincidence that precisely with regard to *interim* release the Appeals Chamber of the ICC has developed an extensive case law and has elaborated on important material and procedural issues.⁴² In this context, even if under a slightly different perspective, it might also be apposite to recall the *Lubanga* case, where the question of *interim* release was posed as a possible consequence of a conditional stay of proceedings, which resulted from a gross violation of defence rights.⁴³

2.2.3. Interlocutory appeal, with leave of the court, pursuant to Article 82(1)(d) ICCSt

The last sub-paragraph of Article 82 contains another “catch-all” provision for issues not included in the forgoing paragraphs. Article

1497 OA8, Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para 37; *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-1487 OA12, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of the Trial Chamber I entitled ‘Decision on the Release of Thomas Lubanga Dyilo’, 21 October 2008, para 44.

⁴¹ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-568 OA3, Appeals Chamber, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’, 13 October 2006, para 12 ff.

⁴² A Hartwig (n 24) 545-546.

⁴³ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-1487 OA12, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of the Trial Chamber I entitled ‘Decision on the Release of Thomas Lubanga Dyilo’, 21 October 2008.

82 (1) (d) ICCSt states the right of the defendant to appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. As can be derived from the letter of the law, this provision is intended to apply to any type of interlocutory decision. The wide scope attributed by the Rome Statute to this provision is, however, significantly restricted by the stipulation of certain requirements, first of all a procedural prerequisite: the leave of the chamber that delivered the impugned decision. In this regard, the Pre-Trial Chamber II, in the *Situation of Uganda*, has stated that any determination of the Prosecutor's application for leave to appeal must be guided by three principles. Firstly, the restrictive character of the remedy provided for in Article 82 (1) (d) ICCSt. Secondly, the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision. Thirdly, the irrelevance of or non-necessity at this stage of the Chamber to address arguments relating to the merit or substance of the appeal.⁴⁴ As these guidelines seem to have a general character, arguably they can be referred also to applications for leave to appeal submitted by the defence. Hence, Article 82 (1) (d) ICCSt seems to be accessible only under "*limited and very specific circumstances*" also for the defence.⁴⁵ In addition, the decision as to whether leave to appeal is conceded is not, in itself, appealable. As a result, a denial of leave to appeal must be deemed definitive.

The other two requirements that must be demonstrated by the party seeking leave are substantive in nature. First, the decision of the first instance judge must entail 'an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'. In this regard, the concept of 'issue' must be understood as an identifiable subject or topic that needs resolution and not just a simple question on which there is disagreement. Moreover, this issue must

⁴⁴ ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, para 15.

⁴⁵ ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, para 16.

‘significantly affect’ either the outcome of the trial or the fair and (cumulatively) expeditious conduct of the proceeding. It is clear that the term “fair” is strongly linked to the concept of fair trial. The same holds true for the reference to expeditious conduct of the proceedings, which relates – even if in a peculiar way, as described above – to the notion of trial fairness. According to the ICC Appeals Chamber in its ruling in the *Situation in the Democratic Republic of Congo*, the core of Article 82 (1) (d) ICCSt lies in the immediate tackling of procedural errors that otherwise might put the integrity of the proceedings at risk.⁴⁶ The second substantial condition must be read in the same light. Article 82 (1) (d) ICCSt requires that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. The *rationale* is to avoid, as early as possible, through an ‘immediate resolution’, potential errors so as to allow the proceedings to ‘move forward’, ensuring that the right course is followed.⁴⁷ Only if these requirements are fulfilled, the Chamber of first instance is entitled to grant the leave to appeal. The grounds for the appeal to be lodged pursuant to Article 82 (1) (d) ICCSt, can be based on the list contained in Article 81 (1) (a) ICCSt.⁴⁸

This being said, two problematic aspects – a conceptual and an application related one – of the necessity to obtain the leave from the first instance Chamber in order to file an appeal must be pointed out. First, the fact that the green light to lodge an appeal must be given by the very institution that issued the decision to be impugned, entails the risk for an inherent bias in the examination of the existence of the requirements laid down in Article 82 (1) (d) ICCSt. The fact that the decision on the matter is not subject to appeal, intensifies this problem even further. It might have been preferable, when drafting the existing regime governing the ICC, to allow parallel routes, as it is the case in some domestic orders, such as England and Wales. There, the assessment in question is conducted by the lower court as well as directly by the higher court. Taking again inspiration from a

⁴⁶ ICC, *Situation in the Democratic Republic of Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para 11.

⁴⁷ ICC, *Situation in the Democratic Republic of Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para 14, 15 and 19; A Hartwig (n 24) 549.

⁴⁸ A Hartwig (n 24) 549.

national system, this time Sweden, another solution could have been providing for the decision on the application for leave to appeal to be only a matter for the higher court, the Appeals Chamber, in the case of the ICC.⁴⁹

Second, practice shows that interlocutory appeals are generally disfavoured. They are regarded as inefficient, because ‘they disrupt the momentum of the case; rob the trial court of the power to conduct the trial as it sees as fit; and risk exposing the appellate court to appeals alleging numerous errors during the course of the case, many of which might be corrected by the trial court or become moot if the trial is allowed to proceed’.⁵⁰ The ICC Pre-Trial Chamber expressed this position as follows: ‘in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined [...] in the ICC Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions’.⁵¹

As much as the intent to avoid unreasonable delays of the proceedings must be appreciated, such a restrictive interpretation might undermine the core function of interlocutory appeals. As has already been mentioned, interlocutory appeals are of great importance to the proceedings and the development of law, especially the interpretation of the Rome Statute and the provisions in the Rules of Procedure and Evidence. Moreover, it must be considered, that an early review of the Appeals Chamber on certain questions might even contribute to avoiding lengthy trials, and that the Appeals Chamber might help to ensure certainty and consistency in the application of the law.⁵² In this sense, it appears that this restrictive attitude by first instance Chambers makes the right to appeal under Article 82 (1) (d) ICCSt and, at the same time, also those defence rights whose

⁴⁹ H Friman, ‘Interlocutory appeals in the early practice of the International Criminal Court’ in C Stahn, G Sluiter, *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 556.

⁵⁰ M C Fleming, ‘Appellate Review in the International Criminal Tribunals’ (2002) *Texas International Law Journal* 144.

⁵¹ ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor’s Application for Leave to Appeal in the Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, 19 August 2005, para 19.

⁵² A Hartwig (n 24) 549-550.

protection is pursued through the interlocutory appeal, more theoretical and illusory than practical and effective.⁵³

2.2.4. *Procedural aspects of interlocutory appeals*

Appeals ‘against other decisions’ are governed by Rules 154-158 ICC RPE. Accordingly, an appeal pursuant to Article 82 (1) (a) and (b) ICCSt may be filed within five days from the date upon which the party filing the appeal is notified on the decision. The appeal is to be filed with the Registrar who then transmits the trial record to the Appeals Chamber.⁵⁴ As far as appeals that require leave of the Court are concerned, the party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reason for the request for leave to appeal. Once the decision has been brought down, the Chamber shall notify all parties who participated in the proceedings.⁵⁵

Despite the specific rules for the initial phase of the appeals being different depending on the necessity to obtain leave for appeal, the following procedure for the appeal applies to all interlocutory appeals. Rule 156 ICC RPE states that as soon as an appeal has been filed, the Registrar shall transmit to the Appeals Chamber the record of the proceedings of the Chamber that made the decision that is the subject of the appeal. The following appeals proceedings shall be in writing, unless the Appeals Chamber decides to convene a hearing.

The judgment on the appeal, as regulated by Rule 158 ICC RPE, in contrast to what is established in Article 83 (2) ICCSt, seems to be limited to the following three options for the Appeals Chamber: confirm, reverse or amend the decision appealed. The ICC regulatory framework does not expressly provide the power of remand for the Appeals Chamber in relation to appeals under Article 82 ICCSt. This impression is corroborated by the fact that, according to Article 83 (2) ICCSt, the Appeals Chamber may exercise this power only in relation to decisions by the Trial Chamber and not in relation to decisions by the Pre-Trial Chamber.⁵⁶ However, the ICC Appeals Chamber has on several occasions exercised the power of remand in relation to

⁵³ *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979) para 24; *Artico v Italy*, App no 6694/74 (ECtHR, 13 May 1980) para 33.

⁵⁴ Rule 154 ICC RPE.

⁵⁵ Rule 155 ICC RPE.

⁵⁶ P N D C B Waite, ‘An Inquiry into the ICC Appeals Chamber’s Exercise of the

interlocutory appeals, basing this power on the Chamber's inherent powers.⁵⁷ The need to refer to the Court's inherent jurisprudence, in order to justify the exercise of the power of remand, derives from the fact that Article 83 ICCSt is not directly applicable to interlocutory appeals. This is confirmed by the fact, that where dispositions of Article 83 ICCSt were provided to apply also to this latter category of appeals, the legal framework of the ICC has expressly extended the scope of those dispositions: this is, for instance, the reason for the explicit recall of the rule contained in Article 83 (4) ICCSt by Rule 158 RPE.

Likewise, Article 83 (2) ICCSt – in relation to the need for the error forming the ground of appeal to materially affect the impugned decision – does not *per se* apply to appeals under Article 82 ICCSt. However, it has already been pointed out how the Appeals Chamber after arguing, in the *Lubanga* case, against the applicability of this provision to interlocutory appeals,⁵⁸ in later judgments nonetheless adopted the standard of Article 83 (2) ICCSt in this context.⁵⁹ What has been observed in relation to appeals against final decisions appears to be even more true with regard to interlocutory appeals. Considering their fundamental importance for the correct development of the proceedings, rules introducing procedural hurdles for the filing of such an appeal must be critically evaluated, in light of the risk of them unreasonably limiting effective protection of defence rights. The addition by interpretation of a further, substantive threshold, not foreseen by the Statute or the Rules of Procedure, such as the

Power of Remand' (2010) *The Law and Practice of International Courts and Tribunals* 315.

⁵⁷ Also the Appeals Chamber of the ICTY operated according to its inherent jurisprudence: see ICTY, *Prosecutor v Delalic' et al.*, Case N° IT-96-21-A, Appeals Chamber, Judgment on Sentence Appeal, 8 April 2003; P N D C B Waite (n 56) 316 and 321-323.

⁵⁸ ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-568 OA3, Appeals Chamber, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, para 12 ff.

⁵⁹ ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Case N° ICC-01/04-01/07-1497 OA8, Appeals Chamber, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para 37; *Prosecutor v Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-1487 OA12, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of the Trial Chamber I entitled 'Decision on the Release of Thomas Lubanga Dyilo', 21 October 2008, para 44; A Hartwig (n 24) 553.

extension of the requirement under Article 83 (2) ICCSt, might result in an excessive restriction of the right to appeal and other underlying defence rights. Not only is such an interpretation questionable with regard to the principle of the *ubi lex voluit dixit, ubi noluit tacuit*, but, even from a teleological perspective, it does not appear justifiable, since the consequences hardly seem to have effects *in bonam partem*.

3. Concluding remarks

To conclude, it can be stated that a well-functioning review system is an important guarantee for the effectiveness of defence rights granted by the law and for trial fairness in general. Especially for young institutions, such as the ICC, fair trial guarantees and the provision of an effective review mechanism together form the basis for the trust the international community is supposed to place in them. In this regard, it might be appropriate to recall one of the main lessons from the experience of the Nuremberg Tribunal, that is, trial fairness for the defendants is the main yardstick against which the legitimacy of the whole exercise will be measured.⁶⁰

Since violations of rights granted by the law can always occur, it is crucial that each system has a review mechanism which is able to redress damages and re-establish the fragile balance trial that comprises fairness. As has been displayed above, the ICC system does not provide for any external review. In other words, the ICC is its own watchdog: the ICC controls itself from within, through the Appeals Chamber. This means that the protection of defence rights rests solely on the integrity of the judges in applying the Rome Statute and the human rights standards foreseen in Article 21 (3) ICCSt.⁶¹

The present analysis has shown that fundamental defence rights, albeit exhaustively enshrined in the Rome Statute, are less protected than one might think at a first glance at the Statute. First of all, there are legal restrictions for a concrete enforcement of fundamental rights, such as the necessity under Article 83 (2) ICCSt of a material impact of the alleged error on the decision and the requirement of a leave to appeal for certain appeals. Furthermore, practice shows that progress

⁶⁰ S Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003) 164.

⁶¹ C Safferling (n 22) 666.

in terms of trial fairness guarantees and protection of the rights of the accused must be relativized due to a rather restrictive approach by the ICC jurisprudence in the identification of cases, in which a violation of those rights is deemed to be relevant for the sake of judicial review. This restrictive line of the ICC can be observed in relation to the approach to granting leave to appeal, with regard to the evaluation of the material impact of the lamented error as well as in the interpretative extension of this requirement beyond the scope attributed to it by the Rome Statute itself.

The provision contained in Article 83 (2) ICCSt deserves particular attention, as it reveals a fundamentally questionable standpoint with regard to procedural rights protection. The requirement of an alleged error to have ‘materially affected’ the impugned decision, in order for an appeal to be upheld, mirrors the anti-formalistic and empirical approach propagated by the ECtHR.⁶² The Strasbourg Court, has expressed in various judgments that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.⁶³ The restrictive approach of the ECtHR can be understood and eventually justified under two points of view. First, a practical one: the number of contracting parties and the workload deriving from it would not allow any other approach than limiting the jurisdiction only to those gross violations of defence rights that simultaneously amount to a violation of the ECHR itself. In this sense, it cannot be implied that denounced violations of national law that do not reach the relevance threshold set by the ECHR system, are irrelevant also within the internal procedural framework. Second, the ECtHR would not even have the means for a formalistic control since it does not operate within a ‘closed system’. The role of the ECHR consists in the reasoning through general principles that can be then applied, as a guideline, within the respective domestic order.

Neither of these arguments apply to the ICC. First, the ICC has a relatively limited workload due to the limited jurisdiction *ratione*

⁶² On this topic see also M Caianiello, *Premesse per una Teoria del Pregiudizio Effettivo nelle Invalidità Processuali Penali* (Bononia University Press, 2012)

⁶³ *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988) para 45; *Teixeira de Casrto v Portugal* App no 44/1997/828/1034 (ECtHR, 9 June 1989 para 34; *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006) paras 94-97; *Lee Davis v Belgium*, App no 18704/05 (ECtHR, 28 July 2009) para 40 ff.

materiae and the principle of complementarity. Second, the ICC functions in a closed and self-consistent system. The ICC Appeals Chamber does not have the task of giving guidelines to the Chamber of first instance. The Appeals Chamber faces a concrete question within a criminal proceeding. From this perspective, the position and nature of the ICC is closer to that of a national criminal court than to that of a supranational human rights court. Arguably, effective defence rights protection, especially with regard to judicial review, might be better guaranteed through a more formalistic approach, according to which a procedural sanction is generally foreseen in case of breach a procedural rule, regardless of it having materially affected the vitiated act or not.

CHAPTER V

MUTUAL RECOGNITION AND ABSOLUTE STANDARDS OF EFFECTIVE JUDICIAL PROTECTION

Valentina Covolo

TABLE OF CONTENTS: 1. The European Arrest Warrant as a case study. – 2. Presumption of equivalent and effective protection of fundamental rights. – 3. An exceptional ground for postponement: Real risks of inhuman and degrading treatment. – 4. Real risks to breach the essence of the right to a fair trial, a further restriction on the duty to execute a EWA. – 5. Judicial review in implementing grounds for non-execution. – 6. Balancing effectiveness of mutual recognition instruments with the right to an effective remedy and fair trial. – 6.1. Constitutional guarantees of judicial review impairing the primacy and effectiveness of Union law. – 6.2. National margin of discretion. – 7. Conclusions.

1. The European Arrest Warrant as a case study

The right to an effective remedy guaranteed by Article 47 of the Charter infuses into national criminal procedure minimum standards of judicial protection with the aim of ensuring the effective implementation of individual rights conferred by Union law.¹ Pursuant to Article 53 of the Charter, the provision shall not be interpreted as restricting or adversely affecting fundamental rights as recognized by the Member States' constitutions. Nonetheless, the possibility for the Member States to provide a higher level of protection may face limitations in cross-border criminal proceedings. Indeed, restrictions on the right to judicial review guaranteed under

¹ H Hofmann, 'Article 47. Specific provisions' in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: a commentary* (Hart Publishing, 2014) 1211, 1212 ff.

domestic law may result from the application by national authorities of EU instruments of mutual recognition of judicial decisions. The latter presupposes the ‘automaticity in the operation of inter-state cooperation’² for the sake of the prompt and effective administration of justice in transnational cases. In particular, mutual recognition of judicial decisions restricts, by its very nature, the scrutiny able to be undertaken by national judicial authorities executing a decision taken by their counterparts in another country.³

Accordingly, the CJEU has repeatedly stressed that ‘EU law imposes an obligation of mutual trust’ between Member States, which prevents the executing authority from verifying whether the issuing authority has observed fundamental rights.⁴ The high degree of confidence results from the assumption that each of the national legal systems are capable of providing an equivalent and effective protection of fundamental rights,⁵ both as regards the adequacy of domestic rules and their correct application.⁶ Nonetheless, mutual recognition of judicial decisions is not absolute: scrutiny by the executing authorities is allowed, however only on limited grounds for non-execution. In this regard, the CJEU has been called upon to rule on the conditions under which national judicial authorities must ‘refrain from reviewing decisions taken by their counterparts in other Member States without infringing an individual’s right of effective judicial protection’.⁷ According to the case law, the balance between the right to an

² V Mitsilegas, ‘The Limits of Mutual Trust in Europe’s Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual’ (2012) 31 Yearbook of European Law 319, 324.

³ Legal scholars refers to a ‘negative mutual recognition’ or a ‘negative obligation (...) no to check whether the other Member State has in a specific case respected human rights. V Mitsilegas (n 2) 321; Z Đurđević, ‘The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order’ in Z Đurđević, E Ivičević Karas (ed), *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges* (2016, Croatian Association of European Criminal Law) 9, 11.

⁴ Opinion 2/13 EU:C:2014:2454, para 194.

⁵ Case C-491/10 *Aguirre Zarraga* EU:C:2010:828, para 70.

⁶ Recital 4 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1

⁷ D Düsterhaus, ‘Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection’ (2015) 8 Review of European Administrative Law 151, 157 – 158.

effective remedy and mutual recognition tips in favor of the latter in as far as the review undertaken in the executing State compromises the primacy, unity and effectiveness of Union law.⁸

The question is common to all instruments of mutual recognition in criminal matters. The framework decisions on freezing orders,⁹ confiscation,¹⁰ as well as the European Investigation Order,¹¹ contain provisions that seek to define the respective jurisdictions of issuing and executing judicial authorities. Despite this, the following analysis will focus on the Framework Decision 2002/584 on the European Arrest Warrant (EAW),¹² as the most prominent illustration of the challenges that mutual trust poses to the right to effective judicial protection within the EU criminal justice area. First, the position of the Court referred to above has been particularly well developed in this field. Second, the procedure for the execution of a EAW explicitly falls within the scope of application of the EU Directives on the rights of suspects and accused persons in criminal proceedings.

2. Presumption of equivalent and effective protection of fundamental rights

Mutual recognition is rooted in mutual trust, a principle whose fundamental importance in the area of freedom, security and justice has been particularly emphasized by the CJEU. As stated in Opinion 2/13 concerning the accession of the EU or the ECHR, mutual trust requires the Member States:

(...) to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a

⁸ Case C-399/11 *Melloni*, Opinion of AG Bot EU:C:2012:600, para 189.

⁹ Art. 11 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45.

¹⁰ Art. 9 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L 328/59.

¹¹ Article 14 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L 130/1.

¹² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 [2002] JO L 190/1.

higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.¹³

The presumption of equivalent protection led the CJEU to adopt a strict and almost literal interpretation of the Framework Decision 2002/584 in *Radu*.¹⁴ In that case, the person subject to the EAW opposed his surrender on the ground that the issuing authorities did not hear him beforehand, in breach of Article 47 and 48 of the Charter. In its ruling, the Court first noted that the Member State issued an arrest warrant for the purpose of prosecution. Contrary to the execution of criminal sentences delivered *in absentia*, the failure by the issuing authorities to hear the surrendered person does not figure among the grounds for non-execution provided under the Framework Decision.¹⁵ In addition, the Court noted that requiring the national judicial authorities to hear the requested person before issuing a EAW would extinguish any ‘element of surprise’ needed to stop the person concerned from taking flight and, thereby, ‘would inevitably lead to the failure of the very system of surrender provided for by Framework Decision’.¹⁶ In these circumstances, the executing authorities cannot refuse the execution of the EAW and, consequently, verify whether the issuing State observed beforehand the right to be heard of the surrendered persons.

Admittedly, the reasoning adopted by the Court may be understood as leaving room for a different solution if the EAW is issued for the purpose of the execution of sentences. It is nonetheless worth mentioning that the CJEU limited itself to recalling the ‘high degree of confidence which should exist between the Member States’,¹⁷ without undertaking a balancing test between mutual recognition and fundamental rights. The latter approach was, however, suggested by Advocate General Sharpston. Although the Framework Decision provides an exhaustive list of grounds for non-execution, the obligation of the Member States to act upon a EAW should be

¹³ Opinion 2/13 EU:C:2014:2454, para 192 (emphasis added).

¹⁴ Case C-396/11 *Radu* EU:C:2013:39.

¹⁵ *Ibid* para 38.

¹⁶ *Ibid* para 40.

¹⁷ *Ibid* para 34.

interpreted in line with the duty to respect fundamental rights enshrined in Article 1(3) of the Framework Decision.¹⁸ Therefore, the Advocate General suggested the acknowledgement of an additional ground for refusal where it is shown that the human rights of the surrendered person have been infringed, or will be infringed, as part of or following the surrender process in the issuing State. Drawing on the ECtHR case law, the suggested ground for refusal could have been based on a stringent test aimed at assessing the severity of the fundamental rights' violation at stake:

In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such *as fundamentally to destroy the fairness of the process*. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.¹⁹

3. An exceptional ground for postponement: Real risks of inhuman and degrading treatment

Although the CJEU did not follow the Opinion of Advocate General Sharpston in *Radu*, it accepted the need to temper, in exceptional circumstances, the automatic application of mutual recognition of judicial decisions in case of serious violations of absolute fundamental rights.²⁰ The preliminary ruling in *Aranyosi* called into question detention conditions in the issuing Member State that pose a real risk to the surrendered person of inhuman and degrading treatment.²¹ Against this background, the Court acknowledged that:

[W]here the judicial authority of the executing Member State is in possession of evidence of a *real risk of inhuman or degrading*

¹⁸ Case C-396/11 *Radu*, Opinion of AG Sharpston EU:C:2012:648, para 68 – 70.

¹⁹ *Ibid* para 97 (emphasis added).

²⁰ For a detailed commentary, G Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi and Căldăraru*' (2016) 53 CMLRev 1675.

²¹ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198.

treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that *judicial authority is bound to assess the existence of that risk* when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant.²²

The ruling thus enhances the consistent interpretation of mutual recognition principles by the CJEU where the person subject to a national decision is exposed to particularly serious violations of fundamental rights.²³ Indeed, the Court had already adopted a similar reasoning with regards to the transfer of asylum seekers in *N.S.* Accordingly, a Member State may refrain from transferring an asylum seeker to another Member State, where the former cannot be unaware that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in the latter State are likely to expose them to inhuman and degrading treatment within the meaning of Article 4 of the Charter.²⁴ While both judgments admit that detention conditions may serve as an obstacle to the execution of decisions taken in another Member State, restrictions to mutual recognition of arrest warrants are more stringently interpreted given the very specific consequences of a failure to surrender the alleged offender. As emphasized by Advocate General Bot, the issue in *NS* was ‘to ascertain which of the Member States was responsible for examining an asylum claim’ and, therefore, admit ‘an exception to a rule of territorial jurisdiction’.²⁵ By contrast, the refusal to execute a EAW issued for the purpose of a criminal prosecution would prevent the issuing authorities to ensure public order and public security with ‘the risk that the offence would remain unpunished’.²⁶ Consequently, aside from specific grounds for non-execution set forth under the Framework Decision 2002/584, risks of inhuman and degrading

²² *Ibid* para 88.

²³ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, Opinion of AG Bot EU:C:2016:140, paras 39 ff.

²⁴ Case C-411/10 *N.S.* EU:C:2011:865.

²⁵ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, Opinion of AG Bot, para 55.

²⁶ *Ibid* para 56 ff.

treatment resulting from detention conditions in the issuing State cannot automatically lead to a refusal to execute the EAW.

In the light of this, the ruling in *Aranyosi* provides detailed guidance on the review to be undertaken by the executing State. First, the assessment undertaken by the executing authority goes beyond the mere ‘finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State’.²⁷ The scrutiny entails in fact a ‘two-step’ test. The judicial authority must initially rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State such as, for instance, judgements of the ECtHR – in order to identify a real risk that the surrender proceeding will lead to a breach of Article 4 of the Charter. Only if faced with substantial grounds to believe that the individual concerned will be exposed to inhuman or degrading treatment²⁸ will the executing judicial authority be furthermore ‘bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4’.²⁹

Second, pursuant to Article 15(2) of the Framework Decision, the executing authority is under the obligation to request the issuing authority to provide ‘as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State’.³⁰ In the event the information provided discounts the existence of a real risk that the surrendered person would be exposed to inhuman and degrading treatment, the EAW must be executed. The individual concerned will have the possibility to challenge the lawfulness of detention conditions in the issuing Member State according to the legal remedies provided under the law of that country.³¹ If, on the contrary, the information provided by the issuing authority does not exclude a real risk of inhuman and degrading treatment in the particular circumstances of the case, the requested

²⁷ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, para 91.

²⁸ *Ibid* para 93.

²⁹ *Ibid* para 94.

³⁰ *Ibid* para 95.

³¹ *Ibid* para 103.

State cannot refuse, but can simply postpone the execution of the EAW.³² In this event, the executing authority may decide to hold the person in custody for a limited period of time that must respect the requirement of proportionality. Conversely, when the executing authority grants provisional release, it is under the obligation to take ‘any measure necessary so as to prevent the person concerned from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken’.³³

4. Real risks to breach the essence of the right to a fair trial, a further restriction on the duty to execute a EAW

Despite the emphasis put by the CJEU on the absolute character of the right enshrined in Article 4 of the Charter, one could have wondered whether the reasoning in *Aranyosi* could apply *mutati mutandis* to particular serious breaches of fundamental rights that can be subject to limitations, such as the right to a fair trial enshrined in Article 47 of the Charter.³⁴ In *LM*, the CJEU gave a positive answer.³⁵ The facts in the main proceedings deal with three EAWs issued by Poland for the purpose of prosecuting a person accused of drug trafficking offences. After having been arrested in Ireland, the person concerned opposed to the surrender, claiming that the execution of the EWA would expose him to a flagrant denial of justice. This risk would have resulted from the reforms undermining the independence of the Polish judiciary at all levels, which led the Commission to propose for the first time in history to activate the procedure of Article 7 TEU.³⁶ Against this background, the High Court of Ireland asked the CJEU if and what kind of review shall the executing authority carry out where

³² Ibid para 98. Regarding this aspect see S Gáspár-Szilágyi, ‘Joined Cases *Aranyosi and Căldăraru*. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant’ (2016) 24 *European Journal of Crime Criminal Law and Criminal Justice* 197.

³³ Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, para 102.

³⁴ The CJEU consistently held, indeed, that the right of access to a tribunal and the right to a fair trial are not absolute. See for instance, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini v Telecom Italia* EU:C:2010:146, paras 63 – 64.

³⁵ Case C-216/18 PPU *LM* EU:C:2018:586.

³⁶ Reasoned Proposal of the European Commission in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM (2017) 835 final.

there are cogent evidence of a real risk of serious breach of the right to a fair trial because the judicial system of the issuing State does not operate anymore within the rule of law.

The Court of Justice first recalled that the principle of mutual recognition does not imply ‘blind mutual trust’.³⁷ Indeed, the high level of trust between the Member States is based on ‘the premiss that the criminal courts of the other Member States [...] meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts’.³⁸ The latter requirements are inherent features of the right to a fair trial, ‘which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’.³⁹

Based on these considerations, the Court thus acknowledged that, under exceptional circumstances, the executing judicial authority shall undertake the two-step test outlined in *Aranyosi* where the execution of the EAW exposes the requested person to a real risk of breach of the fundamental right to a fair trial on account of systemic or generalized deficiencies that affect the independence of the issuing Member State’s judiciary. It is important to note, however, that this new limitation on mutual recognition of judicial decisions in criminal matters specifically concerns a requirement, the one of judicial independence that, according to the court, forms part of the essence of the right,⁴⁰ which according to Article 52(1) of the Charter cannot be subject to limitations.

As a first step, the executing judicial authority must undertake an objective assessment aimed to establish whether there is a real risk of breaching the right to a fair trial in its essence on account of systemic or generalized deficiencies that compromise the independence of the issuing State’s judiciary. In doing so, the executing authority shall base its assessment on ‘material that is objective reliable, specific and properly updated concerning the operation of the system of justice in

³⁷ The CJEU already took this stance in *Aranyosi and Căldăraru*. See notably K Lenaerts, ‘La vie après l’avis: Exploring the Principle of Mutual (Yet not Blind) Trust’ (2017) 54 CMLRev 805.

³⁸ Case C-216/18 PPU *LM*, para 58.

³⁹ *Ibid* para 48.

⁴⁰ *Ibid*.

the issuing Member State', notably the reasoned proposal of the Commission under Article 7 TEU.⁴¹

If the national court comes to the conclusion that the risk of violating the essence of the right to fair trial is real, it must also undertake, as a second step, an individual assessment. This consists in verifying whether there are substantial grounds for believing that the requested person will actually and personally run that risk having regard to the particular circumstances of the case.⁴² In this respect, attention must be paid to the 'personal situation [of the requested person], as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant'.⁴³

Despite the emphasis put by the CJEU on the imperative need for an individual assessment,⁴⁴ this second tier raises problematic issues. Indeed, the CJEU requires the judicial authority of the issuing State to identify the court of the executing State that 'has jurisdiction over the proceedings to which the requested person will be subject' in order to determine whether the independence of that competent court is affected.⁴⁵ The national judge is therefore confronted with a quite difficult – almost impossible – task: to figure out at an early stage of the criminal proceedings which will be the competent trial court, whose jurisdiction is plausibly defined by complex procedural rules of a foreign State and might depend on the charges pressed at the end of the investigation. One could also consider, however, other courts in the executing State as having jurisdiction over the proceedings, such as for instance the judge called upon to review detention pending trial, or the competent Appellate Court at a subsequent stage of the criminal proceedings. In this light, how could systemic deficiencies impairing the independence of a State's judiciary as a whole do not necessarily amount to a flagrant denial of justice in the individual case? The answer provided by Advocate General Tanchev does not seem convincing. According to his opinion, 'the lack of independence and impartiality of a tribunal can be regarded as amounting to a flagrant denial of justice only if it is so serious that it destroys the fairness of the trial'.⁴⁶ It is however 'hard to conceive that a lack of

⁴¹ Ibid para 61.

⁴² Ibid para 68.

⁴³ Ibid para 75.

⁴⁴ Ibid para 69.

⁴⁵ Ibid para 74.

⁴⁶ Case C-216/18 PPU *LM*, Opinion of AG Tanchev EU:C:2018:517, para 93.

independence, of an alleged lower intensity, can be downgraded to a mere irregularity that does not inevitably taint every subsequent step of the proceedings'.⁴⁷ This holds particularly true with respect to the requirement of external independence as interpreted by the ECtHR in the assessment of a 'flagrant denial of justice', a case-law to which no reference whatsoever can be found in the preliminary ruling. As Mirandola rightly notes, the ECtHR takes into account the specific circumstances of the individual case 'only if there are no sufficient elements to argue for a lack of independence in the general legal framework, and not as a further step to take when independence is not sufficiently ensured at legislative level'.⁴⁸

It is essential to note the place held by the second step of the test within the chain of arguments put forward by the CJEU. By requiring the executing judicial authority to undertake an individual assessment, the CJEU is cautious not to paralyse the entire system of surrender vis-à-vis Poland. It indeed stresses that only the European Council can take the decision to suspend the application of the EAW in respect to a Member State that does not comply with the rule of law, as a result of the procedure under Article 7 TEU.⁴⁹

While trying to limit automatic refusals to cooperate that would endanger the entire system of surrender, the CJEU also recalls that 'the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk' exposing the requested person to a violation of his fundamental right to an independent tribunal.⁵⁰ This may lead, however, to a kafkaesque situation in which the judicial authority of a Member State practically asks his homologue in another EU country to provide objective guarantees of its own judicial system's and, therefore, its own judicial independence.⁵¹ As for the consequences of this dialogue, the CJEU did not follow the opinion of the Advocate General. Whilst for the

⁴⁷ S Mirandola, 'European Arrest Warrant and Judicial Independence in Poland: Where can mutual trust end? (Opinion of the AG in C-216/18 PPU LM)', European Law Blog, 24 July 2018, <<http://europeanlawblog.eu/2018/07/24/european-arrest-warrant-and-judicial-independence-in-poland-where-can-mutual-trust-end-opinion-of-the-ag-in-c-216-18-ppu-l-m/>>.

⁴⁸ Mirandola (n 47).

⁴⁹ Case C-216/18 PPU LM, paras 70-73.

⁵⁰ Ibid para 76.

⁵¹ Ibid para 77.

latter the persistence of the real risk of flagrant denial of justice in the individual case would only have the effect to postpone the execution of the EAW,⁵² in the view of the Court the executing authority ‘must refrain from giving effect’ to the request for surrender where the information provided by the issuing State does not discount the existence of a real risk of breaching the fundamental right to an independent tribunal.⁵³

5. Judicial review in implementing grounds for non-execution

In contrast, the executing authority may, in a limited way, review the respect of fundamental rights by the issuing authorities when such rights constitute grounds for non-execution of the EAW. In these circumstances, the CJEU stressed that the surrender procedure aims at ensuring a high degree of protection of defence rights. In *Dworzecki*, a Dutch Court questioned the conformity of national procedural rules governing the right to information of the accused who is subject to a EAW with Article 4a (1)(a)(i) of the Framework Decision 2002/584. The provision provides that a judicial authority may refuse to execute a EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the arrest warrant states that the person was ‘either summoned in person’ or actually received ‘by any other means official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’. At the outset, the CJEU stressed that the above mentioned conditions set forth in 4a (1)(a)(i) of the Framework Decision have an autonomous meaning in order to ensure the uniform interpretation and application of Union law.⁵⁴

The Court went on to consider the goals of the ground for refusal in the case of convictions delivered *in absentia*. On the one hand, Article 4 of the Framework Decision is not designed to regulate the forms and methods, including procedural requirements that the Member States apply in implementing the surrender procedure.⁵⁵ On the other hand, the provision is aimed at ensuring a high level of protection that

⁵² Case C-216/18 PPU *LM*, Opinion of AG Tanchev EU:C:2018:517, para 131.

⁵³ Case C-216/18 PPU *LM*, para 78.

⁵⁴ Case C-108/16 PPU *Dworzecki* EU:C:2016:346, para 28 ff.

⁵⁵ *Ibid* para 44.

enables the executing authority to consider that the rights of the person subject to the EAW have been respected in the issuing State.⁵⁶ Consequently, the fact that, according to the arrest warrant, the summons was served at the address of the requested person on an adult resident of the household, who undertook to hand the summons over to the requested persons, does in itself fulfill the requirements under Article 4a (1)(a)(i) of the Framework Decision. In such circumstances, it is for the issuing authority to indicate in the EAW elements on the basis on which it relies on, that the person concerned was effectively and officially informed.⁵⁷ As for the assessment undertaken by the executing authority when applying the optional ground for non-execution under Article 4, the Court stressed that it may take into consideration other circumstances of the case, notably the conduct of the person concerned as well as the eventual right to retrial guaranteed by the law of the issuing State.

In *Piotrowski*, the CJEU recently confirmed that grounds for refusals set forth in the Framework Decision 2002/584 and the judicial review undertaken by the executing authorities when implementing such grounds must be interpreted strictly.⁵⁸ The case in the main proceedings called into question the mandatory non-execution of a EAW issued by Poland against a minor who could not be held ‘criminally responsible for the acts on which the arrest warrant is based under the law of the executing State’.⁵⁹ The question arose whether the provision requires the executing Belgian authority to undertake an assessment *in abstracto* (i.e. establish whether the minor subject to the EAW can theoretically be held criminally responsible under the law of the executing country having regard to his age) or calls for an assessment *in concreto* (i.e. allowing the executing authority to take into consideration individual circumstances which condition the prosecution and conviction of a minor subject according to the law of the executing State).

In line with the conclusions of Advocate General Bot,⁶⁰ the Court rejected this second option. Although the best interests of a child who is subject to criminal proceedings ‘are always a primary consideration’,⁶¹

⁵⁶ Ibid paras 37 – 38.

⁵⁷ Ibid para 49.

⁵⁸ Case C-367/16 *Piotrowski* EU:C:2018:27, para 48.

⁵⁹ Art. 3 (3) Framework Decision 2003/577/JHA.

⁶⁰ Case C-367/16 *Piotrowski* Opinion of AG Bot EU:C:2017:636.

⁶¹ Case C-367/16 *Piotrowski*, para 37.

‘observance of those rights [aimed to protect minors] falls primarily within the responsibility of the issuing Member State’ that seeks to prosecute him or enforce a sentence pronounced against him.⁶² Yet, the principle of mutual recognition requires the executing State to trust and therefore presume that the issuing State complies with Union law fundamental rights guarantees with regard to the surrendered person.⁶³ Hence, by taking into consideration objective and subjective circumstances, such as the level of maturity of the minor, his family situation, and the youth protection measures previously adopted, the review *in concreto* undertaken by the executing authority would imply a new assessment of criminal responsibility of the minor, which ‘in fact amounts to a substantive re-examination of the analysis previously conducted in connection with the judicial decision adopted in the issuing Member State’.⁶⁴ In the view of the Court, such an in depth review based on additional considerations that were not foreseen in the Framework Decision contradicts the very essence of the principle of mutual recognition.

An interesting note in the ruling is the reference to Directive 2016/800/EU harmonizing procedural safeguards for children who are suspects or accused persons in criminal proceedings.⁶⁵ Even though the ABC Directive must be regarded as ‘trust-enhancing legislation’,⁶⁶ it does not establish common rules governing the criminal liability of minors referred to under Article 3 (3) of the Framework Decision. As emphasized by both the Court and the Advocate General, the EU Directive simply provides minors subject to criminal proceedings and proceedings for the execution of a EAW with procedural safeguards ‘in order to ensure that, as stated in recital 8 of that directive, the best interests of a child (...) are of primary consideration.’⁶⁷ One should add to this – surprisingly not emphasized in the preliminary ruling – that the right to an individual assessment

⁶² Ibid para 50.

⁶³ Ibid.

⁶⁴ Ibid para 52.

⁶⁵ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1.

⁶⁶ The formula, which perfectly reflects the link established by Article 82 TFEU between harmonization and mutual recognition in criminal matters, is used by K Lenaerts (n 37) 811.

⁶⁷ Case C-367/16 *Piotrowski*, para 37.

guaranteed under Article 7 Directive 2016/800/EU is included among the safeguards that benefit minors who are subject to a EAW.⁶⁸

It therefore follows that the question for preliminary ruling in *Piotrowski* does not deal with breaches in the issuing State of harmonized defence rights that Union law grants to surrendered persons. Indeed, violations of defence rights guaranteed by the ABC Directives do not constitute grounds for refusal under the Framework Decision 2002/584.⁶⁹ Such violations by the issuing State should not fall, as a matter of principle, within the scope of review undertaken by the executing authority. Were it otherwise, the executing State would verify, instead of trusting, whether another Member State actually complies with EU fundamental rights and thereby would ‘call into question the premise that those two Member States are equally capable of providing effective judicial protection of those rights’.⁷⁰

5. Balancing effectiveness of mutual recognition instruments with the right to an effective remedy and fair trial

5.1. Constitutional guarantees of judicial review impairing the primacy and effectiveness of Union law

Mutual trust does not only prevent the executing authorities from verifying whether fundamental rights have been or will be respected in the issuing State. When the executing authority invokes a ground for non-execution set forth in the Framework Decision 2002/584, it cannot apply higher standards of protection provided under its own constitutional legal order where this would impair the effective implementation of the surrender procedure established by Union law. The CJEU adopted this approach in the landmark judgment

⁶⁸ Art. 17 Directive 2016/800/EU.

⁶⁹ In this regard it is worth noting that even though Article 4a Framework Decision 2002/584/JHA provides for a ground for refusal where the EAW is issued for the purpose of enforcing a judgments rendered in violation of the right to be heard in person, the corresponding procedural safeguards guaranteed by 8 and 9 Directive 2016/343/EU do not apply to proceedings for the execution of a EAW.

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1.

⁷⁰ K Lenaerts (n 37) 821.

Melloni.⁷¹ The Court was called upon to interpret Article 4a (1) of Framework Decision 2002/384 that established an optional ground for refusal when a EAW is issued for the purpose of executing a sentence rendered *in absentia*.

By adopting a strict reading of the wording and purpose of the provision, the Court first stressed that the Framework Decision 2002/384/JHA provides ‘an exhaustive list of the circumstances in which the execution of a European arrest warrant issued in order to enforce a decision rendered in absentia must be regarded as not infringing the rights of the defence’.⁷² In particular, Article 4a (1) requires the judicial authorities to surrender a person, despite his absence at trial in the issuing State, if the person was informed in due time of the scheduled trial and of the fact that a decision could be handed down if he did not appear for the trial or, being aware of the scheduled trial, engaged a lawyer to defend him at trial.⁷³ It thus results from the wording and the purpose of the provision that Article 4a (1) precludes the executing judicial authorities from making the surrender of the person convicted *in absentia* conditional upon the conviction being open to review in his presence.

In addition, the Court held that Article 4a (1) complies with Articles 47 and 48 of the Charter.⁷⁴ Indeed, by setting the conditions upon which the person concerned must be deemed to have waived voluntary and unambiguously his right to be present at trial, the provision reflects the interpretation of the right to a fair trial consistently held by the ECtHR, as a fundamental guarantee that is not, as emphasized by the CJEU, an absolute right.⁷⁵ The ruling further stresses that a stringent interpretation of the grounds for non-execution is in line with Article 53 of the Charter. Building on the primacy of Union law, the CJEU held:

[w]here an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by

⁷¹ C-399/11 *Melloni* EU:C:2013:107.

⁷² *Ibid* para 44.

⁷³ Art. 4a (1) Framework Decision 2002/584/JHA.

⁷⁴ The question on whether European guarantees in *in absentia* proceedings are sufficient remain however unanswered. On this aspect, M Böse, ‘Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant’ in S Ruggeri, *Human Rights in European Criminal Law* (2015, Springer) 135, 141-142.

⁷⁵ Case C- 399/11 *Melloni*, paras 49 – 50.

the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised (...) Allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.⁷⁶

Consequently, Article 47 of the Charter must be understood as prescribing absolute standards of the right to an effective judicial review and the right to a fair trial, in as far as the application of stronger guarantees provided under the constitutional order of the executing Member State would frustrate the correct implementation of the Union instrument of mutual recognition.

5.2. *National margin of discretion*

Although the ruling in *Melloni* places paramount importance on the obligation for Member States to give effect to a EAW, it does not systematically rule out the possibility for the executing judicial authority to apply higher or additional fundamental rights standards of protection than those guaranteed by Union law. This has been confirmed by the CJEU in *Jeremy F.*⁷⁷ The French Constitutional Court referred a question for preliminary ruling on whether national procedures enabling the surrendered person to bring an appeal with suspensive effect against the decision to execute a EAW or a decision giving consent to an extension of the warrant or to onward surrender is compatible with the Framework decision 2002/384.⁷⁸ At the outset, the CJEU recalled the ‘special importance’ that the right to an

⁷⁶ Ibid paras 60 and 63.

⁷⁷ Case C-168/13 PPU *Jeremy F.* EU:C:2013:358.

⁷⁸ Besides the right to access a court, the preliminary ruling further raised questions related to constitutional review in the field of Union law. See for instance, F-X Millet, ‘How much lenience for how much cooperation? On the first

effective remedy holds both in extradition and surrender proceedings,⁷⁹ while clarifying the scope of review that respectively falls within the jurisdiction of the issuing and the executing authorities. On the one hand, remedies available in the issuing Member State enable the person to be surrendered to challenge ‘the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order’.⁸⁰ By contrast, the dispute in the main proceedings calls into question the judicial review of the decision to execute a EAW adopted in the executing State. Thus, appeals against such an act neither encroach upon the jurisdiction of the judicial authorities in the issuing State, nor does it impinge on the effective protection of fundamental rights in the issuing State.

The Court further noted that the Framework decision leaves to the discretion of the national competent authorities the specific manner of implementation of the surrender procedure.⁸¹ Indeed, no express provision obliges nor precludes the Member States to allow the surrendered person to bring an appeal against the decision to execute a EAW⁸². Consequently, the CJEU held that:

provided that the application of the Framework Decision is not frustrated (...) it does not prevent a Member State from applying its constitutional rules relating *inter alia* to respect for the right to a fair trial. It follows that (...) the Framework Decision must be interpreted as not precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority which rules on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to his surrender pursuant to a European arrest warrant, other than that for which he was surrendered, or to the surrender of a person to a Member State other than the executing Member State, pursuant to a European arrest warrant issued for an offence committed prior to his surrender.⁸³

preliminary reference of the French Constitutional Council to the Court of Justice’ (2014) 51 CMLRev 195.

⁷⁹ Case C-168/13 PPU *Jeremy F*, para 42.

⁸⁰ *Ibid* para 50.

⁸¹ *Ibid* para 52.

⁸² *Ibid* paras 37 – 38.

⁸³ *Ibid* paras 53 and 55.

Such a possibility, however, comes up against certain limits, consisting in the prohibition of disregarding specific rules set out in the Framework decision and, thereby, frustrate its very objective of establishing accelerated and simplified surrender proceeding.⁸⁴ In particular, the additional remedy provided under the law of the executing State must nonetheless comply with the time limits specifically set forth by the Framework Decision for taking the final decision on the execution of the arrest warrant.

6. Conclusions

The increasing number of legal instruments adopted by the EU in criminal matters means that the CJEU is persistently confronted with a delicate and challenging exercise: the necessary ‘triangulation’ between the fundamental rights standards provided under the EU Charter, the level of protection guaranteed under the abundant and ever evolving case law of the ECtHR and in the constitutional legal orders of the Member States.⁸⁵ The question is all the more thorny where Article 47 of the Charter touches upon the very structure of the national criminal justice systems when they must ensure the effectiveness of Union law. Against this background, general provisions governing the application of the Charter do not entirely answer the question. Admittedly, Article 52(3) and 53 require the EU to provide at least the same level of protection of fundamental rights enshrined in the Charter as that guaranteed under the corresponding guarantees afforded by the ECHR, ‘without thereby affecting the autonomy of Union law’.⁸⁶ Likewise, where the Member States are implementing Union law, they shall provide, as a minimum, the same level of protection afforded by the Charter,⁸⁷ which might be more extensive when compared to the Convention.⁸⁸ But can the Member State apply higher constitutional guarantees in line with the ECHR

⁸⁴ H Labayle, R Mehdi, ‘Le droit au juge et le mandat d’arrêt européen : lectures convergentes de la Cour de justice de l’Union européenne et du Conseil constitutionnel’ (2013) 4 RFDA 691, 695 ff.

⁸⁵ M Daniele, ‘La triangolazione delle garanzie processuali fra diritto dell’Unione europea, CEDU e sistemi nazionali’ (2016) 4 Diritto penale contemporaneo 48.

⁸⁶ S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: a commentary* (Hart Publishing, 2014) 1498.

⁸⁷ Art. 51(1) EU Charter.

⁸⁸ Art. 52(3) EU Charter.

where they are likely to frustrate the primacy and effectiveness of Union law? The CJEU answered in the negative,⁸⁹ in as far as it is not possible for the national judge to interpret domestic law in compliance with EU legal instruments.⁹⁰ In these circumstances, Article 47 of the Charter must be understood as providing maximum standards of protection.⁹¹

Hence, the procedural autonomy that Member States enjoy under Union law is conceptually different from the national margin of appreciation under the Convention.⁹² The latter only aims at providing minimum common standards of protection and, therefore, leaves room for discretion in implementing those standards where domestic authorities are better placed ‘to evaluate local needs and conditions’ that are likely to collide with European fundamental rights.⁹³ In contrast, Union law does not only provide minimum requirements for the protection of fundamental rights. It further relies on the national criminal enforcement systems and harmonized national criminal procedures for the sake of ensuring the effective implementation of EU rights and obligations. From this perspective, the national procedural autonomy draws its *raison d’être* from the principle of indirect administration. Deference to national law thus reflects the institutional sharing of competence between the EU and the Member States. Therefore, procedural autonomy reaches its limits in those Union legal provisions that pre-empt the leeway of the Member States in implementing both individual rights and repressive measures provided under Union law. These considerations put the procedural autonomy of national criminal justice at the heart of fundamental questions inherent in the construction of an integrated European penal area, among which is ensuring the effective judicial protection of defence rights that are now harmonized by the ABC Directives.

⁸⁹ C- 399/11 *Melloni*.

⁹⁰ Case C-168/13 PPU *Jeremy F*

⁹¹ M Safian, D Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU’ (2014) 33 Yearbook of European Law 3, 38.

⁹² *Ibid* 4.

⁹³ W Schabas, *The European Convention of Human Rights. A Commentary* (Oxford University Press, 2015) 78 ff.

PART III

**DEFENDING THE RIGHTS OF
SUSPECTS AND ACCUSED PERSONS
IN FRONT OF NATIONAL CRIMINAL COURTS**

CHAPTER I
BELGIUM

*Michele Panzavolta*¹

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Competent judicial authorities. – 2.2. Scope of review. – 2.3. Exceptions. – 2.4. Remedies available to the defendant. – 3. Deprivation of liberty: Arrest and pre-trial custodial measures. – 3.1. Information about available remedies. – 3.2. Arrest, *habeas corpus* and judicial review. – 3.3. Detention pending trial. – 3.4. Arrest and detention order for questioning. – 4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information. – 5. Sanctions against illegal or improperly obtained evidence. – 5.1. Infringements to the right of access the case file. – 5.2. Statements obtained in breach of the right to access a lawyer. – 5.3. Breaches of the right to translation and interpretation. – 5.4. Failure to provide information about rights and about accusation. – 6. Appeals against conviction and sentence. – 7. Appeals in cassation. – 8. Access to the Constitutional Court. – 9. EAW and judicial review. – 9.1. Competent judicial authorities. – 9.2. Judicial review by the Belgian executing authorities.

1. Constitutional guarantees

The Belgian Constitution spells out the fundamental rights of

¹ This chapter is the follow up of the earlier national report which I drafted in cooperation with Marie Horseele, Frank Verbruggen, Katrien Veresschen. I wish to thank my colleagues for their invaluable input in the preliminary report. While credits need to be equally shared with all my colleagues, any errors in the text are my sole responsibility.

individuals. Article 12 protects the right of liberty of people, by also making reference to the principle of legality, which principle is also affirmed in article 14 of the Constitution. Article 12 section 2 stipulates in fact that ‘nobody can be prosecuted but in the cases and with the forms foreseen by the law’. By making reference to the prosecution (and not to the punishment) of an individual, the provision clearly encompasses the principle of legality also within procedural law. Furthermore, while the word ‘case’ refers to substantive criminal law, the term ‘forms’ (*de vorm* in Dutch/ *la forme* in French) is a clear reference to the procedural provisions. Literally read the provision does not however confer the right to a review of the status of detention, although it could be argued that such right derives from the provision of section 2 and from that of the following section. Article 12 section 3 in fact states that a person can be deprived of the liberty without judicial authorization only for 48 hours.

There is no express provision under Belgian Constitution concerning the right of defence. Likewise there is no express provision concerning the right of access to a court. An indirect form of protection could be at most be inferred from Article 13 of the Belgian Constitution, which asserts the right to a lawfully established judge (*‘juge naturel’*).²

It should be noted, however, that Article 13 and 6 ECHR (the latter implicitly comprising – according to the case-law of the European Court of Human Rights (ECtHR) – the right to access to court) have direct effect into the Belgian legal order. Indeed, the Belgian Supreme Court (Court of Cassation) as well as the Belgian Supreme Administrative Court (*Hoge Raad, Conseil d’Etat*) have explicitly held that Belgium is a monist system, by which international treaties (once signed) have direct effect into the Belgian legal order. Moreover, the Belgian Constitutional Court draws heavily on the case-law of the ECtHR and it is often the case that national constitutional provisions are read in line with the reading given by the Strasbourg level to equivalent rights in the European Convention on Human Rights (ECHR). The Court has proved to be ready to quash an act of Parliament if it infringes a provision of the Belgian Constitution ‘read in conjunction with’ the ECHR.

Likewise, the Belgian Constitution does not expressly guarantee the

² Art. 13 of the Belgian Constitution reads ‘No one can be diverted, against his will, from the judge that the law has assigned to him.’

right to appeal against conviction and sentences. The recognition of such right within the Belgian legal order derives from the 2012 ratification of Protocol 7 of the ECHR: since then the international provision has direct effect into the Belgian legal order with a role equivalent to a constitutional rule.

2. Investigative measures subject to prior judicial authorization

2.1. Competent judicial authorities

The Code of Criminal Procedure (CCP) distinguishes between two main types of investigations. One is the preliminary investigation conducted by the Public Prosecutor (*information* in French, *opsporingsonderzoek* in Dutch)³ and the other is the judicial investigation led by the Investigating Judge (*instruction* in French, *gerechtelijk onderzoek* in Dutch).⁴ The first type is more informal and, safe for some exceptions, it does not allow the Prosecutor to perform intrusive or coercive activities but with the consent of the concerned person.⁵ The judicial investigation is more formal, being led by the Investigative Judge and it permits the judge to take the needed coercive or intrusive measures.

The traditional rule is that the Public Prosecutor must give way to the investigating judge if coercive or intrusive activities need to be performed, by requesting the opening of a judicial investigation. In this case, the Public Prosecutor must make a written request to the Investigative Judge, handing over the case-file. Coercive measures taken by the Investigative Judge encompass, for instance, house searches⁶ and access to private domiciles,⁷ the taking of bodily samples and other corporal analysis,⁸ digital searches and interceptions of communications,⁹ localization of communications.¹⁰ The Investigative Judge can order any coercive investigative activities upon a written request by the Public Prosecutor, by a private party

³ Art. 28*bis* CCP.

⁴ Art. 55 CCP.

⁵ See the exceptions below.

⁶ Art. 89*bis* CCP.

⁷ Art. 89*ter* CCP.

⁸ Art. 90 CCP.

⁹ Art. 90*ter* CCP.

¹⁰ Art. 88*bis*.

(the defence or the civil party)¹¹ or of his own motion. The Investigative Judge orders the investigative measure by sending a written warrant to the police officers that conduct the criminal investigation in the field.

Over the time, however, the lawmaker has introduced the possibility for the Public Prosecutor to obtain a judicial authorization for coercive measures from the Investigating Judge without having to start a judicial investigation, i.e. without ceasing the lead of the investigation to the judge. This possibility is called '*mini-instructie*' (mini-judicial investigation).¹² When requested of a measure in the context of a *mini-instructie*, the Investigative Judge decides on the prior authorization of the investigative measure and oversees its execution. Subsequently, the case-file is sent back to the Public Prosecutor for the following investigative steps. The Investigative Judge, however, retains the possibility to take over the criminal investigation, after being requested of the authorization of the act in a *mini-instructie*, thus formally opening a judicial investigation *motu proprio*.¹³ The possibility of a *mini-instructie* is however excluded for some specific coercive measures: the issuing of an arrest warrant, a secret digital search or the interception of communications,¹⁴ a house search,¹⁵ the decision to adopt a special procedure for hearing threatened witnesses.¹⁶ In these four cases, the Public Prosecutor has no alternative but to request the opening of a judicial investigation. In other words, the carrying out of these acts mandates that the judge take the lead of the investigation.

2.2. Scope of review

The scrutiny exercised by the judge on the authorization of the measure depends on the requirements set out by the law for each coercive/intrusive measure. The judge (and the prosecutor, in the cases where he is empowered to act without judicial authorization)¹⁷

¹¹ Art. 61quinquies CCP.

¹² Art. 28septies CCP.

¹³ He does not have this power when he refuses to authorize the requested investigative measure.

¹⁴ Art. 90ter.

¹⁵ Art. 89bis.

¹⁶ Art. 86bis CCP.

¹⁷ See *infra*.

must follow the conditions provided for by the law for each specific activity.

As a general rule, all investigative activities can be ordered only if they can obtain relevant and useful information for the case. The CCP does not explicitly set out a general obligation to motivate the warrant. However, some provisions of the Belgian Code of Criminal Investigation require a warrant for a specific investigative measure to be reasoned.¹⁸ Likewise, the provisions of the code concerning investigative activities do not always explicitly require an assessment of the necessity, subsidiarity or proportionality of the investigative measure.¹⁹ The principles are however to be considered implicit in the system, at least with regard to coercive measures. The Prosecutor or the Investigating Judge should always assess whether a measure is necessary to move the investigation forward, whether the measure is proportionate to the investigative aim and whether less intrusive measures are available to reach the same investigative aim.²⁰

When the act becomes more intrusive the law adds further conditions. Sometimes the availability of the act is limited to more serious crimes. In some cases, the law expressly clarifies that the judge must control the proportionality of the measure: this is for instance the case when the judge orders the localization of communications,²¹ or to produce the subscriber data of internet users.²² A proportionality check is expressly required also when requesting passengers' data.²³ In these three instances, the law also mandates the authority to control the subsidiarity of the measures, by ensuring that no other measures would be available or would be useful to find the needed information. A subsidiarity check is also expressly mandated in further instances: for example, when ordering a secret digital search or an interception of communications,²⁴ an

¹⁸ Eg a warrant authorizing an interception of communications under Art. 90 *ter* CCP or a warrant ordering the extraction of DNA-material provided in Art. 90-*undecies* CCP.

¹⁹ It is only in some cases that the provisions of the CCP make explicit mention of these requirements. Eg a warrant authorizing the collection of traffic data, or the interception of communication under Art. 91*quater* CCP.

²⁰ This conclusion can also be derived particularly by the case-law of the ECtHR, notably with regards a warrant authorizing a house search.

²¹ Art. 88*bis* CCP.

²² Art. 46*bis* section 3 CCP.

²³ Art. 46*septies* CCP.

²⁴ Art. 90*ter* CCP.

access in private places²⁵ or when authorizing the establishing of digital contacts with people on the internet.²⁶

2.3. Exceptions

As mentioned above, the principle that only the judge can authorize coercive acts undergoes some exceptions. Firstly, there are some coercive acts which the Public Prosecutor can take of its own initiative: he can seize items relevant for the investigations;²⁷ he can order a search in a computer system as long as the search is not secret or he can order the seizure of digital data;²⁸ he can request subscriber information to internet service providers;²⁹ he can order a post operator to stop communications directed to the suspect (or connected to the suspect) and seize it;³⁰ he can request financial information from banks;³¹ he can order the police to enter private places (but not houses or domicile places);³² he can authorize the police officers to establish digital contact with people on the internet under a false identity;³³ he can obtain the passenger's records.³⁴ The list of measures which the Prosecutor can autonomously take and which interfere with people's liberties has grown over the years. In some cases it is based on the assumption that the interference with fundamental rights is very limited;³⁵ in other cases it is the sign of the intent to give the Prosecutor more powers in the context of the preliminary investigations.

It is important to note that when the Prosecutor has the power to order a coercive measure, this does not open the way to a further control of the judge. In other words, the Prosecutor's authorization is in itself sufficient and does not require a subsequent validation by the judge. It is only in very limited instances that the law requires a validation by the judge of the prosecutorial order.³⁶

²⁵ Art. 46quinquies CCP.

²⁶ Art. 46sexies CCP.

²⁷ Art. 39 CCP.

²⁸ Art. 39bis CCP.

²⁹ Art. 46bis CCP.

³⁰ Art. 46ter CCP.

³¹ Art. 46quarter CCP.

³² Art. 46quinquies CCP.

³³ Art. 46sexies CCP.

³⁴ Art. 46septies CCP.

³⁵ Eg the cases under Art. 46 bis and 46 quarter.

³⁶ See for instance Art. 88 bis section 6 CCP.

Second, the Public Prosecutor can order investigative measures without the prior authorization of the Investigative Judge when a person is caught red handed in the act of committing of a crime (*in flagrante delicto*). When a crime is discovered *in flagrante delicto*³⁷ or in situations which are equated by law to a discovery *in flagrante delicto* (that is, when a suspect is caught immediately after the commission of a crime, or when he is caught in the act of fleeing, or when he is found shortly after the crime in possession of the tools used to commit the crime or of other objects or documents connected to the crime), the prosecutor enjoys larger prerogatives.³⁸ The underlying assumption is that in these situations there is a greater need to act swiftly and a lower risk of arbitrariness from the Public Prosecutor. These special investigative powers of the Public Prosecutor persist as long as the public prosecutor does not interrupt his investigation on the spot, and in any case within 24 hours.

It should be noted, however, that some investigative measures cannot be ordered by the Public Prosecutor even in cases of *in flagrante delicto*, safe for very specific types of crimes. As an illustration thereof, one could mention the case of the interception of communications. Even in cases of *flagrante delicto*, the Public Prosecutor can order the interception of communication without the warrant of an Investigative Judge only in case of kidnapping or malevolent phone calls.³⁹

A final exception is the case of the proactive inquiry (*proactive recherche*). In this case the police can resort to special investigative techniques (*bijzondere opsporingsmethoden*) under the control of the Public Prosecutor (observation, infiltration and use of informants).

2.4. Remedies available to the defendant

The defendant cannot file an appeal against an investigative measure taken by the Investigative Judge (or by the Prosecutor). However, there are some remedial actions that are available to the defendant either immediately during the investigations, either at the end of the investigative stage.

The first possibility is named '*kort geding*' and it has a limited

³⁷ Art. 41, para 1 CCP.

³⁸ Art. 41, para 2 and Art. 46 CCP.

³⁹ Art. 90ter, para 6 CCP.

scope. If the measure has caused damage to the property of someone, the person who suffered the damage can request the Investigating Judge⁴⁰ or the Prosecutor⁴¹ the removal or the lifting of the measure. If the Prosecutor dismisses the request or provides no answer, the person can take the case in front of the Chamber of accusation (*Chambre des mises en accusation, Kamer van inbeschuldigingstelling*). Likewise the decision of the investigating judge can be appealed in front of the Chamber of accusation. In the majority of cases, this course of action is taken against decisions to seize goods. Although infrequent, it could however also be taken against any other investigative decision, provided that it has caused damage to the person property.

The second possibility is to challenge the validity of the measure at the end of the investigative stage (or at the beginning of the trial if the defendant is taken to trial directly). This can be done in connection with the rules on nullities. In some cases in fact, the law states that some of the conditions to adopt or execute an investigative activity are so essential that their lack of respect causes the measure to be null and void. The nullity of the measure can be challenged at the end of the judicial investigation in front of the judge tasked to control the legality and correctness of such investigation. The decision of the Chamber of the council (*Raadkamer*) can then be appealed in front of the Chamber of accusation. If the defendant is taken directly to trial by the Public Prosecutor (which can happen if no judicial investigation is opened), then the nullity challenge can be brought directly in front of the trial judge.

3. Deprivation of liberty: Arrest and pre-trial custodial measures

3.1. Information about available remedies

The Belgian system of deprivation of liberty is only to a limited extent regulated in the CCP. The largest part of the relevant rules is in fact to be found in a separate act, the statute of 20 July 1990 on pre-trial custody.⁴² The Belgian system is organized around a system of mandatory controls, whereby the decision to arrest a person and keep her in custody is placed under scrutiny at regular intervals. This does

⁴⁰ Art. 61*quater* CCP.

⁴¹ Art. 28*sexies* CCP.

⁴² *Wet betreffende de voorlopige hechtenis in Dutch / Loi relative à la détention préventive*, OJ 14.08.1990, hereinafter Pre-Trial Custody Act.

not exclude that further remedies are available at the initiative of the parties.⁴³ It is not the case however that the suspect is informed of the available remedies. No provision of the CCP carries an explicit obligation to inform the suspect neither of the automatic controls nor of the further remedies that can be triggered by the defence. The lack of information is problematic in two ways: with regard to the automatic controls, because it might affect the effectiveness of the defence if the suspect is left completely unaware of the subsequent procedural steps; with regard to the controls available on request, because the lack of information might preclude the suspects from availing themselves of the possibility.

3.2. *Arrest, habeas corpus and judicial review*

There are two possible scenarios for arresting a person. The first is the case of a person caught in the act of committing a crime (*in flagrante delicto*) or in equivalent situations (e.g. fleeing immediately after the commission of a criminal offence or being in possession of objects related to the crime shortly after the commission of the crime). In this case, the person can be arrested by the police or even by a private individual. The crime must be of some gravity, which means that minor offences (in Dutch *overtredingen*, in French *contraventions*) are excluded. Under Belgian law the formal decision to arrest must in this case be taken by a policeman who holds the rank of ‘officer’,⁴⁴ although the moment of arrest – which is relevant for determining the duration of the deprivation of liberty – is to be determined from the moment a person can no longer freely decide to come and go as pleased. When a suspect is arrested by a private individual, the moment of arrest coincides with the moment in which a police (wo)man has been informed.

The second is the situation of arrest of somebody who has not been caught in the act of committing a crime. Here it is the Public Prosecutor who can order to arrest a person under the condition that there exist serious elements pointing to the guilt of the person.⁴⁵ If a judicial

⁴³ See *infra*.

⁴⁴ Police officers have greater seniority than police agents. Police agents can however prevent the suspect of a crime caught red handed from fleeing but they have to immediately hand the person over to the police senior officer for the decision on arrest.

⁴⁵ The equivalent of the Anglo-Saxon subjective probable cause.

investigation has been opened, the arrest can be ordered under the same conditions by the Investigating Judge.

There is finally a third possibility. The Investigative Judge has the power to order that the person be brought in front of him for questioning, a situation which in practice equates to that of arrest. This decision is called order (or warrant) 'to bring the suspect' (*bevel tot medebrenging/ mandat d'amener*).⁴⁶

In all these situations, (arrest by the police, arrest by the Prosecutor or the Investigating Judge, order to bring the suspect issued by the Investigative Judge) the authorities can deprive the person of their liberty for 48 hours.⁴⁷ The 48 hours period is the result of a recent change in the law (and in the Constitution) enacted by the Parliament, which doubles the initial limit of 24 hours (although the old law provided for some possibility to extend the 24 hours period, which possibilities have now been abolished).

The arrested person (included the person apprehended by order of the judge) enjoys several rights. The main rule is to be found in Article 47*bis* § 4 CCP which states that suspects deprived of their liberty should be informed of the rights they enjoy according to the law on pre-trial custody. The following provision mandates that such communications be given in writing by means of a letter of rights.⁴⁸ According to the act on pre-trial custody, arrested suspects have the right to be assisted by a lawyer, the right to have a third person informed of the deprivation of liberty,⁴⁹ the right to medical assistance.⁵⁰ Furthermore, if the arrested person is questioned, the person is entitled to the communication of the further rights provided for by Article 47 § 2 CCP and by Article 24*bis*/1 CCP.

The safeguards surrounding arrest and *habeas corpus* can be divided in different categories. The first one encompasses the rights of the arrested person and information on the reasons for deprivation the liberty. As was just mentioned, arrested persons enjoy several rights

⁴⁶ Art. 3 of the Pre-Trial Custody Act. See *infra*.

⁴⁷ Art. 1, section 1, 1^o, Article 2 section 1, and Art. 3 section 2 of the Pre-Trial Custody Act.

⁴⁸ Art. 47 §5 CCP.

⁴⁹ The right to have a third person informed can be postponed by the Prosecutor or the Investigating Judge (depending on the phase of the investigations) if there is a urgent need to either prevent negative consequences for the life, liberty or physical integrity of people or to prevent situations that could harm the effectiveness of the proceedings.

⁵⁰ Art. 2*bis* of the Pre-Trial Custody Act.

from the moment of deprivation of liberty: the right to a lawyer, the right to have a third party informed, the right to medical assistance. The law does not expressly state that the arrested person should be informed of the reasons of the arrest at the moment of arrest. A similar requirement can however be inferred from the provision of Article 5 § 2 ECHR. There is instead an express provision concerning the judicial order to accompany the suspect. The judge has in fact to give reasons for the order,⁵¹ which is then served on the stopped person.⁵² Reasons are also given in the custodial order issued by the investigating judge.⁵³ Furthermore, the investigating judge has to question the suspect before issuing the custodial order and before the beginning of the interrogation the judge has to concisely inform the suspect of the facts and circumstances on which he will be questioned.⁵⁴

Secondly, the arrested person has the right to be brought before a judge within 48 hours. Without a further judicial intervention the person must necessarily be released. The same judicial order to bring the person is valid only for 48 hours, despite the fact that it was issued by a judicial authority. Here too the judge will have to take a second decision (custody order) if s/he wants to keep the person in custody. Although a judicial intervention is needed to keep the person in detention for longer, Belgian law does not require judicial intervention if detention ceases within the first 48 hours.

A further guarantee lies in the mandatory involvement of a prosecutorial figure when the person is deprived of the liberty by the police. When a person is arrested by the police in a case of *flagrante delicto* or when the police has deprived a person of his liberty as a protective measure, the Public Prosecutor must necessarily intervene.⁵⁵ This offers them the opportunity to assess the legality of the arrest as soon as they are informed thereof by the police and take the subsequent necessary decisions. However such a control is not formalized in a written decision. If the prosecutor believes that the arrest did not meet the legal requirements, he can release the person immediately.

⁵¹ Art. 3 of the Pre-Trial Custody Act.

⁵² Art. 7 and 8 of the Pre-Trial Custody Act.

⁵³ Art. 16 § 5 of the Pre-Trial Custody Act.

⁵⁴ Art. 16 of the Pre-Trial Custody Act in connection with Art. 47bis, § 2 CCP, which also applies to interrogations by the Investigative Judge under Art. 70bis CCP.

⁵⁵ In the exceptional situation that the arrest is ordered by the Investigative Judge after the opening of a judicial investigation, it is then for the judge to assess the legality of the arrest.

The decision of arrest taken by the police or by the Public Prosecutor cannot be appealed before a court. However, since the person must be taken before the judge if the detention is to last more than 48 hours, the judicial authority has the opportunity to scrutinize the existence of the legal conditions to keep a person in custody. Nonetheless, the judge's intervention cannot be considered a form of review of the arrest, as it is confirmed by the fact that the judge is not even competent to take a decision if the arrested person is released within the first 48 hours. The law in fact stipulates that, when the authorities (the Public Prosecutor or the Investigating Judge) have ordered the arrest of a person outside of a situation of *flagrante delicto*, they can release the arrested person as soon as the detention is no longer necessary.⁵⁶ The competent judge will in fact have to evaluate whether or not, after the arrest (or the judicial order to bring the person), the conditions exist to issue a subsequent custody order (which conditions are stricter than those for arresting a person), but the judge is not specifically required to review the legality of the arrest.

The judicial order to bring the person before the court is not amenable to appeal, neither is it subjected to some forms of further review of scrutiny. It is however interesting to note that Article 15 of the Law of 20 July 1990 on pretrial detention explicitly states that the Investigative Judge and the registrar (and also the court) can be criminally fined, can be subjected to disciplinary actions and can – contrary to the ordinary rule – even be held personally liable for damages when they issue an illegal order.

3.3. *Detention pending trial*

The suspect who represents a danger for public security can be placed in detention during the investigative phase, and even after the trial has started and while the trial is running. The decision to place a person in pre-trial custody is taken by the Investigating Judge. It is solely this authority that is competent for ordering a detention longer than 48 hours.

When the arrested person is brought in front of the Investigative Judge, the latter decides whether or not to emit a custodial order (*bevel tot aanhouding, mandat d'arrêt*), by which the person

⁵⁶ Art. 2, 5° of the Pre-Trial Custody Act, which is also applicable when the arrest is made in *flagrante delicto*.

remains in custody. The issuing of a custodial order requires the existence of some substantive conditions. First, the crime must be punishable with a prison sentence of at least one year. Second, there must be serious elements that the crime was effectively committed by the person. Third, there must be an absolute need for the public security to keep the person in custody. Such a requirement is more stringent if the crime of which the person is a suspect is not of the most serious kind. The relevant legal threshold is whether the crime can be punished with a prison term of more than fifteen years. If the crime remains below this threshold (i.e. its maximum prison penalty does not exceed 15 years), there must then be one of three legally identified reasons: a) there are serious reasons to believe that the suspect might commit new crimes of a certain gravity (not misdemeanours); b) there are serious reasons to believe that the suspect might escape justice; c) there are serious reasons to believe that the suspect might tamper with the evidence or might collude with others.⁵⁷ Furthermore the judge must hear the suspects,⁵⁸ so that they can give reasons to dispel the suspicion or to exclude the need to keep them in custody.⁵⁹

The custodial order can be issued by the investigating judge even outside of a situation of arrest. The judge can for instance issue a custodial order after the issuing of an order to bring the person (*bevel tot medebrenging*); or it can issue a custodial order upon the request of the public prosecutor without the person having been previously arrested, because the person is on the run or has fled.

The judicial custodial order possesses however a limited temporal validity. On its basis the person can remain in custody only for five days.⁶⁰ Within this timeframe a new decision must be taken to confirm the custody order. It is once again a judicial decision, but this time it is in the hands of the Chamber of council (*Chambre du*

⁵⁷ Art. 16 § 1 section 4 of the Pre-Trial Custody Act.

⁵⁸ Unless the suspects have fled or could not be found, as provided by Art. 16 § 2 of the Pre-Trial Custody Act. If the judge does not proceed to the questioning the suspect must be immediately released.

⁵⁹ It is worth mentioning that the custodial order can be issued by the Investigating Judge even outside of a situation of arrest. The judge can for instance issue a custodial order after the issuing of a *bevel tot medebrenging*. Or it can issue a custodial order upon the request of the Public Prosecutor without the person having been previously arrested, because the person is on the run or has fled.

⁶⁰ Art. 21 § 1 of the Pre-Trial Custody Act.

conseil, Raadkamer).⁶¹ As already said, and despite its name, the Chamber of council is today composed by a single judge, who is not involved in the investigations, unlike the investigating judge. This second judicial figure is therefore more distant from the case and can have a more unbiased reading of the information contained in the file, which enhances the impartiality of the control.

The Belgian system of custody is structured along the idea of periodical controls. Periodically the decision to keep someone in custody must be reassessed in order to ensure that the conditions to keep the person detained still exist. This is achieved by confining the validity of each decision within strict temporal boundaries. The decision of the Council Chamber to confirm the detention remains valid only for a month.⁶² A longer detention requires therefore a new confirmation decision. The second decision of confirmation is also only valid for a month. The Council Chamber will thus have to intervene once more for the person to be kept longer in detention. From then on (i.e. from the third decision), each further confirmation is valid for two months. Periodically (on a bimonthly basis) the Council Chamber will therefore have to reconsider the need to keep the person in custody.⁶³ Each decision of confirmation is taken after a hearing where the suspect and his lawyer have the right to bring forward their arguments.⁶⁴

The control of the Council Chamber is *ex officio*, meaning that it takes place without any formal request by the parties. If the Council Chamber does not perform its control, the person is immediately released. The control is therefore mandated only if the authorities intend to keep the person in detention.

The custody order of the Investigating Judge cannot be appealed in front of higher courts.⁶⁵ The reason for not allowing an appeal is simply due to the fact that in any case the decision of the Investigating Judge must be mandatorily reviewed by the Council chamber within five days. The possibility of appeal is available against the decisions Council Chamber. The appeal is brought before the Chamber of accusation.

The decisions of the Chamber of accusation on appeal can be

⁶¹ Art. 21 § 1 section 2 of the Pre-Trial Custody Act.

⁶² Art. 21 § 6 of the Pre-Trial Custody Act.

⁶³ Art. 22 of the Pre-Trial Custody Act.

⁶⁴ See *infra*.

⁶⁵ Art. 19 § 1 of the Pre-Trial Custody Act.

challenged before the Court of cassation. A recent statute had introduced a strong limitation to this further right of appeal by providing that only the appeal decision against the first decision of confirmation of the Council of chamber (on appeal) could be taken before Court of Cassation.⁶⁶ The limitation was however quashed by a recent decision of the Constitutional Court, which restored the previous situation.⁶⁷

3.4. *Arrest and detention order for questioning*

As was mentioned above, the Investigating Judge can obtain the appearance of the suspect in order to question him (*bevel tot medebrenging/ mandat d'amener*).⁶⁸ The order to bring the suspect before the judge largely corresponds to a decision of arrest. It can be taken if a judicial investigation has been opened⁶⁹ but it could also be adopted by the judge at the prosecutor's request within a *mini instructie* (*mini-judicial investigation*).

The police agents must apprehend the person and they have to bring it before the Investigating Judge for questioning. Unlike the decisions to arrest, the order to bring the person expressly stipulates the reasons behind the order. Furthermore the order is specifically intended to question the suspect. The questioning must take place without unnecessary delay from the moment in which the order is served.⁷⁰

4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings

4.1. *Restrictions on the right to access the case file*

Under Belgium criminal procedure, the suspect enjoys a limited right to discovery. The phase of the investigation is in fact a stage characterized by secrecy. This applies to the preliminary investigations of the Prosecutor as well as to the judicial investigation led by the

⁶⁶ Art. 31 of the Pre-Trial Custody Act.

⁶⁷ Decision of the Constitutional Court of 21 December 2017, n. 148/2017.

⁶⁸ Lastly, the law also provides for a similar order with regards to persons other than the suspect: it is in that case an order to bring the person. This can be done if the presence of another person is necessary with a view to collecting some evidence.

⁶⁹ The Public Prosecutor could also request the opening of a judicial investigation when filing the request to the judge for the issuing of an order to bring the suspect.

⁷⁰ Art. 5 law of the Pre-Trial Custody Act.

Investigative Judge. The principle entails that, as a rule, the suspect does not have access to file during this stage.

There are, however, some exceptions, which have grown over the time. First of all, the suspect can always ask the Prosecutor (in the phase of the *information/opsporingsonderzoek*) to have access to the file, which request can be granted by the competent authority.⁷¹ The Prosecutor has (a rather long) term of four months to take a decision on the request. He can turn down the request for the reasons expressly listed in the law. This is the case if the needs of the investigation require that secrecy be kept or if the lifting of the secrecy might be dangerous for people or could undermine the privacy of people. In any case the Prosecutor should reject the request if the person does not offer a good reason to inspect the file. The request is turned down also if the file contains only the complaint or if the counsel already had access to the file. Moreover, the request will be rejected if meanwhile a judicial investigation has been opened, or the case has been referred to the trial court.⁷²

A similar request can be made to the Investigating Judge in the context of a judicial investigation.⁷³ The judge has to take a decision within a month from the request. He can also allow the request only in part, by giving access to only some elements of the case-file. The Public Prosecutor can oppose the decision of the Investigative Judge to grant access to the defence by appealing the decision before the chamber of accusation.⁷⁴ The judge can refuse the request for the reasons listed in the law (which mostly correspond with those available to the prosecutor, although some grounds are here not repeated). Such reasons are: 1) if the needs of the investigation so demand, or 2) if access might cause danger to people or might put the privacy of others at risk and, in any case, 3) whenever the claimant does not offer a legitimate reason for inspecting the file, thus justifying the lifting of the veil of secrecy.⁷⁵

The suspect enjoys in both the aforementioned cases only a power to request the access and it is in the hands of the discretion of the

⁷¹ Art. 21*bis* CCP.

⁷² Art. 21*bis* § 5 CCP. The list of grounds for rejections has been introduced only recently in consequence of the introduction of the possibility to appeal the refusal of the prosecutor to allow access to the file.

⁷³ Art. 61*ter* CCP.

⁷⁴ See *infra*.

⁷⁵ These reasons corresponds in large part to those for which the prosecutor can refuse the request.

authorities whether or not to lift the secrecy of the investigations. The reasons for which the request can be turned are so largely drafted that it is impossible to speak of a right to access the case-file. In practice it happens seldom that the authorities allow access to the file before they have completed the investigative activities. The parties can however file an appeal against the dismissal of the request before the Chamber of Accusation. Until recently this possibility was given only against decision of the Investigating Judge. The Constitutional Court found a breach of the principle of equality in that the dismissal of the Prosecutor was not amenable to appeal.⁷⁶ The lawmaker extended in consequence the same possibility of appeal against the decision of the Prosecutor.

A second minor exception to the secrecy of investigations lies in the right of the suspects to have a copy of the transcript of their interrogation. A further exception applies in case of custodial measures applied before trial. Indeed, the suspect placed in pre-trial custody has the right to access the case-file just before the hearing in front of the Council Chamber.⁷⁷ The suspects and their lawyer enjoy in this case a right to access to the elements of the case-file. No derogation is allowed. The Court of Cassation even ruled it an infringement that access to the file was given only to the counsel, and not to the suspect.⁷⁸ The defence has the right to have access to all the pieces of evidence that the Investigating Judge has at his disposal and that are relevant for the imposition and maintenance of the detention.⁷⁹ If the suspect is not granted access to the file, his right of defence is infringed upon and he must be released from pre-trial detention.⁸⁰ The person has the right to consult the case-file every time the Council chamber reviews the pretrial detention at regular intervals (at the latest 24 hours before the hearing).

The secrecy of the investigation naturally ends when the investigating authority believes that all relevant activities have been carried out and moves the case to the next procedural stage. In case a

⁷⁶ Belgian Constitutional Court, judgement n° 6/2017 of 25 January 2017.

⁷⁷ Art. 21, § 3.

⁷⁸ See Cass. 30 December 1997, P.97.1690.N, *Rechtskundig Weekblad* 1998-99, 364.

⁷⁹ Cass 13 August 1987, *Rechtskundig Weekblad* 1987-88,989; Cass 9 August 2011, P.11.1401.F.

⁸⁰ Tribunal Correctionnel Namur 16 June 1992, JLMB 1993, 25; Tribunal Correctionnel Namur 23 September 1999, *Revue droit pénal* 2000, 1092; R Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 611.

judicial investigation has been opened, the Prosecutor sends the file to the Council Chamber that decides whether the case should be sent before a court. The decision of the Council Chamber is taken at a hearing where the defence can participate. Before the hearing, the entire file is disclosed to the defence. Likewise, if no judicial investigation has been opened and the Prosecutor refers the case directly to the trial court, the defence has the right to have access to all elements of the file. The suspect has an unlimited right to consult the case-file at the registries office and to receive a copy of the case-file at the latest 15 days before the hearing of the Council Chamber.⁸¹

The right to have access to the case file can consist of the right to consult it at the registries office on the one hand, and to receive a copy of the case file on the other hand. The right to consult the case file at the registries office is free of charge. The right to receive copies is charged with a fee per page with an absolute maximum.⁸² A person with limited financial resources can however receive legal aid for these charges.

As mentioned above, during a criminal investigation led by the Public Prosecutor, the latter enjoys quite some discretion on whether or not to grant access to the case-file despite the recent introduction of an exhaustive list of grounds for which access can be refused. Such grounds are in fact worded rather broadly. The needs of the investigation can for instance cover a large range of situations. Furthermore the law requires that the person show a good reason for inspecting the file. If interpreted restrictively, this requirement could easily lead to a large number of refusals. During a criminal investigation led by an Investigative Judge, the law foresees fewer reasons for refusing access to file. Nevertheless it remains true that the grounds for refusing access are sufficiently broad to give the judge quite some room for manoeuvre.

Apart from these general aspects, there are also specific rules concerning restrictions to the right to access the case –file in specific situations. This is for instance the case with regard to the protection of methods of secret investigations and of the identity of the agents/officers involved therein. With regard to special investigative methods (observation, infiltration) the law provides that the information concerning the secret methods and techniques employed, and the information concerning the security and the identity of the policemen

⁸¹ Art. 127 CCP.

⁸² Copies are charged with 0,25 euros per page, with an absolute maximum of 1250 euros.

involved in the activities be kept only in a separate file to be maintained confidential at all times.⁸³ The suspect cannot have access to this confidential file, nor can the other parties. Besides the prosecutor (or the Investigative Judge in case of a judicial investigation), it is only the Chamber of accusation that can access the information within this separate confidential file with a view to exercising the legality control on these activities. Furthermore there are special rules which apply to the interceptions of communications: in this case the law provides for a selection of the information collected before their addition to the file.⁸⁴ Furthermore, for some investigative measures (interceptions of communications,⁸⁵ observation and infiltration⁸⁶) the results are added to the case-file only after the termination of the measure in order not to jeopardize the ongoing measure.

As was mentioned, the defendant can challenge the refusal to access the case file during the investigation. During a judicial investigation, the defendant has the right to appeal the decision of the Investigative Judge to refuse access to the file. The refusal is appealed to the Chamber of accusation within eight days from the notification of the decision of the investigating judge.⁸⁷ The defendant can also address his request directly to the Chamber of accusation if the Investigative Judge fails to take a decision on the formal request of the defendant to access of the case-file within a period of one month and 15 days.⁸⁸

There was instead until recently no possibility to appeal against the refusal to access the case-file during the preliminary investigation of the Public Prosecutor. The situation changed in consequence of a decision of the Belgian Constitutional Court, where the Court held that the Constitution and the ECHR both require a right to appeal the decision. Furthermore, the Court stressed the asymmetry with the situation of a request made to the Investigative Judge during a judicial investigation, where instead an appeal is possible.⁸⁹ The Court

⁸³ Art. 47*septies* (and 56*bis*) and 47*novies* CCP. The law provides in particular that the policemen draft two set of reports concerning the secret activities carried out. One is the set of full reports, which contain all information and which remain secret. The second is the set of open reports which are and which be placed in the ordinary file and then disclosed to the parties according to the ordinary rules.

⁸⁴ Art. 90*sexies* and 90*septies* CCP.

⁸⁵ Art. 90*sexies*, § 4 CCP.

⁸⁶ Art. 47*septies*, 47*novies*, 56*bis* last sentence CCP.

⁸⁷ Art. 61*ter*, § 5 CCP.

⁸⁸ Art. 61*ter* § 7 CCP.

⁸⁹ Belgian Constitutional Court, judgement n° 6/2017 of 25 January 2017.

concluded that until a legislative amendment was adopted, Article 61ter, §§ 5 and 6 CCP had to be applied by analogy to the case of a request made to the Public Prosecutor. The situation has now been remedied by the lawmaker with the Statute of 18 March 2018,⁹⁰ which entered into force on 12 May 2018. The statute rewrote Article 21-*bis* and in doing so it also introduced the possibility of appealing the refusal of the Public Prosecutor in front of the Chamber of accusation.⁹¹ The claimant has eight days to file the challenge. Moreover the law also introduced the possibility of bringing the request of access to the file to the Chamber of accusation if the Prosecutor remains passive and does not respond to the request within the time legally foreseen (three months, or four months in cases of *mini-instructie*) increased by fifteen days.⁹²

4.2. Derogations on the right to access a lawyer

The implementation in Belgian law of the right of access to a lawyer has undergone a winding path and it has required several legislative steps. The first one was taken as early as 2011, just after the decision of the European Court of Human Rights in the *Salduz* case. The first law of 2011⁹³ was based on the distinction between the right to consult with a lawyer and the right to have a lawyer present during the interrogation. The latter right was accorded only to suspects in custody, while the right to consult was given to all suspects for crimes for which an order of pre-trial custody could be imposed, with the exclusion of traffic offences. The act of 2011 recognized the right to access to a lawyer too narrowly. It was successfully challenged in front of the Constitutional Court in 2011.⁹⁴ The Constitutional Court listed several defects of the new act. It highlighted that the right to consult with a lawyer was excluded for a number of offences which could potentially lead to a prison sentence

⁹⁰ *Wet houdende wijzigingen van diverse bepalingen van het strafrecht, de strafvordering en het gerechtelijk recht, Loi modifiant diverses dispositions du droit pénal, de la procédure pénale et du droit judiciaire*, OJ 02.05.2018.

⁹¹ Art. 21 *bis* §7 CCP.

⁹² Art. 21*bis* § 8 CCP.

⁹³ *Wet tot wijziging van het Wetboek van strafvordering en van de wet van 20 juli 1990 betreffende de voorlopige hechtenis (wet Salduz)/ Loi modifiant le Code d'instruction criminelle et la loi du 20 juillet 1990 relative à la détention préventive (loi Salduz)*, OJ 05.09.2011.

⁹⁴ Constitutional Court, judgement no 7/2013 of 14 februari 2013.

and sometimes not even a lighter one. It also noted that in case of violation the rule did not require exclusion of the statements obtained in violation of the *Salduz* rules, but it permitted instead to use them for corroboration.

The decision of the Constitutional Court was then followed by a new act of 2014.⁹⁵ The act instated the changes brought about by the Constitutional Court, but it fell short of enacting sufficient rules for transposing Directive 2013/48/EU. Even after the law of 2014, only suspects deprived of their liberty had right to the presence of the lawyer during the questioning. The *Salduz* rules were applicable only to the first interrogation and not to following interrogations.⁹⁶ Furthermore, the possibility to have access to a counsel was not given for the other investigative acts foreseen in the directive.

The last step was taken in the last months of 2016, with the law of 21 November 2016.⁹⁷ The act constitutes implementation of the Directive and it is intended to bring Belgian law in line with the European rules on this matter. The distinction between the right to consultation before the questioning and the right to the counsel's presence during questioning is maintained, but both rights are now more largely granted than before.

Article 47bis § 2 provides that all suspects charged with a crime for which a prison sentence could be imposed have the right to consult with a lawyer before every interrogation. The right to consult with a lawyer before an interrogation is therefore not applicable for crimes for which the person does not face the risk of a prison sentence (e.g. crimes punished only with a fine). All suspects who face a possible prison sentence or other sentence entailing deprivation of liberty must be informed of their right to prior consultation with a lawyer. Likewise, they all have the right to the assistance of the counsel during the interrogation. There remains a difference, however, between those suspects facing a possible prison sentence who are deprived of their liberty and those who are not. In the former case, the authorities are

⁹⁵ *Wet van 25 april 2014 houdende diverse bepalingen betreffende Justitie/Loi portant des dispositions diverses en matière de Justice*, OJ 14 May 2014.

⁹⁶ This entailed in essence that the suspect needed not be informed a second time of his *Salduz* rights.

⁹⁷ *Wet van 21 november 2016 betreffende bepaalde rechten van personen die worden verhoord/ Loi relative à certains droits des personnes soumises à un interrogatoire*, JO 24.11.2016. See Y Liégeois, 'De 'Salduz+' wet van 21 november 2016: een nieuw hoogtepunt in het recht van toegang tot een advocaat onder dictaat van Europa' (2017) *Nullum crimen*, 105.

required to contact a lawyer for the person, while in the latter case they can remain passive after they have provided the information. It is the responsibility of the free suspect to contact a counsel and arrange all that is required for an effective legal assistance.

The circular of the college of General Prosecutors⁹⁸ summarizes the current situation by distinguishing between four interviewing regimes depending on the person to be interviewed.⁹⁹ The ‘*Salduz I*’ category refers to interviews of people who are not suspects. The ‘*Salduz II*’ category comprises the interviews of suspects of crimes for which no prison sentence can be imposed: they have no right to be informed of the right to counsel, although they can ask to be assisted by a lawyer if they so wish. The ‘*Salduz III*’ category is the interviewing regime of suspects of crimes for which a prison sentence can be imposed and who are not deprived of their liberty: they ought to be informed of the right to counsel before the interrogation but it is their entire responsibility to arrange for the legal assistance. The ‘*Salduz IV*’ category refers to suspects of crimes who could face a prison sentence and who are deprived of their liberty: these suspects must be informed of the right to counsel and the authorities are required to take an active stance in providing the suspects with a counsel of choice.

The category of suspect that receives the greatest protection is the latter, since they are in the vulnerable position of being deprived of their liberty. Article *2bis* of the law on pretrial custody stipulates that everyone who is deprived of their liberty (whether as a result of an arrest or of a warrant to bring the person) has from that moment and before the first subsequent interrogation by the police, the Prosecutor, or the Investigating Judge, the right to consult confidentially with a counsel of choice. In order to reach the elicited counsel or another counsel, contact is taken with the special permanent office managed by the bar council (*Orde van Vlaamse balies, Ordre des barreaux francophones et germanophone*). It is here for the prosecuting authority to take the initiative to contact the counsel, whether the one elicited by the arrested suspect or another one in case the suspect

⁹⁸ The General Prosecutors are the chiefs of each prosecution office at the level of the Court of Appeal. They compose a college that is entitled to issue directives and guidance on issues related to criminal justice through circular letters.

⁹⁹ Omzendbrief COL 08/2011, <https://www.om-mp.be/sites/default/files/u1/col_08_2011_-_versie_2017_fr_0.zip> (last accessed 30 July 2018).

does not give the name of a specific lawyer, but only with regard to the first interrogation.

Moreover, the law goes into further detail with regard to the position of the arrested person. The private consultation must take place within two hours from the moment in which the counsel is contacted. The lawyer and the client can agree for the consultation to take place telephonically. The consultation can last for thirty minutes and it is only in exceptional circumstances that the interviewing authority can allow a longer contact time. The questioning can begin once the consultation is over. If it turns out to be impossible to hold a confidential consultation within two hours, there must be in any case a telephonic consultation with the permanent office managed by the bar, before the interrogation can begin. The persons to be heard have the right to be assisted by their lawyer during the interview, as long as the interview is conducted within the two hours from the moment in which the counsel was contacted. The interview can be interrupted for a maximum period of fifteen minutes, with a view to allowing further consultation between the suspect and the lawyer, either upon request of the suspect or the counsel, or when new criminal facts come to light which could give rise to new charges.¹⁰⁰

The right to counsel for the suspect deprived of his liberty is not absolute, not only in that it can be restricted but also because it can be waived (art. 2*bis* § 6 law on pretrial custody). It is only the adult suspect who can waive the right. For juveniles the right to counsel is mandatory. The waiver must be done in writing, in a document which the suspect signs and dates, and where the suspect is informed of the possible consequences of waiving the right. The suspect is also informed that he can revoke his waiving decision. A point of ambiguity is whether the waiver of the right can be done only after having had telephonic contact with a counsel. In this respect Art. 2 *bis* § 3 of the law on pretrial custody provides that the suspect can waive the right to be assisted by a lawyer after a telephonic confidential discussion with the appointed counsel or the counsel of the permanent office, in which case the interrogation should be audio and video recorded – if possible – in order to allow a later control of the interrogation. The provision would seem to imply that the telephonic contact with the lawyer is a mandatory precondition for

¹⁰⁰ Ie new criminal facts other than those which should have constituted the object of the interview and of which the person was informed according to Art. 47*bis*, § 2 CCP.

waiving the right. Nevertheless, another provision in the same article leads to a different conclusion. Article *2bis* § 6, just after recognizing the possibility to waive the right to counsel, establishes that the suspect can request to have a telephonic contact with a counsel before taking the decision to waive the right. It appears therefore that a telephonic conversation with a lawyer is not always necessary for a valid waiver. Regardless of whether the counsel is present, the interviewing authority can always autonomously decide that the interrogation of the arrested suspect shall be audio and video recorded.

The law is far less detailed with regard to the rules applicable to the questioning of '*Salduz III*' suspects. Art. *47bis* § 2 stipulates that each suspect for an offence for which a sentence of deprivation of liberty can be imposed should be informed that he has the right to consult with a lawyer of choice and to be assisted by the lawyer during the interrogation. This information is provided together with a concise description of the facts and circumstances on which the suspect will be heard and the communication of further rights. The suspects must in fact also be informed i) that (after disclosing their identity) they can freely decide whether or not to make a statement or to answer the questions posed, ii) that they have the right not to self-incriminate, that their statements can be used in evidence, iii) that they can ask for the interrogation to be fully recorded, iv) that they have the right to leave the interrogation room whenever they want, v) that they can request the authorities to take a specific investigative measure, vi) that they can use documents.

The law then draws a differentiation between the situation of the suspect who receives a written invitation to appear for the interrogation and the situation of the suspect who is orally invited. If the suspect is invited orally to the interrogation, the competent authority must inform the suspect of all the aforementioned rights before the beginning of the interrogation and postpone the interrogation to allow the consultation with the counsel. However, the law does not clarify how long the consultation can last, whether it can take place telephonically and whether the counsel must arrive within two hours in order to assist the client during the interrogation, as it happens for apprehended suspects. It would seem sensible to make here analogic application of the more detailed rules that are applicable for suspects in custody, since the regime of safeguards applicable to apprehended suspects should not be less favorable than that applicable to other suspects.

After having been informed of his rights, the adult suspect can decide to waive the right to counsel. The decision of the free suspect

to waive the right to counsel is less formalized than the waiver of the suspect in custody. The waiver must be done in writing in a document which contains the information on the right to counsel and which warns on the consequences of the waiver. In any case the suspect is informed that he can withdraw his decision to waive the counsel.

Furthermore, specific rules apply for the case in which the suspect received a prior written invitation. If the suspect is summoned in writing, the summon must contain the information on the right to counsel and the other rights. Once provided in the written document, the information need not be given a second time before the beginning of the interrogation. The law explicitly states that if the suspect is summoned in writing, the suspect is presumed to have consulted a lawyer and to have taken the necessary steps in order to receive proper legal assistance during the interrogation. If the person appears at the interrogation without a lawyer, they shall only be reminded that they have a right to freely choose whether or not to give a statement or answer the question and that they have a right not to incriminate themselves. The presumption is consistent with the premise that free suspects (i.e. who are not deprived of their liberty) are responsible for arranging for legal assistance. It is nonetheless to be doubted whether such a regime is entirely in line with the provisions of the Directive 2013/48/EU. The presumption leads in fact to a situation that is factually equivalent to a waiver of the right to counsel.¹⁰¹ According to Article 9 of the Directive, waiver of the right must be done voluntarily, unequivocally and with knowledge of the consequences that the waiver entails. Furthermore, the Directive provides that the waiver must be done in writing, which would not be the case here.

In all cases of interrogation (interrogation of a free suspect, interrogation of a suspect in custody), the prerogatives of the lawyer during the interrogation are spelled out in Article 47-*bis* point 7) CCP. The provision addresses a point of longstanding discussion with regard to the demeanor of the counsel during the interrogation. The law clarifies the goals that the legal assistance should pursue. The assistance is intended to a) protect the right not to incriminate themselves of the persons interviewed, their free choice to give a statement, remain silent or to answer the questions; b) ensure that the

¹⁰¹ A sign of this equivalence is the fact that the legal provision on the position of the suspect invited in writing does not say anything concerning the waiver, while specific rules are laid out in the case of oral invitation (as was already mentioned in the text).

person is treated properly during the interrogation without use of unjustified force, intimidation or compulsion; c) ensure that the clients are informed correctly of their rights and that the interrogation is conducted lawfully. To this end the lawyer can point to any violations that occurs and request that his observation be recorded.

Besides this role as a watchdog of the clients' rights, the discussion centered mostly on the possibility for the counsel to take a more active stance during the interrogation. It was in particular debated whether and to what extent the lawyer could intervene on the merits of the interrogation and of the questions posed. The law now explicitly clarifies that during the interrogation the counsel can ask for clarifications on the questions asked, and s/he can make remarks over the investigations and the interrogation. The counsel can also request during the interrogation that a certain investigative act be taken, although the request is not binding for the prosecuting authorities. It is however precluded to the lawyer to answer a question in the place of the suspect and to obstruct the course of the interrogation. The interrogation is lead by the prosecuting authorities and the counsel cannot exercise any leading role in the asking of questions.

It is important to mention that the counsel should receive by the interviewing authorities some essential information on the charges before the interrogation begins. The provision of Article 47-*bis* point 6) states that the interviewing authorities should give concise information over the facts on which the person will be heard. This does not correspond to a right of information on the case-file. A delicate point is whether the interviewing authorities must give information on the crucial pieces of incriminating evidence against the client. Finally, Belgian law guarantees the right to have a lawyer present during a confrontation, a line-up and a reconstruction of a crime at the scene.¹⁰²

There are several situations in which the right of access to a lawyer can be restricted. It has already been pointed out that the arrested person has a right to consult confidentially with a counsel as long as the consultation takes place within two hours from the moment when the counsel was called. The interviewing authorities can therefore begin an interrogation without the assistance of a lawyer after having waited for two hours.¹⁰³ Furthermore, the same article provides that in cases of *force majeure* (*overmacht*) the interrogation of the arrested person

¹⁰² Art. 62 CCP.

¹⁰³ Art. 2*bis* § 2 of the Pre-Trial Custody Act.

can begin even without consultation but only after that the suspect has been reminded of the rights mentioned in article 47*bis*, § 2, 2) en 3) CCP.

Other possible reasons for derogations are to be found in other provisions of that same article. According to Article 2*bis* § 9 of the law on pretrial custody, the Prosecutor or the Investigating Judge (depending on the stage of proceedings) can exceptionally in light of particular (*bijzonder, particulieres*) circumstances of the case – and with a reasoned decision – derogate to the rights of consultation prior the interrogation and of assistance during the interrogation if there are compelling reasons to justify the derogation.¹⁰⁴ The lawmaker typifies the compelling reasons for which a derogation of the rights can be allowed. The first is a urgent need to prevent negative consequences for the life, the liberty or the physical integrity of a person. In such a case the interview is carried out with the sole purpose of collecting essential information to prevent the aforementioned negative consequences. The second reason is the need to take immediate action in order to prevent that the investigation would suffer significant harm. The interview can in this case be carried out only with a view to collecting the information that is essential to prevent harm to the proceedings.

Article 2*bis* § 10 of the act on pre-trial custody establishes that, without prejudice to Article 184*ter* CCP, the Prosecutor or the Investigating Judge (depending on the stage of the proceedings) can exceptionally derogate to the condition of promptness (*zonder onnodig uitstel*) foreseen in §§ 2 and 5, if the geographical distance from where the suspect is makes it impossible to allow access to a council within that timeframe and the exercise of these rights cannot be realized by means of telephone or videoconference. This provision is not applicable to the suspect who finds himself within the boundaries of the State according to Article 7 of the Constitution.

If the rules on the protection of the right to counsel are not respected, there are several consequences possible. With regard to the violation of the right of access to counsel in the context of the interrogation of the suspect, the natural remedy is the exclusion of the statements so obtained. Point 9) of Article 47-*bis* CCP provides that no conviction can be passed on the basis of statements obtained in violation of *Salduz* rights. In particular, the Article provides that the

¹⁰⁴ Art. 2*bis* § 9 of the Pre-Trial Custody Act.

statements cannot be used if there was a violation of the information that must be given to the suspects before the interrogation, or if there was a violation of the right to consult with the lawyer and/or to be assisted by the lawyer. The statements cannot be used also if the person was heard as a witness, gave self-incriminating statements during the interview, and was not then given the right to information and to access to counsel.

Although the law simply states that the conviction cannot be based on statements obtained in violation of *Salduz* rights, it is clear that that any use of the statements is precluded. The irregular statements cannot be used even for corroboration, i.e. to support other pieces of evidence.¹⁰⁵

The provision expressly refers to the prohibition to use statements for convicting the person, therefore allowing the possibility to use the statements irregularly obtained in favour of the defendant. The statements remain therefore in the dossier. The Court of cassation has in fact clarified that, since the violation of the *Salduz* rules does not constitute a nullity, the irregular statements need not be taken out of the file.¹⁰⁶

Furthermore, the case-law has endorsed the idea that the irregular statements cannot be used only against the maker of the statement but they can be used to convict other accomplices. The Court of cassation has at least in some decisions identified some limits to the use against third parties of the irregular statements, that is when the maker of the statements has later retracted its statements¹⁰⁷ and when the irregularity would seriously affect the reliability of the evidence.¹⁰⁸

Besides the exclusion of the statements, the violation of the rules on access to the counsel and assistance by the counsel can have other, more drastic consequences. It was already highlighted that the violation of the rules does not entail a nullity. Nonetheless, if the breach is very severe the judge could hold the proceedings to be inadmissible because of the breach of the right to a fair trial.¹⁰⁹ A similar decision can however be

¹⁰⁵ This is the consequence of a decision of the Constitutional Court that found that the earlier provision, for which the conviction could not be based 'solely' on the irregular statement, breached the Constitution.

¹⁰⁶ Cass., 16 February 2016, P.14.1935.N, *Tijdschrift Strafrecht* 2017, 202.

¹⁰⁷ Cass., 30 April 2013, P.12.1133.N, *Tijdschrift Strafrecht*, 2014, 117.

¹⁰⁸ Cass., 1 April 2014, P.12.1334.

¹⁰⁹ For the general statement that the proceedings are inadmissible if in grave breach of the right to fair trial: Cass., 18 March 2014, P.13.1407.N, *Tijdschrift Strafrecht*, 2014, 252.

taken only in cases where the violation persists and can no longer be remedied.

4.3. Decisions finding that there is no need for interpretation

Before sketching the shape of the right to interpretation and translation in Belgian criminal procedure, two preliminary remarks are necessary. First, it should be pointed out that the Belgian lawmaker was rather slow in implementing the Directive 2010/64/EU. This happened only with the Law of 28 October 2016,¹¹⁰ which contains a partial implementation of the aforementioned European Directive. Second, it must be observed out that the topic can only be understood properly in the context of the extensive rules of the Belgian legislation on the use of languages in criminal proceedings. Belgium is in fact a trilingual country, with French, Dutch and German as official languages. For this reason the rules on the choice of language in criminal proceedings are particularly developed.

The provisions of the CCP on the language of the proceedings are integrated by the rules provided for by the law 15 June 1935 on the use of languages in judicial cases (hereafter, Language Act).¹¹¹ According to these rules, criminal cases are normally handled in French or in Dutch, depending on where the case is conducted. During the investigations, the official investigative reports (*processen-verbaal*, *procès-verbaux*) are drafted in either French, Dutch or German, depending on the language of the region. In the municipalities of the Brussels area, the choice is between French and Dutch depending on the language spoken by the person involved, or on the necessity of the case. When performing their activities, the Prosecutors and the Investigating Judges make use of the official language of the judicial authority to which they belong.

The language of the trial is established on the basis of the location

¹¹⁰ *Wet van 28 Oktober 2016 houdende verdere omzetting van de Richtlijn 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolking en vertaling in strafprocedures en van de Richtlijn 2012/29/EU van het Europees Parlement en de Raad van 25 oktober 2012 tot vaststelling van minimumnormen voor de rechten, de ondersteuning en de bescherming van slachtoffers van strafbare feiten, en ter vervanging van Kaderbesluit 2001/220/JBZ*, JO 24.11.2016.

¹¹¹ *Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken/ Loi concernant l'emploi des langues en matière judiciaire*, JO 22.06.1935.

of the judicial authority which is handling the case. The law clarifies that the trial procedure before police courts and correctional courts of first instance should be done in French, in Dutch, or in German, depending on the province and judicial *arrondissement*¹¹² where the competent court. The law establishes which language should be used before the courts of each judicial *arrondissements*.¹¹³ For the court of assize the law clarifies the language of the proceedings on the basis of the province where the Court is located.¹¹⁴

Given the rules above, defendants have nonetheless the possibility during the trial stage to request that the case be sent in front of another Belgian court that speaks their language.¹¹⁵ This possibility to request the transferral of the trial to another court does not always correspond to a right to obtain such a transferral. If the case is dealt with by a lower court the defendant has no right that the case be taken elsewhere: the tribunal can decline the request of the defendant on the basis of the circumstances of the case.¹¹⁶ When the case is dealt with by the Court of Assize, the defendants enjoy instead a right that the case be tried in front of a court which speaks their language.¹¹⁷

The need for an interpreter obviously arises when the suspect does not have knowledge of the language used in the proceedings.¹¹⁸ In this

¹¹² The judicial *arrondissements* are the geographical units in which the country is divided with regard to the organization of the judiciary at the level of police courts and correctional courts.

¹¹³ The official language is the French language for the judicial *arrondissements* Hainaut (Henegouwen), Liège (Luik), Luxembourg, Namur (Namen) and Brabant wallon (Waals-Brabant), and for the French-speaking courts in the *arrondissement* of Brussels. The Dutch language is the official language for the *arrondissements* of Antwerpen (Anvers), Oost-Vlaanderen (Flandre orientale), West-Vlaanderen (Flandre occidentale), Limburg (Limbourg) en Leuven (Louvain) and for the Dutch-speaking courts of the *arrondissement* of Brussels. Further rules also apply for the Courts in the Brussel judicial *arrondissement* (see Articles 15 and 16 of the Language Act). German is used before the courts in the *arrondissement* of Eupen.

¹¹⁴ French for the provinces Henegouwen, Luxemburg, Namur and Waals-Brabant, Dutch for the provinces of Antwerpen, Oost-Vlaanderen, West-Vlaanderen, Vlaams-Brabant and Limburg. And, depending on the language spoken by the defendant, Dutch or French in the *administratief arrondissement* of Brussel capital, German or French in the province of Lieges.

¹¹⁵ Art. 23 of the Language Act.

¹¹⁶ Art. 23 section 4 of the Language Act, which in essence leaves the decision to the discretion of the court, without giving further guidance.

¹¹⁷ Art. 20 of the Language Act, which also requires that the defendant file his request in advance, during the committal procedure.

¹¹⁸ On this topic see, A-M Baldovin, 'Le renforcement du droit à l'assistance linguistique dans le cadre des procédures pénales' (2017) *Rev.dr.pén.* 236; Y Van

respect, Article 31 Language Act states that suspects have the right to speak the language of their choice during all questioning in the investigations, whether in front of the Prosecutor, in front of the Investigating Judge or in front of the Council Chamber or the Chamber of accusation. If the interrogating officers do not know the chosen language, they should then appoint a sworn interpreter.

Article 31 section 3 further clarifies that the party who does not understand the language in which the proceedings are conducted is assisted by a sworn interpreter, who translates all spoken statements.¹¹⁹ A new addition by the Law of October 2016 further states that the necessity of an interpreter is evaluated by the competent authority, in light of the phase of the procedure. The last section of Article 31 Language Act establishes that the costs of translation are borne by the State.¹²⁰

The right of suspects to be assisted by a sworn interpreter during an interview is further emphasized by Article 47*bis* § 6, 4) CCP. The provision refers here not only to the situation where the suspect (or the victim) does not speak or understand the language of the procedure, but also to cases where the interviewed person suffers from a listening or speaking deficit. If no sworn interpreter is available, the interviewed person is given the possibility to note down her statements autonomously, without leaving the task to the interviewing officers or a third person.¹²¹ A further provision is to be found with regard to the questioning of people in custody.¹²²

As was seen above, the decision concerning the need for interpretation or translation can be taken by the judge or the Prosecutor depending on the phase of the procedure. During the preliminary investigations, the competence lies with the Public

Den Bosch, 'Het recht op vertolking en vertaling in strafzaken & de omzetting van de EU-richtlijnen' (2017) *Tijdschrift Strafrecht* 96.

¹¹⁹ There is a separate provision for the trial phase. Art. 152 *bis* CCP states that if the defendant (like the civil party) does not understand or speak the language of the procedure or suffers from a speaking or hearing deficit, the Court appoints *motu proprio* a qualified interpreter. If the person suffers from a speaking or hearing deficit he or she also has the further right to be assisted by a person of confidence (see also Art. 282 and 283 CCP for the Court of Assize).

¹²⁰ A provision which predates the implementation Act of October 2016.

¹²¹ A similar, only slightly milder, rule applies to the interview of persons other than the suspect. See Art. 47*bis* § 6, 4) second period CCP. In this case, in the absence of a sworn interpreter it is possible that the statements given by the interviewed person are noted down (in the language in which they are given) by a third person.

¹²² Art. 2*bis* § 4 of the Pre-Trial Custody Act.

Prosecutor. During the judicial investigation it is the judge who decides on the presence and assistance of an interpreter.

A very sensitive issue concerns the determination of the ability of the person to speak or to understand the language in which the proceedings take place. It is generally considered insufficient that the person can utter or understand some words in the language of the proceedings.¹²³

Furthermore, it is observed that a person who does not speak (sufficiently) the language cannot be expected to request the assistance of an interpreter. The proceedings authorities have therefore a duty to actively check if the person understands the language of the proceedings.¹²⁴

Another problem refers to the difficulty of finding an appropriate and qualified interpreter. In some cases and for rare languages, it might be difficult to find a person available. In these circumstances the case-law gives precedence to the need for proceedings to move on over the right of the individual. If all reasonable efforts have been exhausted to find an interpreter and have nonetheless failed, the proceedings can move on.¹²⁵

The rules on the right to have an interpreter are protected by a procedural sanction. Article 40 of the Language Act provides for a nullity if the rules on the right to an interpreter are violated. This however does not entail that the proceedings will automatically be void if the defendant is deprived of his right to an interpreter. The irregularity affects the activity (for instance, the interrogation) where a violation of the rules took place. The law provides that the irregularity is cured by every decision given after full arguments from both parties and which is not merely interlocutory.¹²⁶ The rule is in essence based on the idea that the defendant must take an active stance to ensure the presence of an interpreter and lament the violation of his right. If the claim is not raised, the decision taken cures the violation.

¹²³ L Arnou, 'De andere taal in de strafprocedure en de rechten van verdediging' (2017) *Nullum crimen* 519, 522; L Huybrechts, 'De Europese Richtlijn betreffende het recht op vertolking en vertaling in strafprocedures en de Belgische wet en rechtspraak' (2011) *Nullum crimen* 4, nr. 15.

¹²⁴ L Huybrechts (n 128).

¹²⁵ Chamber of Accusation (K.I.) Antwerpen 21 May 1993, *Tijdschrift Strafrecht*, 2004, 77. See also S. Vandromme, 'De wegens taalperikelen onmogelijke ondervraging door de onderzoeksrechter bij de aflevering van een aanhoudingsbevel' (2004) *Rev. dr. pén.* 5, 21.

¹²⁶ See Art. 40 section 2 of the Language Act.

The provision covers all forms of violations, including a wrong decision on whether an interpreter was needed. The assessment on the need of an interpreter is a factual judgment, which must be taken in light of the concrete circumstances of the case. If the violation is so severe that the entire right to a fair trial is persistently compromised, the proceedings can be declared inadmissible.

4.4. Decisions finding that there is no need for translation

Just like the right to an interpreter, the right to translation must be seen in the larger context of the rules concerning the use of languages in criminal trials.¹²⁷ A set of provisions in the CCP and the Language Act guarantee the said right throughout the criminal proceedings. In particular, the provisions of the CCP identify the specific procedural acts and documents for which a translation must be offered.¹²⁸ Article 22 of the Language Act integrates this rule with a provision of more general application.

In the pre-trial stage, Articles 145 and 189 CCP provide that the accused who does not understand the language has the right to a translation in a language he understands of the relevant passages of the warrant (which contains the indictment and the date and time of appearance before the court. An equivalent provision is to be found in Article 216*quater* CPP, which refers to an alternative way for summoning the accused before the correctional courts or police courts. Although the right to translation is explicitly limited to the relevant passages of the summon, all provisions make clear that the translation must be done in a way that gives the accused information over the charges (the charged facts and their legal qualification) and allows them to exercise an effective defence. The request for translation must be made at the registrar of the competent court. The translation must be done in a reasonable time and it is made at the expenses of the State.

¹²⁷ See *supra*.

¹²⁸ This is particularly the case of the trial judgement. Art. 164 CCP provides for the right to translation of the judgement to the defendant who does not understand the language. Just like with the summoning warrant, the provision confers a right to translation of the relevant passages of the judgement, but it makes clear that the translation should allow the accused to be informed of the facts for which he was convicted and to defend himself effectively. See also Art. 353 CCP with regard to the procedure before the Court of Assize.

A similar rule applies before the Court of assize. The procedure before the Court of Assize is however structured in more phases. Before the trial hearing there is a preliminary hearing, for the selection of the jury and the preparation of all other practical aspect. The law provides now that the accused has the right to a translation of the charges when summoned for the preliminary hearing (Article 275 CCP). The accused has also the right to have a translation of the relevant passages of the decision of the preliminary hearing on the admitted witnesses, of the summoning of jurors and of the summon of the accused.

A specific rule also applies for the custody order. According to Article 16 § 6 of the Pre-trial Custody Act, suspects have the right to a translation in a language they understand of the relevant passages of the custody order (*relevante passages van het bevel*), so that they be informed of the facts with which they are charged and they can defend themselves effectively. It is not necessarily the case that the translation must be in writing. The law explicitly makes possible that the translation be offered orally, in which case mention of the oral translation is to be made in the order. In order to obtain the translation, the suspect must make a request (to the clerk of the competent Tribunal in first instance) within three days from the reception of the order. The translation must be given in a reasonable time and it is paid by the State.

The rules of the CCP are then complemented by Article 22 of the Language Act. The articles gives the suspect, the defendant and the convicted the right to have further documents translated (other than those for which translation is already provided for by the CCP) if they do not understand the language of the proceedings. The request is made to the Prosecutor or the Investigating Judge depending on the stage of the proceedings and it must contain the supporting reasons. The request can be made during the investigations or during the trial stage, but in the latter case it must be made within 8 days from the moment the accused was summoned for trial. Furthermore the request is inadmissible if it does clearly indicate the acts of the procedure for which the translation is requested. The requested authority must decide within fifteen days. The request can be allowed in its totality or only in part. Article 22 of the Language Act expressly states that the translation is limited to the passages of the file that are essential in order to ensure that the accused can defend themselves effectively. When the request is allowed, the translation must be provided within a reasonable time and it is made at the expenses of the State.

Just like for the right to interpretation, the violation of the right to

translation entails a nullity.¹²⁹ The remarks made earlier¹³⁰ are also applicable here.

4.5. *Violations of the right to information*

Throughout the procedure the defendant enjoys the right to information in several circumstances. The general rule is that the information on rights is given at the moment of first contact with the judicial or prosecutorial authorities. The defendant has in fact the right to receive information on his rights before the interrogation.¹³¹ In particular the suspects must be briefly informed of the facts upon which they will be interviewed and that: they have the right to consult with a counsel before the interrogation (if the right is applicable); they can choose, after having answered the questions on their identity, whether or not to answer the other questions; they are not compelled to self-incriminate themselves; their statements can be used as evidence in judicial proceedings; they can request that all questions and answers be precisely recorded; that they are free to stay or to leave the interrogation whenever they want, unless they are in state of arrest or custody; they can request that investigative activities be carried out or that other people be heard; they can make use of documents in their possession and they can request that these documents be added to the file.

Furthermore the persons deprived of the liberty are informed that that they enjoy the rights provided for by Article 2 *bis* of the Pre-Trial Custody Act and of the further rights foreseen in case a pre-trial custody order is taken, including the right to receive a copy of the order and to obtain a translation of it.¹³²

In both cases the information is also to be given in writing (Article 47 *bis* CCP § 5), while the relevant European directive made the letter of rights compulsory only for people deprived of their liberty (see Article 4 directive 2012/13/EU).

A further moment of information on the rights takes place at the end of the judicial investigation. Upon completion of the investigations, the Investigating Judge sends the file to the Prosecutor. If the latter also

¹²⁹ Art. 40 of the Language Act.

¹³⁰ *Supra*, 4.3.

¹³¹ Art. 47*bis*, § 2 CCP.

¹³² See *supra*.

believes that the investigation is complete, he can apply to the Chamber of the Council, which he does by drafting his conclusions (*requisitions finales, eindvordering*). In its conclusion the Prosecutor sums up the facts he wants to prosecute before the criminal court, and their legal qualifications.¹³³ The conclusions of the Prosecutor are then to be discussed before the Council of Chamber in an adversarial hearing. At this stage (i.e. before the hearing) the defence is informed that they have a right to access the entire investigative file. When no judicial investigation has been opened, the suspect receives communication of the charges (facts and legal qualifications) with the summon for the trial.¹³⁴

The violation of the right to information is not explicitly protected by a nullity. If the violation of the right of information concerns an activity of collection of evidence (the interrogation of the suspect).

5. Sanctions against illegal or improperly obtained evidence

It was already mentioned that if investigative activity are carried out in violations of certain provisions they are affected by a nullity, which entails that the judge (either at the end of the investigation or at the trial) must declare the nullity and exclude the results of the irregular activity and all subsequently obtained evidence.¹³⁵ The possibility to declare an act void by a nullity is limited to the situation where the procedural sanction is expressly codified. If an investigative activity is affected by a nullity, this means therefore that all the information it has brought about cannot be used. This is however not the only case of exclusion of evidence.

The general rule on exclusion of evidence is contained in Article 32 of the Preliminary Title of the CCP. The provision was recently introduced to codify the case-law of the Court of cassation (which goes by the name of ‘Antigoon’ case-law).¹³⁶ It was in fact the Court of cassation to first establish that evidence could be excluded either when the evidence is unreliable, when it is obtained with violation of procedural rules for which a nullity is prescribed, and when it is obtained in violation of the right of defence. The position of the Court

¹³³ Art. 127, § 1 CCP.

¹³⁴ Art. 43 CCP.

¹³⁵ See *supra*.

¹³⁶ The case-law was initiated with the decision in the Antigoon case (Cass., 14 October 2003, NJW 2003, 1367), and it was then further confirmed by later decisions.

of cassation represented a restrictive turn when compared to the previous situation, where the majoritarian opinion considered that evidence could be excluded every time it was obtained in violation of a procedural rule codified in the code. With its decision in the Antigoon case, the Court of cassation reduced the grounds of exclusion to three hypotheses.

These three grounds are now codified in Article 32 of the Preliminary Title CCP. The provision states that evidence is to be excluded: 1) in case of failure to comply with requirements which respect is prescribed on pain of nullity, 2) when the illegality has affected the reliability of the evidence, or 3) when the use of the evidence would be incompatible with the right to a fair trial.

In its case-law the Court also specified how the third criterion ‘incompatible with the right to a fair trial’ has to be interpreted. The following circumstances can be taken into account: the fact that the government committed the irregularity intentionally, that the seriousness of the criminal offence far exceeds the irregularity, that the illegally obtained evidence only concerns the proof of a material element of the criminal offence, that the irregularity has influenced the protected fundamental right or that the irregularity is a purely formal requirement.

In a judgement of 24 April 2013 the Court of Cassation added a fourth criterion for exclusion of evidence. The Court ruled that evidence is by definition inadmissible when an infringement is made on a substantial procedural requirement which relates to the organization of courts and tribunals. Since the legislator did not include this fourth criterion in Article 32 of the Preliminary Title of the CCP, it is deemed to no longer exist as the list of grounds for exclusion of evidence of Article 32 is considered to be limitative.

The exclusion of evidence affects not only to the evidentiary element that is directly tainted by the irregularity. Indeed, Belgian law accepts the doctrine of ‘the fruits of the poisonous tree’, according to which all the evidence that is clearly connected with or is the result of the excluded evidence has to be disregarded as well. It is thus for the judge to establish which elements of proof are intertwined with the illegal evidence. Nevertheless, the application of the doctrine is now strongly limited by the narrower scope of the exclusionary rule of Article 32 of the Preliminary Title CCP.

During the trial stage, exclusion of evidence does not mean that the illegally obtained pieces of proof will be physically removed from the case file. The judge at the trial court only has ‘to ban the evidence from the rest of the proceedings’, which means that he cannot take the unlawful elements into account in his decision-making process.

Conversely, evidence that is declared inadmissible during the pre-trial investigation stage will be removed from the case file and deposited at the court registry.¹³⁷

The implications of the case-law of European courts should also be considered. The European Court of Human Rights has very recently endorsed the Belgian exclusionary rules.¹³⁸ Whether Article 32 of the Preliminary Title CCP is in accordance with the case law of the Court of Justice is more uncertain. In a recent Hungarian case the Court of Justice decided that each violation of a fundamental right protected by the Charter of the EU should induce the exclusion of the evidence obtained through that violation.¹³⁹

The exclusion of evidence is the ordinary remedy against illegal evidence. Nothing excludes however that the illegality of the evidence be connected to a more severe violation of the fair trial right of the defence. If the defendant can prove that the right to a fair trial was so badly affected that the violation still persists and cannot be restored, then the judge can declare the proceedings inadmissible. The Court of cassation has however observed that this is normally not the case when the evidence is tainted. It has in particular observed that the ordinary consequence of a piece of evidence obtained in violation of the rules of the fair trial (in the case, the absence of the lawyer) is the exclusion of the evidence and not the inadmissibility of proceedings.¹⁴⁰ The judge can instead declare the criminal proceedings inadmissible when the evidence was gathered in consequence of police provocation.¹⁴¹

¹³⁷ Art. 131 §2 and Art. 235bis §6 CCP. It is worth clarifying that the Belgian system provides since 1998 for a system called ‘*purge of nullities*’ (*zuivering van nietigheden*). It is based on the idea that nullities must insofar as possible be identified and formally declared already at the final stage of the investigative stage, without waiting for the trial stage. This system applies however only if a judicial investigation has been opened. The elements that the Council chamber finds void (together with those that are subsequently tainted) are taken out of the file, so that they will not prejudice the approach of the trial judge (Art. 131 CCP). However, the issue concerning the irregularity of the elements could still be raised during the trial phase, unless in those cases in which the decision of the Council Chamber has been confirmed on appeal by the Chamber of Accusation.

¹³⁸ *Kalnėnienė v België* App no 40233/07 (ECtHR, 31 January 2017).

¹³⁹ Case C-419/14 *WebMindLicenses* EU:C:2015:832.

¹⁴⁰ Cass., 18 January 2017, AR P.16.0626.F, *Rev. dr. pen. Crim.*, 2017, 630.

¹⁴¹ Art. 30, § 3 Preliminary Title CCP.

5.1. Infringements to the right of access the case file

As was mentioned, the general rule is that suspects do not have access to the case file during the investigations save for specific exceptions. When these exceptions apply, the refusal to disclose materials or the incomplete disclosure represent a violation of the defendant's rights. The violation does not however represent a nullity and there is therefore no possibility to exclude the evidence or quash the proceedings. When a violation of the right is established, the judge will have to take remedial measure, in order to ensure that the right of the defendant be restored. When no restoration is possible and the violation is therefore still persistent, the judge must instead declare the proceedings inadmissible for violation of the right of fair trial.

5.2. Statements obtained in breach of the right to access a lawyer

The rules on the remedies against statements obtained in breach of the right to counsel have already been described. The relevant rule is to be found in Article 47*bis* § 6, point 9 CCP. One last thing must be pointed out. The rule is to be integrated with the general rule of Article 32 of the Preliminary Title CCP. This means that all violations of procedural rules that do not fall in the scope of application of Article 47*bis* § 6, point 9 CCP, could still lead to the exclusion of the statements if Article 32 Preliminary Title CCP can apply. This is for instance the case for the violations of the right to counsel concerning confrontations, line-up and reconstructions of the crime scene. However, failure to guarantee the right to a lawyer is not explicitly prescribed under penalty of nullity. In other words, the exclusion could be possible only if the violation of the rules leads to the unreliability of evidence or to the violation of the fair trial rights.

The relation between Article 47*bis*, §6, paragraph 9 CCP and Article 32 of the Preliminary Title CCP is nonetheless obscure. The Court of cassation ruled that the judge does not automatically need to declare statements made in breach of the provisions concerning the right to legal assistance null or irrevocably in violation of the right to a fair trial.¹⁴² So the Court seems to indicate that infringements to the right to legal assistance summed up in Article 47*bis*, §6, paragraph 9

¹⁴² Cass., 16 February 2016, NC 2016, vol. 6, 497.

CCP do not necessarily imply an exclusion according to Article 32 of the Preliminary Title CCP.

5.3. Breaches of the right to translation and interpretation

It was already mentioned that the violations of the relevant rules entails a nullity on the basis of Article 40 of the Language Act. The nullity entails that evidence has to be excluded. If the nullity concerns procedural activities, such activities are also void. The judge must here carefully evaluate to what extent the procedure has been tainted. If the violation has been remedied or it can be remedied, the judge must take the necessary steps. Such steps may also include declaring a part of the proceedings void. If the violations is so serious that it in no way can be restored, then the judge must declare the inadmissibility of the proceedings.

The application of Article 32 CCP can also derives from other aspects. In case a different kind of breach of the right to interpretation and translation has been made, the question whether the evidence has to be excluded will depend on the facts of the case. An incorrect translation or interpretation can affect the reliability of the evidence¹⁴³ or might be in conflict with the right to a fair trial.¹⁴⁴ All depends on the assessment made by the judge.

5.4. Failure to provide information about rights and about accusation

The person receives information on the charges at different stages of the procedure. Before the interrogation, the person is briefly informed of the facts upon which he or she will be questioned. Failure to provide with this information does not constitute a nullity. It remains to be seen whether the failure could not constitute an affront to the rights of the defence, which could even worsen if indeed the statements obtained were to be used against the defendant. Knowledge of the accusation is an essential element for the accused to exercise a proper and effective defence.

When the suspect is apprehended, he receives information on the charges. Failure to comply with this information does not entail a

¹⁴³ Art. 32 CCP, second ground.

¹⁴⁴ Art. 32 CCP, third ground.

nullity. It may however represent a violation the fair trial, if the missing or late information has an impact on the proper exercise of the defence rights.

There is no doubt that inadequate information on the charges before the beginning of the trial constitutes a cause of inadmissibility of the proceedings. This applies to cases where the defence is not served with an information on the charges just like to cases where the information on charges is unclear and/or ambiguous, to the extent that the defendant cannot properly defend himself.¹⁴⁵

6. Appeals against conviction and sentence

The Belgian procedural system generally provides for the possibility to appeal decisions. As was mentioned, while the right to appeal is not formally recognized in the Belgian Constitution, the right finds application thanks to the ratification in 2012 of the 7th Protocol to ECHR.¹⁴⁶ *Belgium has also ratified the 1966 International Covenant on Civil and Political Rights (ICCPR), which in its Article 14 § 5 holds that ‘everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law’. It is open to debate whether the provision intends ‘review’ as to mean a fresh decision in second instance on the merits of the case. At any case, the Belgian State has submitted a declaration whereby paragraph 5 of the article ‘shall not apply to persons who, under Belgian law, are convicted and sentenced at second instance following an appeal against their acquittal of first instance or who, under Belgian law, are brought directly before a higher tribunal such as the Court of Cassation, the Appeals Court or the Assize Court’.*

With regard to the appeals against the trial judgements, one should differentiate between the right to appeal before the Court of cassation¹⁴⁷ and the right to appeal before other courts acting as courts of second instances.¹⁴⁸ The latter courts can take a new decision on the merits

¹⁴⁵ Cass., 31 October 2000, AR P.00.1280.N, Arr.Cass. 2000, nr. 589 and Cass., 23 May 2001, AR P.01.0218.F, Arr.Cass. 2001, nr. 306.

¹⁴⁶ Before the ratification of the said Protocol, the Court of cassation held that there was no right as such to a decision in second instance. See Cass., 17 December 2003, AR P.03.1450 F, Arr.Cass., 2003, nr. 655.

¹⁴⁷ See *infra*.

¹⁴⁸ See P Traest, J Meese, ‘De rechtsmiddelen verzet en hoger beroep: actualia’

of the case, with examination of evidence. The appellate Court can hear new evidence and order that further investigative activities be performed. The parties can directly request the Court to take this decision. The filing of the appeal suspends the execution of the sentence.

As a general rule, all final trial judgements are amenable to appeal. But while some judgements can be taken before a Court of second instance and then also before the Court of cassation, other judgements can only be challenged before the Court of Cassation. The latter is the case of the judgements of the Court of Assize.¹⁴⁹ The Court of Assize consists of a hybrid panel with a jury of lay people and this special composition is the reason why a challenge of the decision in front of a second instance court is not possible. The final judgements taken by the other courts (Correctional Courts, Police Courts) can instead be challenged before a second instance court (the Correctional Court for Appeals against decisions of the Police Courts, the Appeal Courts for appeals against decisions of the Correctional Courts).

Judgements rendered *in absentia* can be challenged in two alternative ways.¹⁵⁰ The defendant can introduce an opposition (*verzet*), which, if admissible,¹⁵¹ triggers a retrial before the Court that delivered the first judgement.¹⁵² In alternative the defendant can file an appeal in front of a higher court against the decision rendered *in absentia*.¹⁵³ The defendant can choose to oppose against both the

in P Traest, A Verhage, G Vermeulen, *Strafrecht en strafprocesrecht: doel of middel in veranderde samenleving?* Wolters Kluwer, 2017) 515; F Verbruggen, R Verstraeten, *Strafrecht en strafprocesrecht voor bachelors deel II* (Maklu, 2016) 436-440.

¹⁴⁹ A second possibility are the judgements which the Court of Appeal can exceptionally deliver as a court of first instances, e.g. judgements in proceedings against ministers or judges.

¹⁵⁰ On these issues, see J Rozie, S Rutten, A Van Oevelen, *Verstek en verzet in burgerlijke zaken en strafzaken, national en Europees* (Intersentia, 2012) 85; F Verbruggen, R Verstraeten (n 151) 447-453.

¹⁵¹ According to Art. 187, §5 CCP, an opposition is declared inadmissible if it is lodged in an incorrect form or if the time limit has expired, unless the opposing party can invoke '*force majeure*'. It is also declared inadmissible if the initial judgement was not delivered *in absentia* or if the opposing party already appealed against the judgement. However, this list of grounds of inadmissibility is not exhaustive.

¹⁵² There are however two cases in which an admissible opposition will not lead to a retrial. These two cases are called cases where the opposition is declared 'undone' ('*ongedaan*' that is in essence equivalent to an annulment of the opposition). The first is when the opposing party is absent and not represented by a lawyer at the hearing following the opposition. The second is when the opposing party had knowledge of the summons for the initial proceedings and cannot invoke '*force majeure*' or a legitimate excuse for the non-appearance (*wettige reden van verschoning*).

¹⁵³ This possibility is of course precluded for judgements delivered by the Court of assize.

criminal and the civil conviction or to only one of them. However, it is not allowed to lodge an opposition twice in the same instance.¹⁵⁴ In any event, the defendant must have an interest when appealing the decision. A decision of acquittal or a decision that declared the dismissal of the proceedings (*verval*) cannot be appealed.

A recent reform has restricted the scope of the appeal before second instance courts.¹⁵⁵ Before the reform the filing of an appeal did not need to offer reasons. The appeal against the decision always triggered a new decision on all aspects of the criminal case, while the new rules restrict the power of the courts of appeal to decide only on the grounds that are specifically submitted by the appealing parties in their appeal declarations. The defendant is in fact now required to submit a statement of the grounds of appeal.¹⁵⁶ The law expressly provides that the appeal grounds that need to accompany the declaration of appeal must be specific.

Because of the new obligation for appellants to introduce specific grounds of appeal, the time requirement for filing an appeal before the courts of second instance has been extended. Defendants have now thirty days to appeal judgements before appellate courts to obtain a new decision on the merits. In case of decisions *in absentia* the time limit runs from the moment the defendant is served with the decision.¹⁵⁷ The reform of 2016 has also codified the ‘subsequent appeal’ (*volgappel*) of the Public Prosecutor. When the defendant appeals, the Public Prosecutor has now ten extra days to file an appeal.¹⁵⁸ As we shall see, the Prosecutor’s initiative has the effect of lifting the prohibition to impose a harsher sentence on the defendant.

The procedure before the appellate body can have different

¹⁵⁴ ‘*Opposition sur opposition ne vaux*’, Art. 187 §8 CCP.

¹⁵⁵ The reform was passed with the Statute of 5 February 2016, which goes under the name of ‘Poputporri II’ (*Wet van 5 februari 2016 tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie*, JO 19 February 2016).

¹⁵⁶ Art. 204 CCP. The statement is to be submitted either before the registry of the court that delivered the initial judgement, or before the registry of the appellate court. The defendant in custody, can deposit the statement by the prison governor, See Art. 1 Law 25 July 1893.

¹⁵⁷ Art. 203, §1 CCP. If the defendant is not served with the decision in person, the time limit is of fifteen days running from the day on which the defendant gained knowledge of decision. The time limit keeps running if the defendant does not have knowledge of the sentence, until the limitation period for the execution of the punishment expires.

¹⁵⁸ Art. 203 § 1, second sentence CCP.

outcomes. The Court can uphold the judgement if it finds it procedurally correct and just. Otherwise, it can quash or reform the initial judgement. Even when the decision is quashed due to procedural irregularities, the appellate court is required to take a new decision on the merits of the case.¹⁵⁹

The Belgian system applies the traditional principle of the prohibition of *reformatio in pejus*. If the defendant is the only appellant, his position cannot worsen before the appellate body:¹⁶⁰ the sentence cannot be harsher,¹⁶¹ the amount of civil damages cannot be increased.¹⁶² The rule is not applicable when the judgement is appealed by other parties (the Public Prosecutor or the civil party), in which case the defendant could receive a less favourable decision. There is however a rule which mitigates this latter possibility. If the Court intends to adopt a decision that is less favourable to the defendant (such as in cases where an acquittal is reversed into a conviction or a harsher penalty is imposed), the decision of the judges sitting in the panel must be unanimous.¹⁶³

7. Appeals in cassation

Article 147 of the Belgian Constitution establishes that there is only one Court of cassation for the entire country, which cannot decide on the merits of the case.¹⁶⁴ Following the French tradition, the Court of cassation is in fact established with a view to ensuring the proper and uniform application of the law. Article 608 of the Code of the Judiciary (*Gerechtigd wetboek*) implements the Constitutional provision by granting the Court of cassation jurisdiction only on violation of the law or breach of procedural conditions that are either substantial or entail a nullity.¹⁶⁵ It is normally said that the Court of cassation is competent only to assess questions related to the

¹⁵⁹ Art. 215*bis* CCP. An exception to this rule is the case in which the court declares itself incompetent. See Art. 214 and 213 CCP.

¹⁶⁰ Cass., 16 September 1975.

¹⁶¹ Cass., 11 October 2005, AR P.05.988 N.

¹⁶² Cass., 27 februari 1985, AR 3987, Arr.Cass., 1984-85.

¹⁶³ Art. 211 *bis* CCP.

¹⁶⁴ '*Cette Cour ne connaît pas du fond des affaires*'.

¹⁶⁵ See M Traest, 'Krachlijnen van het cassatieberoep in strafzaken' (2007) *Nullum crimen* 116. See also Art. 612 of the Code of the Judiciary.

interpretation and application of the law and it cannot solve questions related to the reconstruction of facts.¹⁶⁶

Defendants have a right to challenge judgements delivered in last instance that are not or no longer amenable to appeal or opposition in front of the Court of cassation.¹⁶⁷ Interlocutory decisions can be appealed but only after the decision in last instance.¹⁶⁸ The law limits the possibility of interlocutory appeals only to a list of specific cases: decisions concerning the competence of the judge, decisions concerning the principle of liability with regard to civil damages, decision concerning the opening of a special investigation in order to find the profits of the crime.¹⁶⁹ The judgements of the Court of cassation are final and they can no longer be appealed unless the law provides for an explicit exception.¹⁷⁰

The defendant can file an appeal before the Court of cassation within fifteen days from the decision that is challenged. As a result of a reform of 2014, the declaration of appeal must be signed by a qualified counsel.¹⁷¹ The possibility for the defendant to apply to the Court of cassation without the assistance of a lawyer is limited to decisions concerning detention on remand.¹⁷² Just like for the appeal before second instance courts, the defendant must have an effective interest for appealing decisions before the Court of cassation.¹⁷³ As already mentioned, the filing of an appeal before the Court of cassation suspends the execution of the judgement that is challenged.¹⁷⁴

The defendant lodging an appeal in front of the Court of Cassation can adduce the grounds the grounds of the appeal only by means of a written brief, which must be deposited at the registry of the Court no later than fifteen days before the hearing in front of the Court of cassation.¹⁷⁵ The opposing party can respond with a brief that must

¹⁶⁶ The specific role of the Court of cassation has an influence also on the role of the Prosecutor, who is considered to act here also as an *amicus curiae*.

¹⁶⁷ Art. 418 CCP.

¹⁶⁸ Art. 420 CCP. This does not necessarily mean that the appeal against interlocutory decision always requires an appeal against the final decision.

¹⁶⁹ Art. 420 CCP.

¹⁷⁰ *Pourvoi sur pourvoi ne vaut*, Art. 419 CCP.

¹⁷¹ I.e. lawyer holding a certificate in training in proceedings before the Court of Cassation, Art. 425, § 1 CCP.

¹⁷² Art. 426 CCP.

¹⁷³ Art. 416 CCP.

¹⁷⁴ Art. 428 CCP.

¹⁷⁵ Art. 429 CCP.

be submitted at the latest eight days before the hearing.¹⁷⁶ The Court can however identify breaches in the legality of the challenged decision *motu proprio*.¹⁷⁷

As mentioned above, the review undertaken by the Court of Cassation only concerns errors of law. The scope of review is limited by the act of appeal to the Court of Cassation. It can address either the entire conviction, only the criminal or civil conviction, or only the penalty that is imposed. However, it is not possible to appeal to the Court of Cassation against only parts of the penalty that is imposed. Although the scope of review is also limited by the statement of the grounds of appeal, the judge can raise grounds concerning the criminal conviction of his own motion.¹⁷⁸

The Court of cassation can reject the appeal, by declaring it inadmissible or unfounded. Otherwise, it quashes the challenged decision, in whole or in part.¹⁷⁹ Precisely because the Court of cassation is not a trier of facts, it cannot deliver a new decision on the merits of the case. Hence, when the Court finds the decision to be vitiated the Court must quash the decision and send it to a lower court of the same instance of the court which delivered the quashed judgement. If the Court finds that the challenged decision is vitiated in a way which makes it impossible to have a retrial in front of a lower court, it then just quashes the decision for good.¹⁸⁰

8. Access to the Constitutional Court

Belgium permits judicial scrutiny on the provisions of the Constitution, which role is carried out by the Constitutional Court. The powers of the Constitutional Court are set out by the Special Statute on the Constitutional Court of 6 January 1989 (hereafter SSCC).¹⁸¹ The Court has jurisdiction for the annulment of laws or for

¹⁷⁶ Art. 429, section 3 CCP.

¹⁷⁷ See on this issues, R Verstraeten, H Desmedts, 'De cassatieprocedure in strafzaken na de wet van 14 februari 2014: brengt vernieuwing ook verbetering?' (2015) *Nullum crimen* 345.

¹⁷⁸ F Verbruggen, R Verstraeten (n 148) 456-458.

¹⁷⁹ Art. 434 CCP.

¹⁸⁰ Art. 435 CCP.

¹⁸¹ *Bijzondere wet van 6 januari 1989 op het Grondwettelijk Hof/ Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle*, JO 07.01.1989.

the issuing of preliminary rulings concerning the compatibility of the laws with regard to the Constitution.

In the first case,¹⁸² the Constitutional Court is competent for ensuring the compliance of federal laws and decrees and regional laws with the Constitutional rules on: a) the federal organization of the country (and the related division of competences between federal and regional organizations), b) the protection of fundamental rights,¹⁸³ c) the rules on the legality of taxation¹⁸⁴ and on non-nationals.¹⁸⁵ Besides the ‘institutional’ petitioners (federal government, local governments, parliamentary assemblies), proceedings in front of the Constitutional Court can be instituted by every individual who can show to have a sufficient and concrete interest in the annulment. In the second case,¹⁸⁶ the Constitutional Court has the power to issue preliminary rulings. In particular, judicial courts are empowered to refer questions to the Constitutional Court for preliminary rulings, concerning among others the protection of fundamental rights.¹⁸⁷ The Constitutional Court rules only on the legal question and it does not deal with the facts and the merits of the underlying case.

With regard to criminal cases, it is not infrequent that the criminal courts request a preliminary ruling concerning the compatibility of a relevant provision of criminal law with the fundamental rights of people protected by Title II of the Constitution. When an issue of compatibility is raised during a criminal case, courts are in principle required to suspend the criminal proceedings and to request a preliminary ruling to the Constitutional Court. The SSCC differentiates between lower courts and higher courts in terms of the obligation to file a ruling. The obligation is stricter (almost absolute)¹⁸⁸ for higher courts, such as the Court of Cassation, since

¹⁸² Art. 1 SSCC.

¹⁸³ Title II of the Constitution.

¹⁸⁴ Art. 170 and 172 of the Constitution.

¹⁸⁵ Art. 191 of the Constitution.

¹⁸⁶ Art. 26 SSCC.

¹⁸⁷ In particular the Court can issue preliminary rulings concerning a) the violation of the division of competence of the federal state, b) any conflicts between federal laws, federal decrees, and regional laws; c) the protection of fundamental rights (title II of the Constitution), d) the rules on the legality of taxation (Art. 170 and 172 Constitution) and on non-nationals (Art. 191 Constitution). See on these issues A Alen, K Muylle, *Handboek van het Belgisch Staatsrecht* (Mechelen, Kluwer, 2011) 539-553; L De Geyter, ‘Commentaar bij art. 10-18 Bijz.Wet 6 januari 1989’ (2015) Comm.Pub. 131.

¹⁸⁸ A Alen, K Muylle (n 190) 544.

there are no remedies available against their judgements. There are however exceptions to the duty to refer a prejudicial question that apply to both the lower and the higher courts. One of these exceptions concerns urgent cases, such as cases in which the defendant is held in detention on remand. In this situation, the court is not under a duty to refer a question, unless there are serious doubts on the compatibility of a legal provision with the fundamental rights and there is no case pending before the Constitutional Court in which the same question is referred.

9. EAW and judicial review

9.1. Competent judicial authorities

The Framework Decision on the European Arrest Warrant (EAW) was implemented in Belgium with the Law of 19 December 2003.¹⁸⁹ In order to identify the competent judicial authorities, it is necessary to differentiate between the active and passive procedure. When Belgium issues the European arrest warrant, the issuing of an EAW with a view to prosecution is a competence of the Investigating Judge.¹⁹⁰ It is instead the competence of the Public Prosecutor to issue a EAW with a view to the execution of a custodial order.¹⁹¹ The same Public Prosecutor is responsible for the issuing of an EAW with a view to the execution of a conviction passed in Belgium.¹⁹²

On the passive side, when Belgium is the requested State, the EAW is executed by arresting the sought person when she is found on Belgian soil. The arrested person is informed of her rights and receives the letter of rights, with among others the information on the right to be assisted by a counsel, both in Belgium but also in the requesting State, and by an interpreter.¹⁹³ After the arrest the person subject to the EAW is brought before the Investigating Judge. It is then the Investigating Judge who must hear the person and decide whether the person will remain or

¹⁸⁹ *Wet betreffende het Europees aanhoudingsbevel/Loi relative au mandat d'arrêt européen*, JO 22.12.2003.

¹⁹⁰ Art. 32, § 1 EAW Act.

¹⁹¹ Art. 32, § 1 EAW Act. The law clarifies that the internal decision to place a person in custody remains in the hands of the investigating judge or of the tribunal, as it is required by the national rules depending on the stage of the proceedings (investigation or trial).

¹⁹² Art. 32, § 2 EAW Act.

¹⁹³ Art. 10 section 1 EAW Act.

not in custody. If the Investigating Judge realizes during the interview of the person that there are manifest reasons for refusing the execution of the EAW, he can immediately adopt the refusal decision. The Public Prosecutor can appeal the refusal in front of the Chamber of Accusation,¹⁹⁴ with a possibility of further appeal before the Court of cassation.¹⁹⁵ If during the interview the person consents to surrender, it is for the Public Prosecutor to decide on the execution.¹⁹⁶

Besides the abovementioned case, the competence for deciding on the execution of the EAW rests with the Chamber of the council.¹⁹⁷ The decision is taken at the end of a hearing where the person has the possibility to participate with her counsel. The person subject to the EAW is informed of the hearing at the latest the day before. The person and the counsel have access to the file at least a day before the hearing.¹⁹⁸

9.2. Judicial review by the Belgian executing authorities

As for the remedies available to the person subject to the EAW, he can appeal the decision of the Council Chamber before the Chamber of accusation within 24 hours.¹⁹⁹ The decisions of the Chamber of accusation can be challenged before the Court of Cassation, but only with regard to reasons related to the improper interpretation or application of the law and the violation of procedural rules.

As regards the grounds for review, it is worth recalling that two sets of defence rights are relevant in the procedure for the execution of the EAW issued by a foreign authority and sent to a Belgian authority: a) the rights concerning the possibility to defend oneself with regard to the deprivation of liberty²⁰⁰ and b) the defence rights concerning the decision on the execution of the EAW.²⁰¹

In some instances, the case-law has asserted that Article 6 ECHR in its tenet related to criminal law does not apply to EAW procedures.²⁰²

¹⁹⁴ Art. 14 §2 EAW Act.

¹⁹⁵ Art. 14 §7 EAW Act.

¹⁹⁶ Art. 13 §3 EAW Act.

¹⁹⁷ Art. 16 §1 EAW Act.

¹⁹⁸ Art. 16 EAW Act.

¹⁹⁹ Art. 17 § 1 EAW Act.

²⁰⁰ Connected to Art. 5 ECHR.

²⁰¹ Connected to Art. 6 ECHR.

²⁰² Cass., 28 September 2010, P.10.1512.N.; Cass., 10 January 2012, P.12.0024.N.

Such a position was taken mostly to exclude that the lack of assistance by a counsel for the person subject to EAW would affect the procedure.²⁰³ The same conclusion was reached in a case where the defence alleged that their right were breached because they could not access the file prior to the interrogation.²⁰⁴ The Court of cassation observed in these decisions that the Chamber of council is not tasked with the responsibility of taking a decision on the merits of the existence of a crime, but simply it is required to deliver a decision on the surrender of a person.

Likewise, the Courts have taken a negative stance on the possibility for the Council Chamber to refuse the EAW on the basis of a lack of respect of the right to be tried in a reasonable time.²⁰⁵ It is however possible for the Council of Chamber to refuse the execution of the EAW not only for the grounds already codified in the framework decision, but also if the execution of the EAW would breach the fundamental rights of the individual as they are enshrined in Article 6 TEU.

²⁰³ S Dewulf, 'Het mistige spanningsveld tussen het Europees aanhoudingsbevel en het recht op een eerlijk proces van artikel 6 EVRM' (2012) *Nullum crimen* 308.

²⁰⁴ Cass., 14 July 2009, P.09.1074.F. The Court has however observed that the right to access the file before the hearing in front of the Council of Chamber is instead a crucial safeguard.

²⁰⁵ Cass., 9 December 2014, AR P.14.1825.N.

CHAPTER II

FRANCE

*Raphaële Parizot, Bernadette Aubert, Jérôme Bossan,
Christophe Poirier, Jérôme Bourgeois*¹

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Competent authorities and scope of review. – 2.2. Remedies available to the defendant. – 3. Deprivation of liberty: Arrest and pre-trial custodial measures. – 3.1. Information about available remedies. – 3.2. Arrest, *habeas corpus* and judicial review. – 3.3. Detention pending trial. – 3.4. Arrest and detention order for questioning. – 4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information. – 5. Sanctions against illegal or improperly obtained evidence. – 5.1. Infringements to the right of access the case file. – 5.2. Statements obtained in breach of the right to access a lawyer. – 5.3. Breaches of the right to translation and interpretation. – 5.4. Failure to provide information about rights and about accusation. – 6. Appeals against conviction and sentence. – 7. Appeals in cassation. – 8. Access to Constitutional Courts. – 9. EAW and judicial review. – 9.1. Competent judicial authorities. – 9.2. Judicial review by the French executing authorities.

1. Constitutional guarantees

Even if there is no text in the Constitution of 1958 and in the

¹ The sections of the present report are authored as follows: Sections 1, 2 and 3 by R Parizot; Section 4 by J Bourgeois; Sections 5 to 8 by J Bossan et C Poirier; Section 9 by B Aubert.

Declaration of the human and civic rights of 1789 (*Déclaration des droits de l'homme et du citoyen*, hereinafter DDHC),² the French Constitutional Court (*Conseil constitutionnel*) recognized a constitutional status to the right to access a court in a decision of 1996³ on the basis of Article 16 DDHC.⁴ By contrast, the right to appeal has no constitutional status.⁵ It is provided by the preliminary Article of the Code of criminal procedure (CCP), which states that 'Every convicted person has the right to have his conviction examined by a second tribunal'. France ratified Article 2 of Protocol 7 of the European Convention of Human Right (ECHR) with a declaration ('The Government of the French Republic declares that, in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court') and a reservation ('The Government of the French Republic declares that only those offences which under French law fall within the jurisdiction of the French criminal courts may be regarded as offences within the meaning of Articles 2 to 4 of this Protocol').

The right to review the lawfulness of detention in criminal proceedings is not expressly enshrined in the Constitution, nor in the DDHC. However, Article 66 of the Constitution provides that 'No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute'. Based on this, the jurisprudence considers that a person deprived of his/her liberty shall be brought promptly before a judge and shall be able to contest the legality of his detention in line with Article 5 paragraphs 3 and 4 ECHR. In this regard, it is worth mentioning that the French constitutional system is a monist system. National courts directly enforce fundamental rights guaranteed under the Convention pursuant to Article 55 of the Constitution.⁶

² In 1971, the French Constitutional Court (*Conseil constitutionnel*) acknowledged the constitutional value of the DDHC.

³ *Conseil constitutionnel* (Constitutional Council), 9 Apr. 1996, no 96-373.

⁴ Art. 16 DDHC reads 'Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution'.

⁵ *Conseil constitutionnel* (Constitutional Council), 12 Feb. 2004, no 2004-491 DC, no 4; 14 May 2012, no 2012-243/244/245/246 QPC, no 13.

⁶ Art. 55 of the Constitution, according to which 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'.

2. Investigative measures subject to prior judicial authorization

2.1. Competent authorities and scope of review

In the case of a preliminary inquiry conducted under the supervision of the Public Prosecutor, house searches and seizures can only be authorised by a judge.⁷ The same requirement applies to the interception of communication or taking of audio recordings. However, for less serious invasions of privacy, the Constitutional Council has permitted that the authorisation comes from a prosecuting judge.⁸ This is the case in the search of vehicles⁹ or visits to professional premises to carry out checks to combat illegal employment.¹⁰ Likewise, in the case of *flagrante delicto* and when the invasion of privacy is measured, the Constitutional Council allows members of the police force to act on their own authority.¹¹ This is the case for vehicle searches,¹² house searches,¹³ or even for the geolocalisation mechanism (for a maximum duration of 15 consecutive days¹⁴), or even – and this being more questionable – for the taking of bodily samples, such as blood.¹⁵

Depending on the seriousness of the invasion of privacy and the procedural framework (whether preliminary inquiry or judicial investigation), the measure can be authorised by the *juge des libertés et de la détention* (henceforth ‘liberty and custody judge’) or the *juge d’instruction* (an independent investigating magistrate). This is for instance the case of searches and seizures¹⁶ and interception of communication.¹⁷ In all cases, the authorisation must be in writing and reasoned. The authorized act must be justified by the necessity of

⁷ Conseil constitutionnel (Constitutional Council) 27 Dec. 1990, no 90-281; 2 March 2004, no 2004-492, §6.

⁸ Conseil constitutionnel (Constitutional Council) 22 Apr. 1997, no 97-389 DC.

⁹ Art. 78-2-2 CCP.

¹⁰ Art. 78-2-1 CCP.

¹¹ Conseil constitutionnel (Constitutional Council) 13 Mar. 2003, no 2003-467 DC.

¹² Art. 78-2-3 CCP.

¹³ Art. 56 CCP.

¹⁴ Art. 230-33 CCP.

¹⁵ Art. 706-47-2 CCP. See F Desportes and L Lazerges-Cousquer, *Traité de procédure pénale* (Economica, 2015) no 402.

¹⁶ Art. 76 CCP for preliminary hearing, Art. 151 CCP for an inquiry.

¹⁷ Art. 100 CCP in the case of an inquiry (interceptions forbidden in an inquiry, unless in the case of organised crime, Art. 706-95 CCP).

the inquiry or investigation. Specific time limits are set out in the legal texts.

Such authorisation aims to strike a balance between banning all invasions of personal freedom (for which the judiciary authority is responsible according to Article 66 of the Constitution) and what is necessary for the inquiry or investigation (to establish the truth regarding an offence).

Apart from extraordinary powers granted to the law enforcement authorities by the state of emergency that was declared in France in November 2015, there are exceptions to this system of authorisation in the case of *flagrante delicto*. In this case, vehicle searches¹⁸ and seizures can be carried out automatically by police officers without initial inspection.

2.2. Remedies available to the defendant

As regards the available remedies, we need to distinguish between the inquiry and the judicial investigation. During the preliminary inquiry, there is no possibility of recourse against the decisions taken by the investigating authorities. During the preliminary judicial investigation, however, the CCP allows for a series of appeals set out in Articles 186 and following provisions of the CCP. These appeals must be filed within ten days, directly with the investigating chamber for the most part, some of which are filtered by the President of the investigating chamber. The investigating chamber is the second degree of investigation in the court of appeal. It is made up of three councillors and presided over by one of the former as president of the court. Appeals are possible for the following cases: Appeals against a judge's decision to remand someone in custody or on probation;¹⁹ Appeals against a judge's decision to reject a request for a second or additional assessment;²⁰ Appeals against a judge's decision to reject a request for a certain act,²¹ more specifically a medical psychological examination,²² an assessment²³ or an investigative act.²⁴ This appeal

¹⁸ Art. 78-2-3 CCP.

¹⁹ Art. 186 CCP.

²⁰ Art. 186 CCP.

²¹ Art. 186-1 CCP.

²² Art. 81 CCP.

²³ Art. 82-1 CCP.

²⁴ Art. 156 CCP.

is subject to validation by the investigating chamber after being declared admissible by its president.

In practice, the investigating chamber should only confirm or invalidate the ruling of the investigating judge without giving him orders. In this way if the investigating chamber quashes a decision refusing a procedural step, the chamber cannot give an injunction to the investigating judge to accomplish this step.

However, this principle does not apply in two cases. The first is when the investigating chamber is not concerned about a specific step but rather for the entire case (when there is an appeal against the closing order of the investigation); the court can in this instance order specific measures. The second hypothesis is when the investigating chamber decides to use its power to take over the case (*pouvoir d'évocation*).

To conclude, one can only highlight the lack of recourse during the preliminary inquiry phase. Accordingly, potential nullities of an inquiry step can only be raised during the investigation (if there is one) before the investigating chamber or directly before the trial court.

3. Deprivation of liberty: Arrest and pre-trial custodial measures

3.1. Information about available remedies

There are two forms of deprivation of liberty before trial in France: arrest or police custody (*garde à vue*) and detention pending trial (*détention provisoire*). The person placed under arrest is informed of his/her rights immediately upon arrest. He is not informed of any possibility of contesting his arrest in that there is no appeal provided. However, Article 63-1 CCP states that, based on Act no 2014-535 of 27 May 2014 transposing Directive 2012/13/UE of the European Parliament and Council on the right to information in criminal proceedings, he is informed:

(...) ‘of the nature of the offence which is being investigated, of the rights mentioned under Articles 63-2, 63-3 and 63-4 as well as of the provisions governing the length of police custody provided for by Article 63. A mention of this information is entered in the official report and signed by the person under custody; in the event of a refusal to sign, this is noted. The information mentioned under the first paragraph must be given to the person held in custody in a language that he understands, where appropriate by using written forms. Where the person is deaf and

cannot read nor write, he must be assisted by a sign language interpreter or by some other person qualified in a language or method of communicating with the deaf. Use may also be made of any other means making it possible to communicate with persons who are deaf. Where a person is released after detention without the district prosecutor having made a decision as to prosecution, the provisions of Articles 77-2 are brought to his attention. Save in exceptional and unavoidable circumstances, the steps taken by investigators to communicate the rights mentioned in Articles 63-2 and 63-3 must be taken no later than three hours from when the person was placed in custody’.

When a person is placed on detention pending trial, he receives different information. Thus, if the liberty and custody judge foresees a detention pending trial, he will inform the person that the decision can only be made after an audience in the presence of both parties, that the person has the right to ask for an extension to prepare his defence and that, if he does not already have a lawyer, he may choose one, or one will be chosen for him for the debate.²⁵ Once the issue of detention pending trial has been decided, the judge must notify the person concerned but nothing is said about the information that must be given in terms of the right to appeal this decision (information given by the investigating judge (*juge d’instruction*) to the person under investigation do not concern the appeal of the decision of detention pending trial,²⁶ even though a right to appeal does exist.²⁷

3.2. Arrest, habeas corpus and judicial review

Arrest (*garde à vue*) is decided by a judicial police officer under the control of the judicial authority (the public prosecution department or the liberty and custody judge for an arrest implying a longer period of detention). According to Article 62-2 CCP, arrest (*garde à vue*) is a coercive measure decided by a judicial police officer, under the control of the judicial authority, whereby a person is kept in custody and available to investigators because of one or several plausible reasons to suspect that he/she has committed, or has attempted to

²⁵ Art. 145 CCP.

²⁶ Art. 116 CCP.

²⁷ Art. 186 CCP.

commit, an act in relation to a felony or a misdemeanour that is punishable by a prison sentence. This measure must constitute the only way to reach at least one of the following objectives: To allow the execution of investigations involving the presence or the participation of the person; To ensure the presentation of this person before the district prosecutor in order for this magistrate to assess the course to be given to the inquiry; To prevent the person from modifying material evidence or clues; To prevent the person from pressuring witnesses, including victims, as well as their family, or relatives; To prevent the person from consulting with other persons susceptible to be co-perpetrators or accomplices; To ensure the enforcement of the measures aiming at stopping the felony or a misdemeanour. Arrest (*garde à vue*) in France may last for 24 hours plus 24 hours (unless in cases of organised crime and terrorism where it can be prolonged). In any case, if arrest lasts more than 48 hours, it is under the control of the liberty and custody judge.

The person placed under arrest has certain rights of which they must be informed pursuant to Article 63-1 CCP:

'Any person placed in police custody is immediately informed by a judicial police officer, or under the latter's supervision, by a judicial police agent, of the nature of the offence which is being investigated, of the rights mentioned under Articles 63-2, 63-3 and 63-4 as well as of the provisions governing the length of police custody provided for by Article 63. A mention of this information is entered on the official report and signed by the person under custody; in the event of a refusal to sign, this is noted. The information mentioned under the first paragraph must be given to the person held in custody in a language that he understands, where appropriate by using written forms. Where the person is deaf and cannot read nor write, he must be assisted by a sign language interpreter or by some other person qualified in a language or method of communicating with the deaf. Use may also be made of any other means making it possible to communicate with persons who are deaf. Where a person is released after detention without the district prosecutor having made a decision as to prosecution, the provisions of Articles 77-2 are brought to his attention. Save in exceptional and unavoidable circumstances, the steps taken by investigators to communicate the rights mentioned in Articles 63-2 and 63-3 must be taken no later than three hours from when the person was placed in custody.'

3.3. *Detention pending trial*

A person may be placed in detention pending trial essentially for preliminary judicial investigation, and the former can only be decided by the liberty and custody judge, upon court referral through reasoned decision by the investigating judge, or potentially directly by the Public Prosecutor.²⁸

The decision of the liberty and custody judge is subject to two conditions. On the one hand is the seriousness of the offence. Detention pending trial is only possible in the context of crime or for offences with a potential prison sentence of three years or more, or when the person voluntarily avoids obligations pertaining to judicial control or house arrest with electronic surveillance.²⁹

On the other hand is a twofold requirement of necessity and subsidiarity. First, the liberty and custody judge must find that pre-trial detention is the only way to achieve one of the objectives described in Article 144 CCP: to preserve evidence which are necessary to show the truth; to avoid pressure on witnesses or victims and their families; to avoid fraudulent consultation between the accused and his co-perpetrators or accomplices; to protect the accused; to ensure that the accused remains at the disposal of the judicial authorities; to end the offence or avoid its reoccurrence; in criminal matters, to put an end to the exceptional and persistent disturbance of public order caused by the gravity of the offence, the circumstances of its commission or the importance of the harm it has caused (except media coverage of the case). Secondly, he must find that it is absolutely necessary and preferable to other less coercive measures. Indeed, before the trial, the principle is that the accused remains free. However, if the requirements of the investigation demand it, or as a security measure, the person may be subjected to judicial supervision or, if this is not sufficient, to assign him to house arrest under electronic surveillance. It is only if these means are insufficient, and exceptionally, that the person can be placed in pre-trial detention.³⁰

However, it should be noted that pre-trial detention, which is normally only possible during the investigation under the conditions mentioned above, may exceptionally be considered outside the

²⁸ Art. 137-4 CCP.

²⁹ Art. 143-1 CCP.

³⁰ Art. 137 CCP.

investigation. It is possible in case of immediate hearings³¹ or in case of appearance after prior admission of guilt.³² It is decided by the liberty and custody judge at the request of the public prosecutor.

As soon as the public prosecutor has given his/her opinion, the application for release may be taken at any time by the investigating judge. Either requested by the public prosecutor³³ or requested by the person (or his lawyer) to the investigating judge.³⁴ The investigating judge may accept the release. If the investigating judge refuses, within five days after the communication to the public prosecutor, he has to transmit the request together with his reasoned opinion to the liberty and custody judge who shall rule within three working days. If the liberty and custody judge rejects the release or fails to reply within three days, the person may refer the matter to the investigating chamber.³⁵ In sum, the investigating judge, the liberty and custody judge and, lastly, the investigating chamber are competent depending on the specific circumstances of the case.

Detention on remand is subject to statutory time limits. In case of offences punished by a maximum imprisonment terms of 10 years, the time limit is of four months,³⁶ renewable by four months under certain conditions and within the absolute and exceptional limit of two years and four months, or three years but only in case of terrorist association.³⁷ In case of offences punished by an imprisonment term of at least 15 years, the time limit is of one year,³⁸ renewable for six months and within the absolute and exceptional limit of four years and eight months. In any case, pre-trial detention automatically stops at the end of judicial investigation in correctional matters, unless the judge gives a special reasoned order,³⁹ whereas it continues after the end of the judicial investigation in criminal matters until the hearing of the Assize Court.⁴⁰

The release may be ordered 'at any time' by the investigating judge,

³¹ Art. 396 CCP.

³² Art. 495-10 CCP.

³³ Art. 147 CCP.

³⁴ Art. 148 CCP.

³⁵ Art. 186 for appeal and Art. 148, last paragraph in case of non-response of the liberty and custody judge on time.

³⁶ Art. 145-1 CCP.

³⁷ Art. 706-24-3 CCP.

³⁸ Art. 145-2 CCP.

³⁹ Art. 179 CCP.

⁴⁰ Art. 181 CCP.

after having heard the public prosecutor. It is requested by the public prosecutor,⁴¹ the concerned person or his/her lawyer⁴² to the investigating judge. If the person applies for his/her own release, he/she can do so 'at any time'⁴³ without having to respect any time limit between two applications, the only condition being that the previous application has already been processed. In each case, the judge whether there are still conditions and reasons justifying continued detention.⁴⁴ In addition, if pre-trial detention exceeds one year in criminal matters or eight months in correctional matters, decisions ordering the extension or rejecting the requests for release must also include the special grounds that justify in the light of the specific circumstances of the case the need to undertake further investigations and the foreseeable time limit for the achievement of the procedure.⁴⁵

The person detained on remand must be informed of the causes for detention.⁴⁶ In addition, as a person under investigation (the persons under investigation are placed in pre-trial detention exceptionally), the person benefits from the right to be informed about the charges against him⁴⁷ and the right to access the case file.⁴⁸ According to the lawyer interviewed for this study, the right to be informed on the reasons of pre-trial detention is in practice respected, since a copy of the order for pre-trial detention is given to the accused. This copy shall contain the statement of the charges and the causes for the detention on remand. The only criticism that can be made is that this order for pre-trial detention is not always sufficiently reasoned, in that it does not provide sufficient reasons that justify detention in the light of the personal situation and specific factual circumstances of the case.

The right to be heard in person takes place at least every 4 months in cases involving a misdemeanour (pre-trial detention limited to one year⁴⁹) and after 1 year in cases involving a felony, and then every 6 months within the limits of 2 years.⁵⁰ The interviewed investigating judge stressed that although the CCP requires the investigating judge

⁴¹ Art. 147 CCP.

⁴² Art. 148 CCP.

⁴³ Art. 148 CCP.

⁴⁴ Art. 143-1 and 144 CCP.

⁴⁵ Art. 145-3 CCP.

⁴⁶ Arts. 143-1 and 144 CCP specifying the conditions of detention on remand.

⁴⁷ Art. 116 (2) and (7) CCP.

⁴⁸ Art. 116 (6) CCP.

⁴⁹ Art. 145-1 CCP.

⁵⁰ Art. 145-2 CCP.

to heard the persons under detention if he has not been heard in 4 months despite request, lawyers often do not request such a hearing. They usually submit a request for release after 8-9 months, on the ground that the right to be heard was not respected. The interviewee added that it was not always easy for investigating judges to hear persons every 4 months due to high number of cases to manage (the investigating judge interviewed manages 108 cases on his own). That being said, this time limit in practice is not of 4 months but 3 months because investigating judges often want to hear the person before the decision to extend the pre-trial detention. Therefore, investigating judges make a request after 3 months to the liberty and custody judge, namely a month before the expiry of the initial time limit of pre-trial detention.

The right to interpretation and translation is guaranteed under Article 116 CCP and again, in general terms, in the preliminary Article on criminal procedure for the entire proceedings about documents essential to the exercise of the rights of defense.

The right to legal assistance is mentioned in preliminary Article and Article 116 CCP. Where it finds detention pending trial illegal, the competent authority may end pre-trial detention at any time by releasing the individual, under judicial supervision or electronic surveillance at home, if needed. In addition, an individual who has been remanded in custody and who receives a final decision to be dismissed, discharged or acquitted, may seek full reparation for the moral and material damage caused by such detention.⁵¹

3.4. Arrest and detention order for questioning

A distinction must be made between the persons questioned because they are suspected of having committed an offense and those one seeks to question without any tangible suspicion about them. As regards persons in respect of whom there are reasonable grounds to suspect that they have committed or attempted to commit an offense, they may, as the judicial police officer decides, be heard freely and notified a certain number of rights⁵² or heard in custody.⁵³ As regards persons in respect of whom there is no plausible reason to

⁵¹ Art. 149 CCP ff.

⁵² Art. 61-1 CCP introduced by the 27 May 2014 Act.

⁵³ See *supra* Section b) *Arrest, habeas corpus and judicial review*.

suspect that they have committed or attempted to commit an offense, they may be heard freely. However, since the 27 May 2014 Act, Article 62 CCP provides that, if required by the investigation, these persons may be held under constraint for the time necessary for their hearing and within the limit of four hours. This measure is decided by a judicial police officer. If, during the hearing, there are plausible reasons to suspect that the person has committed or attempted to commit a crime or an offense that could lead to imprisonment, he may only be kept under constraint at the disposal of the investigators under custody, and all the rights provided under Article 63-1 CCP shall be notified to him.⁵⁴ Finally, it is possible to compel a witness to appear before the investigating judge⁵⁵ during the hearing.

With regard to judicial remedies, Article 13 CCP simply provides that ‘Within each appeal court’s territorial jurisdiction the judicial police is placed under the supervision of the public prosecutor and under the control of the investigating chamber in accordance with article 224 onwards’. In reality, nothing is anticipated, except to file a complaint for arbitrary detention.⁵⁶

As regards the person not suspected but detained for four hours, the text is not very clear on his right to be informed of the reasons for arrest and detention. Indeed, Article 62 CCP provides such information for unsuspected persons freely heard. But regarding unsuspected persons heard under constraint, nothing is said unless suspicions appear, in which case they go under the custody regime and are informed of it. The person is not entitled to the assistance of a lawyer. Article 62 CCP simply states that if suspicions appear, the persons are detained under police custody and informed of their right to legal assistance.

4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings

4.1. Restrictions on the right to access the case file

As far as voluntary hearing⁵⁷ (within the framework of an investigation supervised by the district prosecutor) is concerned, despite the lack of legal provisions, the 19 December 2014 Circular,

⁵⁴ Ibid.

⁵⁵ Art. 109 CCP.

⁵⁶ Art. 432-4 Criminal Code.

⁵⁷ *Audition libre*.

adopted as part of the transposition of Directive 2012/13/EU, encourages the authorities to allow access to the file to the suspect and to their lawyer in the same conditions as those provided for custody.⁵⁸ Thus, in the context of voluntary hearings, the suspect and the lawyer should be able to have access to the elements of the file. As far as judicial investigation⁵⁹ is concerned, Article 114 CCP guarantees access to the file for the benefit of lawyers, or, if not, of parties who don't have a lawyer (if they have expressly waived this right). Prior to the 27 May 2014 Transposition Act, only access to the file for the benefit of lawyers was given in Article 114 CCP.

As far as voluntary hearing (in the framework of an investigation supervised by the district prosecutor) is concerned, according to the 19 December 2014 Circular, the consultation of the hearing statement by the suspect and their lawyer⁶⁰ seems to be allowed at the end of the hearing. If there is *reasonable suspicion*, the person must be heard in custody. Therefore, they would benefit from the rights inherent to this measure.⁶¹ According to Article 77-2 CCP (derived from the 3 June 2016 Act), after a one-year period, the person who is suspected, for one or more plausible reasons, of having committed or attempted to commit an offence punishable by deprivation of liberty, and who has been heard voluntarily or in custody, may request the district prosecutor to have access to the case file. The same provision also states that, at any stage of the proceedings, the district prosecutor may disclose any or all elements of the case file to the suspect or to the victim, in order to collect their observations or their lawyers'. As far as judicial investigation is concerned, the lawyer who was chosen or appointed *ex officio* at the time of the first appearance may read the file upon their arrival.⁶² Additional procedural safeguards depend on whether the 'person is under judicial examination' (*personne mise en examen*)⁶³ or is considered as an 'assisted witness' (*témoïn assisté*).⁶⁴

⁵⁸ J Leroy, 'Art. 53 à 73 - Fasc. 40 : les personnes soupçonnées ne faisant pas l'objet d'une garde à vue', in *Jurisclasseur Procédure pénale* (LexisNexis) para 67, <<http://www.lexis360.fr>> As regards custody, see Art. 63-1 (3) and 63-4-1 CCP.

⁵⁹ *Information judiciaire*.

⁶⁰ Provided for in Art. 63-4-1 CCP as regards custody.

⁶¹ Art. 63-4-1 CCP.

⁶² Art. 116 CCP.

⁶³ The term '*Personne mise en examen*' refers to the suspect being formally accused by the investigating judge.

⁶⁴ The '*témoïn assisté*' is the person assisted by a lawyer where evidence suggest that they may have been involved in the offence (as opposed to strong and corroborated evidence against the *personne mise en examen*).

In the first case, the case file shall be made available no later than four working days before each interrogation of the person under judicial examination or before each hearing of the civil party: 'After the first appearance of the person under judicial examination or the first hearing of the civil party, the case file is also put at the permanent disposal of the lawyers during working days, subject to the requirements of the proper functioning of the investigating judge's office'.⁶⁵

If new elements are filed within the four-day period, the investigating judge must bring them to the knowledge of the person and their lawyer before proceeding to an interrogation about their contents.⁶⁶ Before the investigating chamber, the case file is also held at the disposal of the lawyers of the person under judicial examination', for a minimum period of five days before the hearing (48 hours as regards detention on remand).⁶⁷ The person under judicial examination has also a right to obtain a copy of the file:

'After the first appearance or first hearing, the lawyers of the parties or, if they do not have a lawyer, the parties may obtain a copy of any or all of the documents and instruments of the case file. This copy must be delivered within one month after the request. If the case file has been digitized, it shall be transmitted in a digitized form, if necessary by telecommunication, in accordance with the procedures provided in Article 803-1'.⁶⁸

In the case where the person is granted the status of assisted witness,⁶⁹ Article 113-3 CCP gives access to the file in accordance with the provisions of Article 114 CCP relating to the person under judicial examination (consultation four days before each interrogation or hearing; the person can get a copy of the documents after the first appearance or hearing). Thus, the assisted witness benefits from the same right of access to the case file as that of the person under judicial examination.

As far as voluntary hearing (in the framework of an investigation

⁶⁵ Art. 114 CCP.

⁶⁶ Cass. Crim. (Court of Cassation) 20 Feb. 1990, no 89-86.666. See F Saint-Pierre, 'Défense pénale', in *Répertoire de droit pénal et de procédure pénale* (Dalloz) para 68 <<http://www.dalloz.fr>>.

⁶⁷ Art. 197, 208 and 209 CCP.

⁶⁸ Art. 114 CCP.

⁶⁹ See *supra* (n 64).

supervised by the district prosecutor) is concerned, the suspect should be able to consult the documents in conditions similar to those specified by Article 63-4-1 CCP for the person remanded in custody.⁷⁰ However, as regards custody, Article 63-4-1 states that the lawyer may read the minutes of his client's hearing. They cannot obtain a copy of it, however, they can take notes. The person in custody may consult this document or a copy of it. Therefore, the same should apply to the suspect heard voluntarily, and to their lawyer.

As far as the judicial investigation is concerned, the complete file of the investigation proceedings must be made available to the person under judicial examination and their lawyers.⁷¹ However, documents related to an on-going investigative measure that the judicial police is enforcing upon request of the investigative judge (ie *commissions rogatoires*) may not appear in the file before the completion and enforcement of that request.⁷² Digital documents such as DVDs of the reconstruction or modelling of crime scenes must be included in the case file. Parties must be provided access to it.⁷³ Only the seals are not included in the case file. The lawyer can request a copy of them in accordance with the procedure of Article 82-1 CCP.⁷⁴ There are restrictions to the procurement of copies of documents. Following the lawyer's request to obtain a copy of all or parts of the documents and acts of the file (to show to their client) or following the party's request (if they're not represented);

'the investigating judge has five working days from receiving the application to refuse to deliver to the parties some or all of the copies requested or of their reproductions by making a specially reasoned order in respect of the risks of pressure on the victims, the persons under judicial examination, their lawyers, the witnesses, the investigators, the experts or any other person taking part in the proceedings'.⁷⁵

If the investigating judge refuses to deliver a copy of the requested documents, paragraph 9 of Article 114 CCP allows the parties or their

⁷⁰ 19 December 2014 Circular, para 1.2. See J Leroy (n 58) para 68.

⁷¹ Art. 114 CCP.

⁷² Cass. Crim. (Court of Cassation) 20 May 2008, no 07-88.672.

⁷³ Cass. Crim. (Court of Cassation) 3 June 2015, no 15-81.801.

⁷⁴ F Saint-Pierre (n 66) para 68.

⁷⁵ Art. 114 CCP.

lawyers ‘within two days of its notification, [to] refer the investigating judge’s decision to the investigating chamber’s president, who rules within five working days by making a written, reasoned and unappealable decision’.

In addition, the person under judicial examination and the assisted witness⁷⁶ (as well as the civil party and the district prosecutor) may file a request for annulment of the proceedings before the investigating chamber.⁷⁷ The applicable time periods are specified in Article 173-1 CCP: six months from the interrogation of the person under judicial examination or from the assisted witness’ hearing, for steps taken before. If a procedural step is taken after the last interrogation, Article 175 CCP specifies the applicable time limits (one month in the case of detention on remand; three months otherwise). For the nullity to be pronounced, the provisions of Article 802 CCP require to prove actual damage to the interests of the party concerned. Case law tempers this principle by admitting damage inherent to certain violations (automatic nullity exempting from proving damage). According to well established case law, it is the case in the event of a breach of the rights of the defence, which include the right to a lawyer. The existence of damage is therefore inherent to a breach of this right. The investigating chamber decides whether the nullity shall be limited to the illegal step or whether it shall be extended to other steps, or even to the entire procedure. Case law limits the nullification to the steps of which the illegal step was the necessary medium.⁷⁸

If the case file is incomplete, the lawyer of the person under judicial examination has to denounce it, by a letter or by an observation recorded in the minutes of the interrogation. In such a case, the nullity of this interrogation would be incurred.⁷⁹ Otherwise, the incompleteness of the case file would not be found prejudicial to the rights of the defendants.⁸⁰

The appeal to the investigating chamber’s president against the investigating judge’s refusal to issue copies of documents⁸¹ was provided for before the 27 May 2014 transposition Act. French law

⁷⁶ A definition of both concepts is provided above (n 63 and 64).

⁷⁷ Art. 173 (3) CCP.

⁷⁸ ‘*Le support nécessaire*’. Eg Cass. Crim. (Court of Cassation) 12 Apr. 2005, no 04-86.780.

⁷⁹ Cass. Crim. (Court of Cassation) 8 Apr. 2015, no 15-80.783; 29 Jan. 2003, no 02-86.774.

⁸⁰ F Saint-Pierre (n 66) para 68.

⁸¹ Art. 114 (9) CCP.

was already more protective than Directive 2012/13/EU. The latter merely requires the decision refusing access to certain documents to be ‘taken by a judicial authority or [to be] at least subject to judicial review’.⁸² French law fulfills these two conditions in a cumulative manner: a decision taken by the investigating judge and an appeal before the investigating chamber’s president.

The criminal chamber of the Court of Cassation has found that Article 63-4-1 CCP, which lists exhaustively the documents that can be consulted by a person in police custody or by their lawyer,⁸³ is not incompatible with Article 6(3) of the European Convention on Human Rights. The Court ruled that the non-transferral of the case file in its entirety at this stage of the procedure did not deprive the person of an effective right to a fair trial as long as the access to these documents was guaranteed before the judicial investigation bodies and the courts.⁸⁴

As a conclusion, French legislation is by its nature ambivalent. Although the right to access the file is very restricted within the framework of an investigation supervised by the district prosecutor, this right is effective when a judicial investigation is opened. In the latter case, French law provides a specific remedy against the refusal to deliver documents.⁸⁵ The short deadlines set out in paragraph 9 of Article 114 CCP ensure the efficiency of this remedy (the investigating chamber’s president has five working days to rule on the remedy). Regarding this, French law ensures a higher protection than the minimum requirement set out in Article 7 of Directive 2012/13/EU.

4.2. Derogations on the right to access a lawyer

With regard to voluntary hearing,⁸⁶ if the person is suspected of having committed an offence punishable by imprisonment (restrictive condition not conforming to Article 3 of Directive 2013/48/EU), they must be informed, prior to the hearing, of their right to be assisted by

⁸² Art. 7 (4) Directive 2012/13/EU.

⁸³ Official report of the placement in custody, minutes of the person’s hearings, medical certificate.

⁸⁴ Cass. Crim. (Court of Cassation) 4 Oct. 2016, no 16-82309, *Recueil Dalloz* 2017, 247 – 250.

⁸⁵ Art. 114 (9) CCP.

⁸⁶ *Audition libre*.

a lawyer⁸⁷. Additionally, Article 61-1 CCP specifies that ‘if the inquiry proceedings allow it, when a summons is addressed to the person for their hearing’, this summons mentions the right to be assisted by a lawyer. With regard to police custody⁸⁸, Article 63-3-1 CCP guarantees, from the start of the custody, that the person may choose a lawyer or may request one to be appointed to them. Article 63-4 CCP guarantees the possibility of a confidential conversation with the lawyer lasting a maximum of 30 minutes, renewable where police custody is extended, at the start of the extension. In addition, the person may request their lawyer to attend their hearings and confrontations.⁸⁹ In this case, the first hearing, unless it only concerns the person’s identity, cannot begin without the lawyer being present before the expiry of a two-hour long period following the notification of the president of the bar or the duty lawyer. The lawyer may take notes during hearings and confrontations.⁹⁰ In both cases (voluntary hearing and police custody), the lawyer may ask questions at the end of the hearing or the confrontation he is attending.⁹¹ The judicial police officer or agent may oppose these questions only if they are likely to disrupt the proper course of the inquiry. Such refusal is recorded in the official report. At the end of each interview with the person, and of each hearing or confrontation they attended, the lawyer may make written observations. They may specify the questions that were refused by the judicial police officer or agent. These observations are added to the case file. They also may send their observations to the district prosecutor during police custody.

With regard to judicial investigations,⁹² if the summons procedure for the first appearance before the judge set out in Article 80-2 CCP has not been followed (in the alternative case of a bench warrant etc⁹³), the investigating judge must inform the person of their right to have a lawyer attending the first appearance, before proceeding to interrogation. Upon arrival, the lawyer ‘may consult the case file at once and freely communicate with the person’.⁹⁴ The lawyer may

⁸⁷ Art. 61-1 CCP.

⁸⁸ Garde à vue.

⁸⁹ Art. 63-4-2 CCP.

⁹⁰ Art 63-4-2 (1) CCP.

⁹¹ Art 63-4-3 CCP, by reference to Art. 61-1 CCP.

⁹² *Information judiciaire*.

⁹³ See art. 133-1 CCP.

⁹⁴ Art. 116 CCP.

present their observations to the investigating judge during the first appearance.⁹⁵ Once the person is under judicial examination, unless they expressly waive this right, they may only be interrogated or confronted in the presence of their lawyer or when their lawyer has been duly called upon.⁹⁶ Similarly, the assisted witness 'benefits from the right to be assisted by a lawyer, who is informed prior to the hearings and who has access to the case file'.⁹⁷ The lawyer may ask questions or make 'brief observations'.⁹⁸

With regard to evidence gathering in the context of an investigation supervised by the district prosecutor, the person suspected of having been involved in committing an offence punishable by a prison sentence⁹⁹ may be assisted by a lawyer 'when they take part in a reconstruction of the scene of a crime' and 'during the identity parade at which they figure'.¹⁰⁰ The person must be informed of this right before the procedure. These safeguards are guaranteed by Article 61-3 CCP. This article, in force since November the 15th 2016, was introduced by the 3 June 2016 Act,¹⁰¹ reinforcing measures against the financing of organised crime and terrorism, and improving the efficiency and guarantees of criminal procedure.¹⁰² Initially, article 61-3 CCP only pertained to offences punishable by a prison sentence up to ten years,¹⁰³ and did not cover more serious crimes.¹⁰⁴ It was promptly modified¹⁰⁵ in order to include all offences punishable by a prison sentence. The directive allows the lawyer to attend all reconstructions and identity parades.¹⁰⁶ Under French law, the lawyer may not attend searches in principle. However, there are exceptions

⁹⁵ Art. 116 (4) CCP.

⁹⁶ Art. 114 CCP.

⁹⁷ Art. 113-3 CCP.

⁹⁸ Art 120 (1) CCP related to both the person under judicial examination and the assisted witness.

⁹⁹ *Crime ou délit puni d'emprisonnement*.

¹⁰⁰ Art. 61-3 CCP as regards the flagrant offence investigation ; Art. 76-1 CCP (by reference to art. 61-3) , as regards the preliminary inquiry.

¹⁰¹ No 2016-731.

¹⁰² *Journal Officiel de la République Française* 4 June 2016.

¹⁰³ Délits.

¹⁰⁴ Article 61-3 only referred to '*délits*' (category of offences punishable by a maximum prison sentence up to ten-year long) and not to '*crimes*' (category of offences punishable by a prison sentence longer than ten years).

¹⁰⁵ On November the 20th, 2016.

¹⁰⁶ As far as the suspect attends the reconstruction or the parade. See art. 3 para 3 c) Directive 2013/48/EU.

(presence of the president of the bar association in the case of searches of a lawyer's office or domicile).¹⁰⁷

With regard to evidence gathering in the context of a judicial investigation, Article 154 CCP states¹⁰⁸ that the lawyer may attend identity parades and reconstructions of the scene of a crime in the case of the carrying out of a rogatory commission. Apart from rogatory commissions, the right to have a lawyer attending identity parades and reconstructions set out in Article 3(3) of Directive 2013/48/EU does not seem to have been transposed into national legislation for acts supervised by the investigating judge themselves. A reconstruction is an act *sui generis*, not regulated by the CCP. This act is composed of:

'acts defined by the texts, and the judge must, in this case, respect the forms of these acts. Thus, when the judge carries out a reconstruction, (...) they in fact carry out a visit to the scene of the occurrence, or an interrogation, or witnesses' or civil parties' hearings and they must respect the rules set for these specific acts'.¹⁰⁹

Thus, because a reconstruction normally includes an interrogation (act for which the right to a lawyer exists), the right to a lawyer should be respected. However, as regards the identity parade supervised by the investigating judge himself, the right to a lawyer is not provided for in the national legislation.¹¹⁰ As far as other acts are concerned, Article 82-2 of the CCP states that:

'where the person under judicial examination under the provisions of Article 82-1 of the CCP makes a formal request to the investigating judge to visit a particular place, or to hear a witness, a civil party or other person under judicial examination, that person may request that this be done in the presence of their lawyer'.

The investigating judge may refuse the person's request to be

¹⁰⁷ Art. 56-1 CCP.

¹⁰⁸ By reference to Art. 61-3 relating to flagrant offence investigations.

¹⁰⁹ JP Valat, 'Art. 79 à 84 - Fasc. 20 : Jurisdiction d'instruction du premier degré', in *Jurisclasseur Procédure pénale* (LexisNexis) para 121, <<http://www.lexis360.fr>>.

¹¹⁰ *Ibid* para 117.

assisted by their lawyer. Article 82-1 CCP¹¹¹ specifies that, ‘the investigating judge must make a reasoned order within one month from receiving the application, when he decides not to grant it’.

As far as police custody in the context of an investigation supervised by the district prosecutor is concerned, paragraph 3 of Article 63-4-2 CCP states:

‘When the inquiry requires the person’s immediate hearing, the district prosecutor may authorise, by a written and reasoned decision, on the judicial police officer’s request, that the hearing starts before the expiry of the [two-hour long] time period’.

Paragraphs 4 and 5 of Article 63-4-2 CCP add:

‘ In exceptional circumstances, at the judicial police officer’s request, the district prosecutor or the liberty and custody judge¹¹², according to the distinctions provided for by the next paragraph, may authorise, by a written and reasoned decision, the postponement of the lawyer’s attendance at hearings or confrontations, *if this measure appears indispensable for compelling reasons regarding the particular circumstances of the inquiry, either in order to allow the proper course of urgent investigations aiming at collecting or secure evidence, or to prevent serious and imminent violation of a person’s life, liberty or physical integrity.*

The district prosecutor may only postpone the lawyer’s attendance for a maximum of twelve hours. Where the person is in custody for a crime punished by a prison sentence longer or equal to five years, the liberty and custody judge may, at the district prosecutor’s request, authorize to postpone the lawyer’s attendance, beyond the twelfth hour, until the twenty-fourth hour. The district prosecutor and the liberty and custody judge’s authorizations are written and reasoned in reference to the conditions provided for by the previous paragraph regarding the precise and detailed elements arising from the facts of the case’.

The postponement of the access to a lawyer provided for by paragraphs 4 and 5 of Article 63-4-2 CCP appears to be compatible

¹¹¹ Art. 82-2 CCP refers to this article.

¹¹² *Juges des libertés et de la détention.*

with Article 3(6) Directive 2013/48/EU. The reasons provided by the CCP are those set out in the directive (to avert serious adverse consequences for the life, liberty or physical integrity of a person; to prevent substantial jeopardy to criminal proceedings). However, the vague formulation of paragraph 3 of Article 63-4-2 CCP relating to the failure to respect the two-hours long waiting period ('when the inquiry requires the person's immediate hearing') do not seem compatible with reasons set out in the directive.

As far as judicial investigation is concerned, notwithstanding the procedure for first appearance,¹¹³ Article 117 CCP allows the investigating judge to carry out immediate interrogation and confrontations, 'in a case of urgency arising from the condition of a witness in danger of death, or from the existence of evidence on the point of disappearing'.¹¹⁴ Moreover, the investigating judge may refuse the lawyer's (and the district prosecutor's) questions during interrogations and confrontations if they are, 'likely to disrupt the proper course of the investigation, or to threaten personal dignity. Any such refusal must be recorded in the official report'.¹¹⁵ As far as the first derogation, set out in Article 117 CCP, is concerned, it appears compatible with the compelling reasons provided for in the directive (to avert serious adverse consequences for the life, liberty or physical integrity of a person; to prevent substantial jeopardy to criminal proceedings). As far as the second derogation is concerned, the directive¹¹⁶ provides that the lawyer 'participate[s] effectively' when the person is questioned. The possibility for the judge to oppose questions, as set out in paragraph 2 of Article 120 CCP, does not seem to compromise the effectiveness of the lawyer's participation.

As far as the investigation supervised by the district prosecutor is concerned, French law does not allow for the challenge of steps taken in the course of a preliminary police inquiry or of a flagrant offence investigation, which are not followed by a judicial investigation, until criminal proceedings before the trial Court.¹¹⁷ As far as judicial investigation is concerned, the person under judicial examination may request to be assisted by a lawyer (during a visit to the scene of the

¹¹³ Art. 116 CCP.

¹¹⁴ Art. 117 CCP.

¹¹⁵ Art. 120 (2) CCP relating to both the person under judicial examination and the assisted witness.

¹¹⁶ Art. 3(3) b) Directive 2013/48/EU.

¹¹⁷ As regards the action of nullity before the trial court, see Art. 375 CCP.

occurrence for instance), within the framework of Articles 82-1 and 82-2 CCP. Within this framework, last paragraph of Article 81 CCP¹¹⁸ specifies that ‘where the investigating judge fails to decide on the application within one month, the party may apply directly to the president of the investigating chamber, who decides (...)’. Article 186-1 CCP adds that the parties (including the person under judicial examination) may lodge an appeal against the orders taken by the investigating judge as set out in Article 82-1. The investigating chamber’s president ‘rules, by an order not susceptible of appeal, whether or not to refer this appeal to the investigating chamber’.¹¹⁹ In addition, the person under judicial examination and the assisted witness (as well as the civil party and the district prosecutor) may also request the nullity of investigation steps before the investigating chamber.¹²⁰ The provisions of Article 802 CCP require the proof of actual damage to the interests of the party concerned, for the nullity to be pronounced. Case law tempers this principle by admitting damage inherent to certain violations (automatic nullity exempting from proving damage). According to constant case law, it is the case in the event of a breach of the rights of the defence, which include the right to a lawyer. The existence of damage is therefore inherent to a breach of this right. The criminal chamber of the Court of Cassation ruled that ‘the hearings carried out after the person under judicial examination had requested a lawyer’s assistance, were irregular’. Therefore, the investigating chamber had ‘to pronounce their nullity, and where relevant, had to extend the effects of the nullification to the steps of which they were the necessary medium’.¹²¹

The lawyer interviewed within the framework of this research, has reported recurrent cases where police officers have deterred defendants from exercising their right to be assisted by a lawyer on the grounds that lawyers are helpless, considering the very restricted access to the case file that they have. Because they directly infringe the implementation of the right to be assisted by a lawyer, these reported behaviours seem very questionable. And one must question the practices consisting of justifying the non-exercise of a right by the lack of effectiveness of another right. Furthermore, these practices question the absence of

¹¹⁸ Referred to successively by Art. 82-2 and 82-1 CCP.

¹¹⁹ Art. 186-1 CCP.

¹²⁰ Art. 173 CCP.

¹²¹ Cass. Crim. (Court of Cassation) 5 Nov. 2013, no 13-82682.

appeal in French law during the stage of an investigation supervised by the district prosecutor.

4.3. *Decisions finding that there is no need for interpretation*

In principle, the authority which carries out the suspected or prosecuted person's hearing must check whether this person understands French. If it is not the case, an interpreter must be appointed *ex officio*.¹²² As regards investigations supervised by the district prosecutor (voluntary hearing and police custody), the preliminary article CCP provides for a right to interpretation to all suspected persons. This includes the suspect heard voluntarily. Voluntary hearings and hearings taking place during police custody are carried out by a judicial police officer under the supervision of the district prosecutor. Pursuant to Articles 61-1 (voluntary hearing) and 63-1 CCP (police custody), the judicial police officer notifies the suspect of their right to interpretation before proceeding to the hearing. Pursuant to Article D594-1 CCP, they must appoint an interpreter *ex officio* if the person does not understand French. With regard to judicial investigations, during interrogations and confrontations, the person under judicial examination¹²³ and the assisted witness¹²⁴ both benefit from the right to interpretation. Article 102 CCP¹²⁵ states that 'the investigating judge may call upon an interpreter who has reached the age of majority'. The third paragraph of Article 121 CCP adds that 'if the person under judicial examination is deaf, the investigating judge officially appoints [...] a sign-language interpreter or another qualified person able to communicate with deaf people'. The judge may also use any technical device enabling communication with the person. Article 102 CCP grants the assisted witness the same guarantees. Furthermore, the parties, including the person under judicial examination, may take the initiative. The first paragraph of Article 82-1 CCP states that 'in the course of the investigation the parties may file with the investigating judge a written and reasoned application (...) for any other step to be taken which seems to them necessary for the discovery of the truth'.

¹²² Art. D594-1 CCP.

¹²³ Art. 116 CCP.

¹²⁴ Art. 113-3 (2) CCP.

¹²⁵ Relating to the assisted witness and to the person under judicial examination by reference to this provision in Article 121 CCP.

The request for interpretation may be made within this framework.¹²⁶ The second paragraph of Article 82-1 CCP adds that, ‘the investigating judge must make a reasoned order within one month from receiving the application, when he decides not to grant it’.

In French law, no remedy is available against acts carried out within the framework of an investigation supervised by the district prosecutor that does not lead to the opening of a judicial investigation. Therefore, the following paragraphs only relate to remedies against acts carried out in the framework of a judicial investigation. Following a request for interpretation made by the person under judicial examination (in the framework of Article 82-1 CCP), ‘where the investigating judge fails to decide on the application within one month, the party may apply directly to the president of the investigating chamber, who decides (...)’.¹²⁷ In addition, the parties (including the person under judicial examination) may lodge an appeal against the investigating judge’s orders delivered under Article 82-1. In this case, the investigating chamber’s president ‘rules, by an order not susceptible of appeal, whether or not to refer this appeal to the investigating chamber’.¹²⁸

An action of nullity may also be lodged.¹²⁹ In principle, for the nullity to be pronounced, the provisions of Article 802 CCP require the proof of actual damage to the interests of the party concerned. Case law tempers this principle by admitting damage inherent to certain violations (automatic nullity exempting from proving damage). According to established case law, it is the case in the event of a breach of the rights of the defence. It was also ruled that the unjustified absence of an interpreter where there was some doubt ‘about the suspect’s understanding of the proceedings, [was] likely to irremediably breach the rights of the defence’.¹³⁰ In such a case, the sanction is the nullity of the act and the subsequent cancellation¹³¹ of any reference to the nullified acts in the case file.

¹²⁶ Cass. Crim. (Court of Cassation) 25 May 2005, *Bull. Crim.* no 157, quoted by J Pradel, *Procédure pénale* (Paris, Cujas, 2015) 697.

¹²⁷ Art. 81 final para CCP (referring to art. 82-1 CCP).

¹²⁸ Art. 186-1 CCP.

¹²⁹ See *supra* Section 4.1 *Restrictions on the right to access the case file*.

¹³⁰ Cass. Crim. (Court of Cassation) 9 Feb. 2016, no15-84277.

¹³¹ The elements unlawfully obtained must be rendered unreadable.

4.4. *Decisions finding that there is no need for translation*

In principle, the suspected or prosecuted person has a right to the translation of documents that are essential to their defence and to the fairness of their trial. Unless they expressly waive this right, these essential documents must be handed over to them or notified, as prescribed under the CCP.¹³² The latter provides a list of documents that must be automatically translated¹³³ (eg minutes of the first appearance before the investigating judge, orders relating to detention under remand, committals for trial). Additional documents may also be translated. Article D594-6 CCP states that, on their own initiative or at the person's request, the district prosecutor and the investigating judge may order the translation of a document that they consider essential to the exercise of the defence and to the fairness of the trial. These may include rulings on the requests made by the person under judicial examination, official reports of interrogations and confrontations, etc.¹³⁴ However, translation may be restricted, as stated in Article D594-7 of the CCP:

'The translation of essential documents may relate *only to the passages of such documents which are relevant* in order to enable the person to know the facts alleged against them. The relevant passages of such documents are determined, depending on the stage of the proceedings, by the district prosecutor, by the investigating judge (...)'.

As far as an order refusing the person's release from detention is concerned, the sole reasons for the decision may suffice.¹³⁵ Furthermore, 'an oral translation or an oral summary of the essential documents'¹³⁶ that must be delivered or notified to the suspected or prosecuted person may also suffice.

In French law, no remedy is available against acts carried out within the framework of an investigation supervised by the district prosecutor, which is not followed by a judicial investigation. Therefore, the following paragraphs only relate to remedies against acts carried out

¹³² Preliminary Art. CCP (III).

¹³³ Art. D594-6 CCP.

¹³⁴ C Guéry, *Dalloz action Droit et pratique de l'instruction préparatoire* (Paris, Dalloz, 2015) para 143.74, <<http://www.dalloz.fr>>.

¹³⁵ *Ibid.*

¹³⁶ Art. 803-5 CCP.

in the framework of a judicial investigation. Similarly to what is provided for the right to interpretation, remedies are available following a refusal to a request for translation made by the person under judicial examination (within the framework of Article 82-1 of the CCP).¹³⁷ The appeal against the investigating judge's refusal is admissible even where the investigating judge has not replied in the form of an order.¹³⁸ An action of nullity is possible as well. It seems that the action of nullity before the investigating chamber, which is available to the person under judicial examination and to the assisted witness, is possible where there has been a breach of the right to translation.¹³⁹

Interviewing stakeholders within the framework of this research showed that only committals for trial are translated in practice. The other documents subject to translation under the CCP are not translated.¹⁴⁰ In addition, contrary to what is stated in the CCP,¹⁴¹ in practice, oral translation seems to be the rule, and written translation, the exception. This misreading, as much on the part of judges as on the part of lawyers, is naturally detrimental to the effectiveness of the right to translation. Thus, a more effective communication about the substance of this right during the practitioners' continuing education would seem appropriate.

4.5. Violations of the right to information

Within the framework of an investigation supervised by the district prosecutor, according to Article 61-1 CCP, the suspect must be informed of the nature of the offence prior to a voluntary hearing: 'If the course of the investigation allows for it, where a summons is addressed to the person for the purpose of their hearing, this summons mentions the offence alleged against them'. The person under police custody is informed 'immediately' of the offence at the time of their placement in custody.¹⁴² The legal qualification of the matters must appear on

¹³⁷ See above Section 4.3 *Decisions finding that there is no need for interpretation*.

¹³⁸ Cass. Crim. (Court of Cassation) 4 Nov. 2015, no 15-84.012. In this case, the judge replied in the form of a simple letter.

¹³⁹ See *supra* Section 4.1 *Restrictions on the right to access the case file*.

¹⁴⁰ Art. D594-6 CCP.

¹⁴¹ Art. 803-5 (3) CCP.

¹⁴² Art. 63-1 CCP.

the official report¹⁴³ under penalty of nullity.¹⁴⁴ Within the framework of a judicial investigation, at the end of the first appearance, the judge informs the person placed under judicial examination of ‘the matters or the legal qualification of the matters of which he is accused, if these matters or their legal qualification differ from those of which he has previously been informed’.¹⁴⁵ At the other end of the process, ‘the indictment order contains, under penalty of nullity, a presentation and the legal qualification of the matters to which the accusation relates’.¹⁴⁶ The order must indicate ‘the legal qualification of the actions he is charged with and state precisely the grounds for which there is or is not sufficient evidence against him’.¹⁴⁷ The assisted witness gets similar information. ‘During his first hearing as an assisted witness, the investigating judge [...] informs him of the initial submission, the complaint or the denunciation’.¹⁴⁸

There does not seem to be any specific remedy relating to the right to information. The action of nullity available to the person under judicial examination and to the assisted witness is possible.¹⁴⁹ The criminal chamber of the Court of Cassation has considered that the absence of a letter of rights necessarily causes damage to the person’s interests, if it isn’t justified by any insurmountable circumstances. Therefore, that person does not need to prove damage.¹⁵⁰ In addition, during the interrogation of first appearance before the investigating judge, the compulsory formalities, including the information of the right to a lawyer, of the right to interpretation and of the right to translation,¹⁵¹ must be observed under penalty of nullity of the act itself and of the later stages of proceedings.¹⁵²

Because no other remedy seems available as regards the right to information, the length of the proceedings before the investigating chamber (action of nullity) seems particularly detrimental to the

¹⁴³ *Procès-verbal*.

¹⁴⁴ Cass. Crim. (Court of Cassation) 16 June 2015, no 14-87.878, quoted by F Saint-Pierre (n 65) para 55.

¹⁴⁵ Art. 116 CCP.

¹⁴⁶ Art. 181 CCP relating to serious crimes (crimes punishable by a maximum prison sentence longer than ten years).

¹⁴⁷ Art. 184 CCP.

¹⁴⁸ Art. 113-4 CCP.

¹⁴⁹ Art. 173 CCP.

¹⁵⁰ Eg Cass. Crim. (Court of Cassation) 2 May 2002, no 01-88453, relating to police custody.

¹⁵¹ Art. 116 CCP.

¹⁵² Cass. Crim. (Court of Cassation) 15 March 1973, *Bull. Crim.* no 134.

efficiency of this right. In addition, interviewing stakeholders within the framework of this research has revealed a lack of consistency in practices, which is regrettable. It seems that templates of official reports for hearings, which support the effectiveness of the right to information, are made available to judicial police officers. Nevertheless, it appears that these templates are not made available to investigating judges. A generalisation of these good practices, and of those in place as regards summons to voluntary hearings,¹⁵³ would seem beneficial.

5. Sanctions against illegal or improperly obtained evidence

In French law, rules governing the admissibility and use of evidence require the judge to verify whether it has been gathered in accordance with the law. The judge cannot base any ruling on evidence that has been annulled. In criminal matters, the question related to the admissibility of evidence does not fall within the competence of trial courts of first instance, but of the investigating chamber in case of a judicial investigation. Thus, Article 170 CCP provides that ‘in the course of the investigation the investigating chamber may in any matter be referred for annulment a procedural instrument or procedural document by the investigating judge, by the district prosecutor, by the parties or by an assisted witness’.

In this case, three types of nullity are likely to invalidate evidence that has been illegally gathered. First of all, some evidence can be discarded due to a nullity of public order of the nullified act without it being necessary to show that it was caused by a grievance. For example, the kind of evidence concerned would be that obtained in the framework of an improper arrest. In this hypothesis, the criminal chamber of the Court of Cassation maintains that documents for which the arrest is the main medium must be annulled¹⁵⁴ or even the execution of an investigative act by the judicial police that had no prior authorisation from the public prosecutor.¹⁵⁵

Subsequently, some evidence may be discarded because of a substantial nullity of private order invalidating the act on condition

¹⁵³ See *supra* Section 4.2 *Derogations on the right to access a lawyer*.

¹⁵⁴ For example Cass Crim (Court of Cassation), 22 June 2000, Bull Crim no242.

¹⁵⁵ Based on Art. 77-1-1 CCP.

that the latter caused a grievance to the claimant.¹⁵⁶ For example, the criminal chamber of the Court of Cassation maintained that the error consisting in not notifying a person officially in a report of his/her rights is a cause for nullity as it is in violation of the interests of the person concerned.¹⁵⁷

Finally, legal precedence considers that certain violations of rights are cause for nullity without it being necessary to show a grievance, being of a nullity of private interest classed with those of a public order. Thus the Court of Cassation maintains that ‘the principle of equality of arms resulting from a fair and adversarial procedure, obliges that the parties of the criminal trial have the same rights; that it must be so and especially in the case of one party’s lawyer being present at the hearing of an expert carried out upon request and in the presence of the public prosecutor’.¹⁵⁸

Nevertheless, it is the case that ‘all grounds for the annulment of the procedure transmitted to it must, without prejudice of the court’s right to raise them of its own motion, be then submitted to it. Failing such submission, the parties are not permitted to raise them except where they could not have known about them’.¹⁵⁹

5.1. Infringements to the right of access the case file

At the moment of police custody, there cannot be any nullity for the moment according to French law, which remains refractory to give access to the file during this measure. Thus, despite the transposition of Directive 2012/2013/EU on the right to information in criminal proceedings by a 2 June 2014 Act, the question of the right of access to the full penal file remains. Thus, in a 21 October 2015 judgment, the criminal chamber of the Court of Cassation made it very clear that ‘the failure to communicate to the lawyer of the person in custody all the documents of the procedure is not such as to deprive him/her of an effective and concrete right to a fair trial as the access to these documents is guaranteed before the investigating and trial courts’.¹⁶⁰ So far, only a few jurisdictions have attempted to move the lines by canceling the custody of an accused whose lawyer had not been able

¹⁵⁶ Art. 171 CCP.

¹⁵⁷ Cass Crim (Court of Cassation), 6 December 1995, Bull Crim no369.

¹⁵⁸ Cass Crim (Court of Cassation), 11 May 2010, appeal no 10-80953.

¹⁵⁹ Art. 174 CCP.

¹⁶⁰ Cass crim (Court of Cassation), 21 October 2015, appeal no 15-81032.

to consult the police investigation record during this measure.¹⁶¹ However, they have never been followed by the Criminal Chamber.

It is therefore necessary to await the implementation of Directive 2013/48/EU, which requires the lawyer to play an active role during interview, which seems to imply access to the file from the beginning of police custody. During the investigation, Article 197, paragraph 3 CCP provides that the case file is available to the lawyer. However, this right of access to the file is considered as an absolute right by the Criminal Chamber of the Court of Cassation. Thus, in a judgment on 11 May 2000, the Court held that Article 197 paragraph 3 CCP states that a party's lawyer should be given access to the investigation file and should produce any statements before the investigating Chamber, and that this provision had to be observed or risk nullity.¹⁶²

5.2. Statements obtained in breach of the right to access a lawyer

Breaches of the right to access a lawyer constitute an 'automatic' nullity, which can be pronounced without a grievance. A violation leads to the annulment of the defective act without it being necessary to show that it caused a grievance. For example, in a 5 November 2013 decision, the Criminal Chamber of the Court of Cassation held that 'hearings taken after the defendant sought legal assistance were irregular', so that it was for the Chamber 'to annul them and, if necessary, to extend the effects of that annulment to the acts of which they were the necessary support'.¹⁶³

5.3. Breaches of the right to translation and interpretation

Article 63-1 CCP stipulates that 'a person in police custody shall be informed immediately by a judicial police officer or, under his or her supervision, by a judicial police officer in a language he/she understands, and if necessary, by means of the form provided for in the thirteenth paragraph: [...] – 'when appropriate, the right to be assisted by an interpreter'.

The unjustified absence of an interpreter, while doubts exist 'as to the suspect's understanding of the proceedings, is likely to compromise

¹⁶¹ See for instance Criminal Court of Paris, 30 December 2013.

¹⁶² Cass Crim (Court of Cassation), 11 May 2000, appeal no 10-81313.

¹⁶³ Cass Crim (Court of Cassation), 5 November 2013, appeal no 13-82682.

irremediably the rights of the defence'.¹⁶⁴ In such a case, the sanction is the nullity of the police custody and the cancellation (the elements obtained illegally must be made illegible) of any mention relating to the acts declared null and void.

Similarly, Article 706-71 paragraph 7 CCP provides that 'in the event of necessity arising from the impossibility for an interpreter to travel, the assistance of the interpreter during a hearing, interview or confrontation may also be carried out by means of telecommunications'. The jurisprudence of the Criminal Chamber of the Court of Cassation demands that this impossibility be ascertained in the minutes of notification of the rights of the detainee. Consequently, in the absence of a reference to the inability of the interpreter to move to custody, the proceedings are punishable by nullity.¹⁶⁵ The same applies if there were no circumstances that would justify the impossibility of appealing to another interpreter than the one requested.¹⁶⁶

5.4. Failure to provide information about rights and about accusation

Article 63-1 CCP stipulates that 'a person in police custody shall be informed immediately by a judicial police officer or, under his or her supervision, by a judicial police officer in a language he/she understands, and if necessary, by means of the form provided for in the thirteenth paragraph: (1) Placement in police custody, as well as the duration of the measure and the extension or extensions to which it may be subjected; (2) The alleged qualification, date and place of the offense which he/she is suspected of having committed or attempted to commit, and the grounds referred to in paragraphs 1 to 6 of Article 62-2 justifying his placement in custody; (3) the fact that he/she benefits from: - the right.'

Again, any breach of the rules governing the granting of the rights of the defence within police custody renders the measure null and void. For example, the absence of notification of rights¹⁶⁷ and of information on all offenses alleged to have been committed¹⁶⁸ is considered by the Criminal Chamber of the Court of Cassation as necessarily infringing

¹⁶⁴ Cass Crim (Court of Cassation), 9 February 2016, appeal no 15-84277.

¹⁶⁵ Cass 1st Civ. (Court of Cassation), 12 May 2010, no 10-81.249.

¹⁶⁶ Cass Crim (Court of Cassation), 3 December 1996, appeal no 96-84503.

¹⁶⁷ Cass Crim (Court of Cassation), 2 May 2002, appeal no 01-88453.

¹⁶⁸ Cass Crim (Court of Cassation), 16 June 2015, appeal no 14-87878.

the interests of the person concerned from the moment when no insurmountable circumstances justify it, so that he/she does not have to show that he/she has suffered a grievance. Consequently, there is a nullity of police custody and of the acts of which it was the necessary support.

6. Appeals against conviction and sentence

Article 380-1, paragraph 1 CCP states that ‘convictions rendered by the Assize Court in first trial may be appealed.’ by the defendant.¹⁶⁹ However, the appeal is admissible only if it concerns all the penal provisions; in other words, it is inadmissible if it concerns only the conviction decision or the sentencing provisions of the judgment.¹⁷⁰ The defendant must lodge the appeal within ten days from the delivery of the judgment under Article 380-9 CCP. However, by way of exception, if the public prosecutor a party other than the defendant is the first to appeal within this ten-day period, the defendant will have an additional five days for cross-appeal.¹⁷¹ In such a case, the defendant has a period of fifteen days after the delivery of the judgment to appeal.

If the procedural conditions are respected, a new Assize Court will be designated by the Criminal Chamber of the Court of Cassation.¹⁷² In this way, it is called a turning appeal, because the appeal is brought before another Assize Court. In this case, the composition of the Assize Court of Appeal is different: whereas in the first trial it is made of three professional judges and six citizens, it is composed of three professional judges and nine citizens in appeal.

The appellate court, as a court of second instance, undertakes its review both on the merits and on the law. In the event of an appeal to a new Assize Court, there is an effect of devolution, which means that the latter must re-examine the whole case. To do so, it examines both the ‘old’ evidence, that is, the evidence on which relied the Assize Court in the first trial for its decision, as well as the ‘new’

¹⁶⁹ In addition to the defendant, one of the people who the arrest may have been a grievance appeal against the latter (Art. 380-5 CCP). The prosecutor general may also appeal against decisions of acquittal (Art. 380-2 (2) CCP) and declarations of absence of responsibility due to mental illness (Art. 703-132 (1) CCP).

¹⁷⁰ Cass Crim (Court of Cassation), 2 February 2005, Bull. no 39.

¹⁷¹ Art. 380-10 CCP.

¹⁷² Art. 380-14 (1) CCP.

pieces of evidence, that is, those that that could be brought to the debate in the appeal.

However, it must be added that the President of the Assize Court has certain powers, both in the preparatory and trial stages. Thus, in the preparatory phase, Article 283 CCP provides that ‘the president, if the investigation is incomplete or if new evidence has been revealed since its closure, can demand any acts of information he/she considers useful’, such as expert opinions or interviews.

It must be added however, that the President of the appellate court also has discretion in the trial. Indeed, according to Article 310 CCP, ‘he may, in his honor and conscience, take whatever measures he believes to be necessary to discover the truth’. In such a case, the President may order expert opinions or transport to the premises, as well as a hearing of witnesses who have not been acquainted with the proceedings and be provided with any new material ‘which appears to him, according to the developments given to him during the audience, useful to the manifestation of the truth’.

The courts of appeal cannot annul a decision given in first trial, this power being limited to the Court of Cassation. The Assize Courts of Appeal may reverse the decision of the first trial (for example, an Assize Court of Appeal may pronounce an acquittal when the accused was convicted in first trial and *vice versa*). The Assize Courts of Appeal also have the possibility, on the basis of Articles 662 to 667-1 CCP, to refer the case to another court of the same order and to the same degree.

The reasons for dismissal are the following: legitimate suspicion,¹⁷³ public safety,¹⁷⁴ interruption of the course of justice,¹⁷⁵ detention of the accused in another place,¹⁷⁶ and finally the proper administration of justice.¹⁷⁷ Apart from these assumptions, no referral is possible.

7. Appeals in cassation

As regards the time limits for bringing an action before the Court of Cassation, Article 568 CCP provides that ‘the public prosecutor and all

¹⁷³ Art. 662 CCP.

¹⁷⁴ Art. 665 (1) CCP.

¹⁷⁵ Art. 665-1 and 667-1 CCP.

¹⁷⁶ Art. 664 CCP.

¹⁷⁷ Art. 665 (2) CCP.

the parties shall have five clear days after the date on which the contested decision was made in cassation'. As regards a possible appeal to the European Court of Human Rights, the applicant must have exhausted domestic remedies and filed his complaint within six months from the date of the final domestic decision.¹⁷⁸

As regards a possible review of the case when a new fact or unknown facts emerge at the time of the trial, no time limit is imposed on the applicant to file his application. In other words, there is no time limit for appeal in this matter, the application simply having to be addressed to the Court of Revision and Review, composed of magistrates of the Court of Cassation. The case can be examined even if there has already been an appeal in cassation.

The role of the Criminal Chamber of the Court of Cassation is to examine whether the decision submitted to it is in conformity with the rules of law. Indeed, it must review only the legality of decisions rendered in so far as it does not rule in fact but only in law. For this reason, it is considered not to constitute a third degree of jurisdiction.

The Court of Cassation does not have the possibility to reverse the decision of the appellate court in so far as it only decides on the law. The Court of Cassation, however, has the power to annul the decision of the appellate court, either in its entirety or only in part, depending on whether the nullity vitiates all or some of the provisions of the judgment. Moreover, the Court of Cassation has the power, when it pronounces a judgment of cassation and annulment in whole or in part of the decision, to refer the parties to a court of the same order and degree as that which rendered the annulled decision.¹⁷⁹ However, the Court of Cassation, in the event of an annulment, has the possibility of not making any referral, in particular when the facts allow it to use the appropriate rule of law.

8. Access to Constitutional Courts

In a criminal trial, the defendant may have access to constitutional courts. Article 61 (1) of the Constitution provides that 'when, in proceedings before a court, it is maintained that a legislative provision

¹⁷⁸ Art. 35 ECHR.

¹⁷⁹ Art. 610 CCP.

infringes the rights and freedoms guaranteed by the Constitution, the Constitutional Council may be seized of this matter upon referral from the Council of State or the Court of Cassation, which shall take a decision within a specified period'. This is called the 'priority question of constitutionality' (PQC).

As stated in Article 61 (1) of the Constitution, the PQC can only be raised in the context of an ongoing proceeding. Moreover, according to the PQC application of the 24 February 2010 circular, only the parties to the criminal trial, as well as the assisted witness and the prosecution, can raise a priority question. This question may be raised during the investigation or before the trial court, with the exception, however, of the Assize Court sitting in first trial. Article R49-25 CCP provides that 'the court shall decide without delay, in accordance with the rules of procedure applicable to it, on the transmission of the priority question of constitutionality' to the Court of Cassation.

If the court refuses to refer the matter to the Court of Cassation, this means that it implicitly recognizes the constitutionality of the provision criticized by way of preliminary ruling; if, on the contrary, it decides to refer the matter to the Court of Cassation, the proceedings in progress are suspended and it is necessary to delay the decision of the Court of Cassation or even that of the Constitutional Council Court if it is in turn referred to the Court of Cassation.

If the Criminal Chamber of the Court of Cassation refers a PQC, the Constitutional Council shall rule within a period of three months. The procedure may lead to three different outcomes. First, the Constitutional Council considers at the end of its examination that the provision is in conformity with the Constitution. In such a case, that provision remains in the domestic legal order and the court must apply it, unless it finds it incompatible with a provision of an international treaty or Union law. Second, the Constitutional Council declares that the impugned provision is contrary to the Constitution. In this case, and according to Article 62 of the Constitution, this provision is 'repealed from the publication of the decision of the Constitutional Council or a later date fixed by that decision. The Constitutional Council shall determine the conditions and limits within which the effects which the provision has produced are liable to be called into question'. Third, the Constitutional Council decides to resort to the technique of interpretation reservations. In other words, it declares a contested provision to be in conformity with the Constitution, provided that this provision is interpreted or applied in the manner that it indicates.

9. EAW and judicial review

9.1. Competent judicial authorities

The Public Prosecutor's Office, as well as the investigating judge or sentencing court, which has issued an arrest warrant, is the competent authority to issue a European Arrest Warrant (EAW).¹⁸⁰ The General Public Prosecutor is the competent executing authority in France.¹⁸¹

9.2. Judicial review by the French executing authorities

Articles 695-27 CCP (information provided by the General Attorney in a language that the person understands) and 695-30 CCP (assistance of an interpreter if necessary) provide for the presence of an interpreter when necessary. These provisions refer to the provisions of the preliminary article of the French CCP which, since the 5 August 2013 law, demands for this assistance. In such a case, the interpreter must be able to be present 'until the end of the proceedings (...) including interviews with his lawyer which are directly related to any questioning or hearing and, unless expressed and informed renunciation by him, to the translation of the essential documents to the exercise of his defence and to the fairness of the trial, which must therefore be handed over to him or notified under this Code'.¹⁸²

This provision is relayed by the provisions of Article 803-5 CCP, which requires the verification of the level of French of the individual in case of doubt on his understanding of the language and which, exceptionally, authorizes:

'an oral translation or an oral summary of the essential documents to be delivered or notified to him. The lack of interpretation or its quality may be challenged by the person who then makes observations which are either mentioned in the minutes of the hearing, examination or in the notes of the hearing if they are made immediately be placed in the record of the proceedings if they are subsequently filed'.¹⁸³

¹⁸⁰ Art. 695-16 CCP.

¹⁸¹ Art. 695-26 CCP.

¹⁸² Preliminary Article CCP (III) para. 3.

¹⁸³ Art. D594-2 CCP.

French law does not however, expressly provide for the possibility of appeal in relation to the written translation of the aforementioned documents as it does for interpretation.¹⁸⁴ The case law does not appear to have had such a dispute. Nevertheless, the judge would probably decide in favor of this appeal: either by analogy (using Article D594-2 CCP), either by resorting to substantive nullity or by giving reasons for its decision on the provisions of the ECHR.

The French CCP provides that a document setting out all the rights of the person arrested shall be given to him/her at the time of notification of the measure. The person can keep it until the end of the measurement. If the document is not available in the language he/she understands, oral information shall be provided and a written document shall be given to the person as soon as possible.¹⁸⁵

The previously cited Article 803-6 CCP provides for the assistance of a lawyer during the entire surrender procedure. The hypothesis of derogations from the right to legal assistance in proceedings relating to the execution of the EAW is not specifically provided for in the CCP. However, it may be considered that the postponement of the assistance of the lawyer provided for in certain procedures (in particular in the event of acts of terrorism) could apply. The jurisprudence has also considered that the strike of members of the Bar constituted an insurmountable circumstance that could validate a hearing during which the accused is not assisted by a lawyer. The motivation is threefold: the Council of the Order has not been able to appoint a lawyer because of a strike whose outcome is not determined; the national and European texts require a reasonable period of time; the person being imprisoned in France and claimed by Belgium, a date of surrender has already been foreseen. The referral of the case is therefore prevented because of the ‘imperative need to ensure the continuity of the course of justice’ and ‘in the state of the insurmountable circumstance that constitutes the strike of lawyers’.¹⁸⁶

Article 695-22, 5° CCP provides for a compulsory ground for refusal, which is mentioned only in recital 12 of the framework-decision: ‘If it is established that the arrest warrant was issued for the purpose to prosecute or convict a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or

¹⁸⁴ Art. D594-2 CCP.

¹⁸⁵ Art. 803-6 CCP.

¹⁸⁶ Nabil X..., Cass Crim (Court of Cassation), 8 July 2015, cassation application no 14-86399, not published and cassation application no 14-86400, Bull. 177.

sexual orientation or gender identity, or that this person may be adversely affected for any of these reasons'. Moreover, French national judicial authorities do not refuse the execution of an EAW because of the conditions of detention in the issuing Member State. At most, they ask for further information in order to ensure that the conditions of detention correspond to European standards.¹⁸⁷ This practice corresponds to the requirements of the *Aranyosi* judgment in which the CJEU insists on additional information and objective checks to be carried out in a concrete and precise manner.

With regard to the execution of a decision rendered *in absentia*, the surrender procedure in respect of a person who has been judged by default is more restrictive since the 5 August 2013 Act no 2013-711. *A priori*, the existence, in the issuing State of the EAW, of a trial by default prohibits the surrender of the person. However, according to Article 695-22-1 CCP, the surrender of a person may be authorized in the following cases: if the person was informed unambiguously or had been represented in the proceedings in the issuing State (subparagraph 1 and 2); where, having received the signification of the decision and being informed that a new procedure allowing a further examination on the merits, he/she did not wish to appeal (subparagraph 3); if the issuing State undertakes to notify the court of its decision and to inform him/her of the time-limits for appeal (subparagraph 4), in accordance with the conditions described in subparagraph 3. French law therefore respects the idea that the person sought and then surrendered must Benefit the right to a new trial where the EWA was issued for the purpose of executing a conviction rendered in *absentia*. In this respect, the rules explained in the French CCP are equivalent to those proposed by the Framework Decision 2002/584/JHA as amended by the Framework Decision 2009/299/JHA.

Moreover, French law provides for two requirements concerning the notification of a copy of the judgment *in absentia*, which do not exactly correspond to the purpose referred to above. Before the surrender, the individual fills in an application. He/she may 'receive' a copy of the decision taken by the issuing State which has led to a conviction after having made a request to the General Attorney who has to transmit it to the foreign authorities. The copy of the decision is then delivered to the individual for information. This is a simple communication, does not constitute the starting point of the time limit

¹⁸⁷ See Cass Crim (Court of Cassation), 10 August 2016, cassation application no 16-84725.

for lodging an appeal against the conviction.¹⁸⁸ In addition, prior to the surrender, the issuing State undertakes to notify the individual, as soon as he/she is surrendered, of the conviction and to inform him/her of the time-limits for appeal¹⁸⁹ respecting the conditions described in subparagraph 3 of the same article.

¹⁸⁸ Art. 695-27, *in fine* CCP.

¹⁸⁹ Art. 695-22-1, 4° CCP.

CHAPTER III
GERMANY

*Marco Mansdörfer, Christian Schmitt*¹

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Competent judicial authorities and scope of review. – 2.2. Exceptions for urgent cases. – 2.3. Remedies available to the defendant. – 3. Deprivation of liberty: Arrest and pre-trial custodial measures. – 3.1. Information about available remedies. – 3.2. Remand detention and provisional arrest. – 3.3. Review of detention and complaints. – 3.4. Defence rights and effective judicial review in the pre-trial stage of criminal proceedings. – 3.5. Arrest and detention for questioning. – 4. Specific remedies for alleged breaches of defence rights. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information. 5. Sanctions against illegal or improperly obtained evidence. – 5.1. Infringements of the right to access the case file. – 5.2. Statements obtained in breach of the right to access a lawyer. – 5.3. Breaches of the right to translation and interpretation. – 5.4. Failure to provide information about rights and about accusation. – 6. Appeals on facts and law. – 7. Appeals limited on errors of law. – 8. Access to the Constitutional Court. – 9. Judicial review and the EAW. – 9.1. Competent judicial authorities. – 9.2. Judicial review by the German executing authorities.

1. Constitutional guarantees

The Grundgesetz (Basic Law for the Federal Republic of Germany, BL)² does not expressly guarantee the right to access a court. However,

¹ The authors would like to thank the participants to the interviews conducted for the present research and Frédéric Salewski for his helpful work.

² Hereinafter BL (Basic Law for the Federal Republic of Germany from 23. May 1949).

many aspects of the right to access a court are contained in other constitutional provisions or derived from them. Most importantly, the legal protection guarantee is provided in Article 19 IV BL. Pursuant to the provision, if any person's rights are violated by the public authority, he may have access to the courts. Article 19 (4) BL reads: 'Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph'. The same applies to the right to appeal. In German constitutional law does not expressly enshrine the right to appeal, which is mainly codified in statutory law.³ But it can also be derived from the legal protection guarantee in Art. 19 IV BL.⁴ It is noteworthy, however, Germany did not ratify Article 2 of the Protocol 7 of the ECHR, which provides the right to appeal against convictions and sentences.⁵

Likewise, the right to review the lawfulness of detention is also not directly guaranteed by German constitutional law, yet it can be derived from Art. 2 II 2 BL.⁶ According to the provision, 'Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law'. This Article protects the freedom of the person and therefore it is always touched (but not necessarily violated) in case of a detention. There is extensive case law of the German *Bundesverfassungsgericht* (Federal Constitutional Court)⁷ on this topic.⁸ Further, the principle of proportionality, which applies to all coercive measures (including detention) is derived from the BL.⁹ Moreover, the rights to an effective judicial remedy and the right to

³ See especially sections 304 ff. of the Code of Criminal Procedure; hereinafter CCP.

⁴ C Enders, in V Epping, C Hilgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (33rd edn, 01.06. 2017), Art. 19 GG n 74.

⁵ R Esser, *Textbuch Deutsches Recht, Europäisches und Internationales Strafrecht* (3rd edn, 2017, Munich, C.F. Müller), A 40d 7. ZP EMRK.

⁶ H-H Kühne, *Strafprozessrecht: eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts* (9th edn, 2015, Heidelberg, C.F.Müller), § 24, n 402.

⁷ Hereinafter BVerfG.

⁸ See only BVerfG, JR 2014, 488; BVerfG, StV 2013, 640; BVerfG, StV 2008, 198; OLG Hamburg, Judgment of 21.07.2016 – 2 Ws 146/ 16, StV 2016, 824.

⁹ H-H Kühne (n 6) § 24, n 406.

access a court are guaranteed by the principle of fair trial in Article 6 of the European Convention on Human Rights (ECHR).¹⁰

Finally, the German system incorporates the ECHR in an ambiguous way. In the constitutional framework, the ECHR does not have constitutional value.¹¹ It is only valid as statutory law. Nonetheless, the German BVerfG held that the entirety of the BL's provisions are to be interpreted as consistently as possible with international law (principle of *Völkerrechtsfreundlichkeit*).¹² Therefore, the legislature has to take the ECHR into account.¹³ In practice, this puts the ECHR and the case law of the ECtHR on a higher rank than the requirements of the BL. This landmark decision has partially been implemented into the BL by Article 25 of the BL. According to the provision, 'The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory'.

2. Investigative measures subject to prior judicial authorization

2.1. Competent judicial authorities and scope of review

The most important investigative measures are regulated in the Code of Criminal Procedure (CCP). In general, coercive investigative acts must be ordered by judge or by court. For instance, searches can only be ordered by a judge.¹⁴ The order should be given in written form. In urgent cases, the order can be given verbally and even by call.¹⁵ The order has to indicate the offence and the basis of

¹⁰ B Valerius, in J-P Graf (ed), *Beck'scher Online-Kommentar StPO mit RiStBV und Mistra* (BeckOK StPO) 27th edn 1.1.2017, EMRK Art. 6 n 5-8.

¹¹ B Weißer, in R Schulze, M Zuleeg, S Kadelbach (eds), *Europarecht – Handbuch für die deutsche Rechtspraxis* (3rd edn, 2015, Baden-Baden, Nomos), second part: Besonderer Teil § 42 Strafrecht n 99-101.

¹² M Hartwig, *Völkerrechtliche Praxis der Bundesrepublik Deutschland 2010* (2013) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaöRV), 735; Bundesverfassungsgericht (Federal Constitutional Court, BVerfG) Judgment of 4.5.2011, 2 BvR 2365/09, 1 BvR 740/10, n 92 ff.

¹³ M Hartwig (n 12) 735; BVerfG Judgment of 4.5.2011, 2 BvR 2365/09, 2 BvR 740/10, n 92 ff.

¹⁴ Section 105 CCP.

¹⁵ B Schmitt, in L Meyer-Goßner, B Schmitt (eds), *Strafprozessordnung: Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen* (60th edn, 2017, Munich, C.H. Beck) § 105, n 3.

suspicious.¹⁶ Likewise, only a court has the power to order seizure,¹⁷ usually without prior hearing of the suspect.¹⁸ The order of the court has to be issued in form of a written and reasoned decision.¹⁹ A physical examination of the accused may be ordered for the purposes of establishing facts, which are of importance for the proceedings.²⁰ The authority to give such an order (prosecutor or police officers) shall be vested by the judge.²¹ The order can be given verbally at first,²² provided that the judge subsequently issues a written decision stating the reasons, the facts and the concrete examination.²³ There are currently reform proposals, allowing that the order can only be given by the prosecution office.²⁴ Without the written consent of the person concerned, molecular and genetic examinations may only be ordered by a court.²⁵ The written order must include the concrete charge, the reasons and the intention.²⁶ In principle, the use of an undercover investigator is admissible with the consent of the public prosecution office.²⁷ However, if the undercover investigation concerns a specific accused individual, or involves the undercover investigator entering private premises not generally accessible, the authorization of the court is required.²⁸

The competent judicial authority verifies whether the legal requirements are fulfilled and the proportionality of the measure. This principle applies to all measures of law enforcement and is derived from the BL.²⁹ Proportionality requirements is expressly codified with regard to detention.³⁰ In case of undercover investigations, review encompasses whether other means of investigating the serious

¹⁶ Ibid § 105, n 5, 5a.

¹⁷ W Meindel, M Andrä, in H Vordermayer, B Heintschel-Heinegg (eds), *Handbuch für den Staatsanwalt* (5th edn, 2016) n 37 ff.; Section 98 s1 CCP.

¹⁸ Section 33 s4 of the CCP; B Schmitt (n 15) § 98, n 8.

¹⁹ B Schmitt (n 15) § 98 n 8.

²⁰ Section 81a I CCP.

²¹ Section 81 II CCP.

²² BVerfG NJW 2010, 2864, 2865 Rn. 30; B Schmitt (n 15) § 81 a, n 25a.

²³ B Schmitt (n 15) § 81 a n 27.

²⁴ LTO, (Legal Tribune Online), <<https://www.lto.de/recht/nachrichten/n/bmjv-reform-richtervorbehalt-blutproben-staatsanwaltschaft-anordnung-polizei/>>, last accessed: 08.28.2017.

²⁵ Section 81f CCP.

²⁶ B Schmitt (n 15) § 81f, n 3.

²⁷ Section 110b I CCP.

²⁸ B Schmitt (n 15) § 110 b n 3; Section 110b II CCP.

²⁹ See *supra* (n 4).

³⁰ Section 116 CCP.

criminal offence would offer no prospect of success or hardly successful.³¹

2.2. *Exceptions for urgent cases*

As an exception, in urgent cases some orders can also be given by the public prosecution office and in case of even greater urgency, by the assisting officials (eg police officers). The reasons and the facts, which constitute an urgent case, must be documented (duty of documentation).³² The order may be given verbally. The duty of documentation supports the judicial review and is derived from the case law of the BVerfG. Particularities exist once again in case of the use of undercover investigators. In urgent circumstances, consent of the public prosecution office can be sufficient.³³ Where the decision of the prosecutorial authorities cannot be obtained in time, the investigation may be started and the decision shall be obtained thereafter without delay. The measure must be terminated at once, if the court does not give its consent within three working days.³⁴

2.3. *Remedies available to the defendant*

In the pre-trial stage of criminal proceedings, the remedies available to the defendant differ depending on whether the measure was subject to judicial authorisation. First, the defendant has the possibility to lodge a complaint. Complaints can be submitted against the order authorizing the measure or against already completed measures.³⁵ They can be filed against court decisions that precede the final judgment and do not involve compulsory measures.³⁶ Complaints engender a review of questions regarding both fact and law. They are decided by the court immediately above the court whose decision is being challenged.³⁷ A

³¹ Section 110 a CCP.

³² BVerfG, Judgment 5.3.2012 – 2 BvR 1464/11; BVerfG (2012) in *Strafverteidiger* (StV) 2012, 385.

³³ Section 110b II CCP.

³⁴ Section 110b II CCP.

³⁵ This is the prevailing opinion in jurisprudence and literature in the case of a grievous violation on fundamental rights.

³⁶ Section 305 CCP.

³⁷ See especially sections 73, 120 and 135 of the Courts Constitution Act (CCA).

complaint does not have suspensive effect, unless the court so decides, and is not subject to any time-limit.

Furthermore, there are some remedies against measures that were not ordered by a judge or a court. The person concerned by a measure may at any time apply for a court decision if an official has executed a measure without a court order (ie in the event of urgent cases).³⁸ The scope of the judicial review encompasses the question whether the legal prerequisites are being observed.³⁹ Although the text of the CCP only stipulates a remedy in case of a seizure, this judicial action applies *mutatis mutandis* for other measures.⁴⁰ The decision can yield the result that the impugned measure was unlawful. The applicant can challenge the order authorizing the measure or the already completed measures.⁴¹

In the case of secret measures, even after completion of the measure and for up to two weeks following their notification, the accused and other persons concerned may apply to the competent court for a review of the lawfulness of the measure, as well as of the manner and means of its execution.⁴² This applies to all secret measures by an analogy to section 101 VII of the CCP.⁴³

Finally, there is the possibility to review the lawfulness of instructions and other measures by judicial authorities.⁴⁴ The scope of application of this remedy is small and the importance in practice is low. It should be noted, however, that German law does not provide remedies against certain measures during the pre-trial stage of proceedings. An example is the refusal of access to the case files before the termination of the investigations.⁴⁵ In these cases, only a disciplinary complaint is possible. At a later time, such errors in the pre-trial stage may uphold an appeal on points of law only. Generally, in the German system, appeals against investigative acts in the pre-trial stage are not as important as in other legal systems. The evidence has to be introduced in the main proceeding itself and in front of the

³⁸ Section 98 II 2 CCP.

³⁹ B Schmitt (n 15) § 98 n 17.

⁴⁰ *Ibid* § 98 n 23.

⁴¹ This is the prevailing opinion in jurisprudence and literature in the case of a grievous encroachment on fundamental rights.

⁴² Section 101 VII CCP.

⁴³ Hegmann, in (n 10) , § 101, Rn. 48.

⁴⁴ Section 23, 28 EGGVG (Introductory Law of the Courts Constitution Act (ILCCA)).

⁴⁵ B Schmitt (n 15) § 147 n 38, 39.

court (*Prinzip der Unmittelbarkeit*, Principle of immediacy). There is no possibility for the preservation of evidences beforehand under German Criminal procedure.⁴⁶

According to the interviewed practitioners, the above-mentioned remedies are considered effective and raise rarely problems in practice. The only difficulty lies in the fact that it is not always guaranteed that the evidence gathered by means of unlawful measures is excluded later at the trial stage.⁴⁷ This does not result however from deficiencies in the legal protection provided by remedies available to the defendant in the investigative stage. It is a direct consequence of the German system of exclusionary rules. Further problems, in particular delays in the proceedings, are related to the shortage of personnel of the police, the courts and the prosecution offices; this is one consequence of a false policy of austerity for years and years at the expense of the legal authorities and the police. There is no improvement of this undesirable development to be expected in the future. This leads to the courts and the prosecution offices remaining overloaded with work for the years to come.

3. Deprivation of liberty: arrest and pre-trial custodial measures

3.1. Information about available remedies

In December 2012, the Directives 2010/64/EU and 2012/13/EU have been implemented in German law through the *Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten*. Section 114 b and 136 CCP are the main legal provisions implementing the Directive 2012/13/EU.⁴⁸ The right of information concerning available remedies is mainly codified in section 114 b CCP. The latter implements Article 4 section 3 Directive 2012/13/EU. It provides that the arrested or accused person must be instructed as to his rights without delay in writing and in a language, he understands.⁴⁹

⁴⁶ K Cornelius, 'Konfrontationsrecht und Unmittelbarkeitsgrundsatz' (2008) NSTZ, 244.

⁴⁷ R Günther, in *Münchener Kommentar zur Strafprozessordnung* (MüKoStPO) (1st edn 2014, Munich, C.H. Beck), § 100a n 144-146.

⁴⁸ E Christl, 'Europäische Mindeststandards für Beschuldigtenrechte – Zur Umsetzung der EU Richtlinien über Sprachmittlung und Information im Strafverfahren' (2014) NSTZ 376, 383.

⁴⁹ Section 114b I 1 CCP.

Most importantly, in the implementation of Article 4 Section 3,⁵⁰ Section 114 b II No. 8 CCP provides that the accused person may, if remand detention is continued after he is brought before the competent judge:

- a. lodge a complaint against the warrant of arrest or apply for a review of detention and an oral hearing,
- b. in the event of inadmissibility of the complaint, make an application for a court decision, and
- c. make an application for a court decision against official decisions and measures in the execution of remand detention.⁵¹

At the beginning of the first examination at the investigation procedure, the accused must be informed promptly with detailed information about the criminal offence he is suspected of and of the applicable criminal law provisions.⁵² He must be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with a defence counsel of his choice.⁵³ He must further be advised that he may request evidence to be taken in his defence. In appropriate cases, the accused has to be informed that he may make a written statement, and of the possibility of perpetrator-victim mediation. The information is given orally or in writing and has to be signed by the suspect in acknowledgment of being informed.⁵⁴

3.2. Remand detention and provisional arrest

German criminal procedure provides for a single legal framework governing arrest and detention pending trial. Thus, a uniform system of arrest is applied in the pre-trial stage. The law sets forth different grounds for detention (risk of escape, risk of re-offence and risk of suppression of evidence),⁵⁵ but all reasons have the same legal consequence with little exceptions. Such an exception is the so-called provisional arrest. In urgent circumstances, the public prosecution

⁵⁰ Draft bill of the Federal Ministry of Justice to implement the Directives 2012/13 EU and 2010/64/EU, 9.

⁵¹ Section 114 b II no 8 CCP.

⁵² Section 136 I CCP.

⁵³ See *supra*.

⁵⁴ Answer of the questioned experts.

⁵⁵ Compare Sections 112 and 112a CCP.

office and police officials are authorised to make a provisional arrest if the legal requirements (ie issuance of an arrest warrant or of a placement order) have been fulfilled.⁵⁶ The arrested person must, without delay, been brought before the judge of the Local Court in whose district he was arrested at the latest on the day after his arrest, unless he has been released.⁵⁷ The judge has to interrogate the person brought to him. He has to give him an opportunity to remove grounds for suspicion and arrest and to present the facts that speak in his favour.⁵⁸ During the examination, the accused must be informed about the charges against him, of the applicable criminal law provisions and of his right to reply to the accusation or to remain silent.⁵⁹

Remand detention must be imposed by the judge in a written arrest warrant.⁶⁰ The issued warrant of arrest shall indicate the following information: first the name of accused; second, the offence of which he is strongly suspected, the time and place of its commission, the statutory elements of the criminal offence and the penal provisions to be applied; third, the ground for arrest; as well as, fourthly the facts disclosing the strong suspicion of the offence and the ground for arrest, unless disclosure would endanger national security. This serves as guidance to the review carried out by the judge. Furthermore, the judge should disclose the reasons for his decision.⁶¹

Provisional arrest can basically be ordered in two cases. If a person is caught in *flagrante delicto* or is being pursued, any person is authorized to arrest him provisionally, even without judicial order, if there is reason to suspect escape or if he cannot be immediately identified, he may also be provisionally arrested.⁶² Furthermore, in urgent cases, the public prosecution office and officials of the police force are authorized to make a provisional arrest if the requirements for the issuance of an arrest warrant or of a placement order have been fulfilled.⁶³

⁵⁶ Section 127 s2 CCP.

⁵⁷ Section 128 s1 CCP.

⁵⁸ D Herrmann, in H Satzger, W Schluckebier, G Widmeier (eds), *StPO* (2nd edn, 2016, Carl Heymanns Verlag) § 119 n 82.

⁵⁹ U Eisenberg, *StPO* (9th edn, 2015) § 136 n 743.

⁶⁰ Section 114 CCP.

⁶¹ Section 114 CCP; B Schmitt (n15) § 114 n 15.

⁶² K M Böhm, E Werner, in *MüKoStPO* (n 46) § 127 n 5; Section 127 s1 CCP.

⁶³ Section 127 s2 CCP.

3.3. Review of detention and complaints

There exist two different remedies under German criminal procedure to ensure the judicial review of provisional arrest: the review of the detention (*Haftprüfung*) and the complaint against the detention (*Haftbeschwerde*).

In the former case, the court which has ordered detention is competent to review whether the reasons for continued detention are still present.⁶⁴ As long as the accused is in remand detention, he may at any time apply for a court hearing.⁶⁵ There is no time limit or formal requirements for such a request.⁶⁶ As long as a judgment imposing imprisonment or a custodial measure of reform and prevention has not been given, remand detention for one and the same offence exceeding a period of six months shall be executed only if there exists a particular difficulty or an unusual length of the investigation or some other important reason do not yet admit pronouncement of judgment and justify continuation of remand detention.⁶⁷

An *ex-officio* review takes place after specific investigations are concluded, which the judge had ordered because of their importance for the subsequent decision.⁶⁸ The judge may order specific investigations that may be important for the subsequent decision concerning continuation of a remand detention. He may conduct a further review after completion of such investigations. The old legislative regime - under which an *ex officio* review had to take place if the accused person had no defence counsel and detention lasts for three months without any appeal lodged by the accused to the competent court - was reformed with the act “zur Änderung des Untersuchungshaftrechts”.⁶⁹ The regulation of this *ex-officio* review was voided, as the access to a defence council is now mandatory in case of detention.⁷⁰

The review of detention has no devolutive effect, which means that the same instance is competent for both issuing the decision to detain

⁶⁴ Section 117 CCP.

⁶⁵ Section 117 I CCP.

⁶⁶ J P Graf, in *Karlsruher Kommentar zur Strafprozessordnung (Karlsruher Kommentar)* (7th edn, 2013, Munich, C.H.Beck) § 117 n 3.

⁶⁷ Section 121 I CCP.

⁶⁸ Section 117 III CCP; J P Graf (n 65) § 117 n 13.

⁶⁹ *Ibid* § 117 n 15.

⁷⁰ Section 140 I no 4 CCP.

and reviewing that decision: This is one of the differences between review of detention and complaint against detention.⁷¹ Another difference is that in the case of review of detention, the decision has to be given after an oral hearing upon application by the accused, or at the court's discretion *proprio motu*.⁷² Normally, the decision of the review of detention is delivered faster than after the complaint of detention, because the oral hearing has to be held without delay. Unless the accused consents otherwise, it must be scheduled no more than two weeks after receipt of the application.⁷³

Further, the accused can lodge a complaint.⁷⁴ The complaint must be addressed to the court that issued the arrest warrant.⁷⁵ In case the Judge(s) intends to deny the revocation of the arrest warrant, the court has to refer the case to the next higher Instance (generally a Regional Court),⁷⁶ which is competent for the final decision on the complaint.⁷⁷ Generally, the decision is made without an oral hearing, in appropriate cases after hearing the public prosecution office.⁷⁸ Upon application by the accused or on the court's own motion, a decision may also be given in the complaint proceedings after an oral hearing.⁷⁹ The court can suspend a warrant of arrest.⁸⁰ The scope of the judicial review is the persistence of the grounds for arrest and of the concrete criminal charge, the question whether the accused is still strongly suspected, and the proportionality of detention.⁸¹ Where a complaint has been lodged against the arrest warrant, a decision may also be given in the complaint proceedings after an oral hearing upon application by the accused or on the court's own motion.⁸²

Lastly, the detained person has the possibility to apply for the abrogation of the arrest with the public prosecution office. The warrant of arrest must also be revoked if the public prosecution office

⁷¹ JP Graf (n 65) § 117 n 5.

⁷² D Herrmann (n 57) § 118 n 1, 2; also Section 118 I CCP.

⁷³ Section 118 V CCP.

⁷⁴ Section 304 s1 CCP.

⁷⁵ Section 306 I CCP.

⁷⁶ Section 73 S. CCP

⁷⁷ Section 73 s1 of the Courts Constitution Act (hereinafter CCA).

⁷⁸ Section 309 s1 CCP.

⁷⁹ C Laue, in D Dölling, G Duttge, S König, D Rössner (eds), *Gesamtes Strafrecht* (4th edn, 2017, Nomos Verlag, Baden-Baden) § 118 CCP n 2; also Section 118 II CCP.

⁸⁰ B Schmitt (n15) § 117 n 10.

⁸¹ *Ibid* § 112 n 8.

⁸² Section 118 II CCP.

makes the relevant application before public charges have been preferred. Simultaneously with this application, the public prosecution office may order the release of the accused.⁸³

3.4. Defence rights and effective judicial review

The scope of judicial review is large. The judge takes a new, independent review of the legal requirements of detention.⁸⁴ He has concentrated, comprehensive decision making-competence. He can uphold, suspend or change the arrest warrant.⁸⁵ In particular, the judge can suspend execution of an arrest warrant justified merely by a finding of a lack of the risk of escape, if the expectation is sufficiently substantiated that the purpose of remand detention may also be achieved by less severe measures. In particular, the following alternative measures may be considered: first, an instruction to report at certain times to the judge, the criminal prosecuting authority, or to a specific designated office; second, an instruction not to leave his place of residence, or wherever he happens to be, or a certain area, without the permission of the judge or the criminal prosecuting authority; thirdly, an instruction not to leave his private premises except under the supervision of a designated person; fourthly the furnishing of adequate security by the accused or another person.⁸⁶

The competent reviewing authority may uphold, suspend or change the arrest warrant, if they find the detention pending trial to be illegal. They can also order less restrictive measures, for example the ones enumerated in Section 116 I 2 of the CCP or in Section 116 II 2 CCP. These encompass an instruction not to leave his private premises except under the supervision of a designated person or the furnishing of adequate security by the accused or another person. Further, the instruction not to have contact with co-accused persons, witnesses, or experts may be considered. The warrant of arrest must be revoked as soon as the conditions for remand detention no longer exist, or if the continued remand detention is disproportionate to the importance of the case or to the anticipated penalty or measure of

⁸³ Section 120 III CCP.

⁸⁴ J P Graf (n 65) § 117 n 11.

⁸⁵ Ibid § 117 n 11.

⁸⁶ P Kotz, in D Burhoff, P Kotz (eds), *Handbuch für die strafrechtlichen Rechtsmittel* (2nd edn, 2016, ZAP-Verlag, Bonn) n 843; see also Section 116 I CCP.

reform and prevention.⁸⁷ In particular, it is to be revoked if the accused is acquitted, or if the opening of the main proceedings is refused, or if the proceedings are terminated other than provisionally.⁸⁸

The person subject to detention pending review has several rights. He has the right to be informed of the reasons for detention and the right to access documents. A copy of the arrest warrant has to be handed over to the accused at the time of his arrest; if he does not have a sufficient knowledge of the German language, he must be provided with a translation in a language he understands.⁸⁹ If it is not possible to provide a copy and, where necessary, a translation to be given to him, he must be informed without delay, in a language he understands, of the grounds for his arrest and the accusations levied against him. In that case, the copy of the warrant of arrest and, where necessary, a translation, must subsequently be given to him without delay.⁹⁰ Further, if the accused is apprehended on the basis of the arrest warrant, he must be brought before the competent court without delay.⁹¹

The person subject to detention pending trial has the right to be heard in person. As long as the accused is in remand detention, he may at any time apply for a court hearing to determine whether the warrant of arrest is to be revoked or its execution suspended.⁹² He has the right to translation⁹³ and also to interpretation. He must be instructed as to his rights without delay in written form and in a language, he understands.⁹⁴ The suspect has to be advised in a language he understands that he may request the assistance of an interpreter or a translator in for the entire criminal proceedings free of charge.⁹⁵ The person subject to detention pending trial has the right to legal assistance. The participation of defence counsel is mandatory.⁹⁶ The accused may at any time, also before his examination, consult with a defence counsel of his choice.⁹⁷ During

⁸⁷ Section 120 I CCP.

⁸⁸ Section 329 I CCP.

⁸⁹ Section 114 a CCP.

⁹⁰ B Schmitt (n 15) n 6, section 114a CCP.

⁹¹ Section 115 I CCP.

⁹² C-M Ulrich, 'Handlungsmöglichkeiten des Strafverteidigers im Haftverfahren?' (1986) StV, 268; Section 117 I CCP.

⁹³ See above.

⁹⁴ B Wankel, in J Bockemühl (ed), *Handbuch des Fachanwalts Strafrecht* (7th edn 2017, Carl Heymann Verlag, Köln) n 111; Section 114b I 1 CCP.

⁹⁵ Section 114 b II 2 CCP.

⁹⁶ Section 140 I no 4 CCP.

⁹⁷ Section 114 b no 4 CCP.

the judicial examination of the accused, the defence counsel can attend the hearing.⁹⁸ The arrested accused must be instructed as to his rights, without delay, and in writing, in a language he understands.⁹⁹ If written instruction is clearly insufficient, additional oral instruction must be given.¹⁰⁰ Further, an arrested accused shall be given an opportunity, without delay, to notify a relative or a person trusted by him.¹⁰¹

In sum, the review of detention and the complaint against a detention are effective remedies. The interviewees stressed that the review of detention sometimes moves too slowly in the higher instances. The judge must have the files of the proceeding, as must the police for their investigation and the defence lawyers. Therefore, there are significant delays. Because of that, it is possible that, in the case of an abrogation, the accused person is in detention much longer than necessary. However, improvements can be expected with the introduction of the electronic case files. Further, it is problematical that sometimes the lower instances issue the arrest warrant in spite of a doubtful body of evidence. All of these, however, are not problems resulting from the legal setting, but rather from practical execution. Better equipped personnel in the police services and the courts could provide a remedy for this.

3.5. *Arrest and detention for questioning*

In the German criminal procedure, a lawful arrest for questioning does not exist. Some voices in literature have implied that in some cases the detention is abused as an arrest for questioning.¹⁰² This is done against the legislature's intention and is therefore unlawful. The questioned national experts, especially the lawyers, have revealed that this is a problem particularly in the field of commercial criminal law.

It is worth noting, however, that detention may be ordered to force a witness to testify. Such detention shall not extend beyond the termination of those particular proceedings, nor beyond a period of six months.¹⁰³ This does expressly not apply to the accused. A

⁹⁸ Section 115 combined with Section 168 c s1 CCP.

⁹⁹ Section 114b I 1 CCP.

¹⁰⁰ Section 114 b I 2 CCP.

¹⁰¹ Section 114c I CCP.

¹⁰² C Roxin, B Schünemann (eds), *Strafverfahrensrecht: ein Studienbuch* (29th edn, 2017, Munich, C.H.Beck) 238 ff.

¹⁰³ Section 70 II CCP.

suspect acquires the position of an accused when the prosecutor takes action against him, if this is clearly intended to investigate a criminal offense.¹⁰⁴ If, however, the public prosecutor only wants to hear him as a witness, he is entitled to freedom of expression in accordance with Sections 136, 163a CCP, so that even in the case of a general statement refusal, detention may be ordered under Section 70 II CCP.¹⁰⁵

4. Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings

4.1. Restrictions on the right to access the case file

Since 19 December 2012, the Directives 2010/64/EU and 2012/13/EU have been implemented in German law by the *Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten*. This law implemented the right to access the case file during judicial investigations. The counsel of the suspected or accused person has the right to access the materials of the case.¹⁰⁶ If the suspected or accused person has no counsel, he has the right to access to the materials himself.¹⁰⁷

The right to access to the case file should be free of charge, pursuant to Article 7(5) Directive 2012/13/EU. In Germany, the access itself is free, but the Court Rees Act No. 9003 attachment 1 GKG foresees sending costs of 12,00 €. The BVerfG found this compatible with the BL, because the suspect or the counsel have free access and the fee's purpose is only to compensate the administrative effort and the postage.¹⁰⁸ The ECJ has not yet judged this problem, but it is reasonable to consider the German requirement compatible with the Directive.

The suspected or accused person usually benefits from this right during the whole pre-trial stage. However, following Section 147 II-VI of the CCP, it is possible to withhold the access. After it has been noted in the file that the investigations have been concluded, the counsel, suspected or accused person have an unconditional right to access the materials.¹⁰⁹ In practice, however, it is sometimes hard to

¹⁰⁴ BGH, NStZ 1997, 398.

¹⁰⁵ See above.

¹⁰⁶ Section 147 I CCP.

¹⁰⁷ Section 147 VII CCP.

¹⁰⁸ BVerfG, NStZ 1997, 43.

¹⁰⁹ Argumentum e contrario Section 147 II CCP.

gain access to the files for an accused without legal representation by a defence lawyer.

The *Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten* further clarifies admissible restrictions in the light of Article 7(4) Directive 2012/13/EU. The most important restriction applies where the access to the materials of the case file would endanger the purpose of the investigation. However, access can only be denied as long as the investigations have not yet been designated as concluded in the file.¹¹⁰ If the accused is in remand detention or provisional arrest, information of relevance for the assessment of the lawfulness of such deprivation of liberty must be made available to defence counsel in suitable form.¹¹¹ The inspection of records concerning examinations and hearings to which the defence counsel's presence was admitted may not be refused at any stage of the proceedings.¹¹² The defence counsel has the right to access the whole file, excluding pieces of evidence.¹¹³ Exceptions are possible if significant grounds present an obstacle to the withdrawal.¹¹⁴ The public prosecution office decides whether to grant access to the case file in preparatory proceedings and after final conclusion of the proceedings; in other cases, the presiding judge of the court charged with the case is competent.¹¹⁵

Decisions made whereby the public prosecution office refuses access to the case file in accordance with Section 147 II CCP are generally not subject to review.¹¹⁶ After the questioning, this might be problematic, since it bears the risk of abuse. Regional differences can be noticed. For example, in Saarland the authorities are very liberal. A questioned top prosecutor of Saarland could only recall one case, to his knowledge, where an accused person gained access to the material only after having lodged a disciplinary complaint. Other cases of refusing the access were not mentioned. An exception applies only if the access is granted to the victim. In this case, the accused can challenge the public prosecution office's decision in analogous application of Section 406e IV 2 CCP.¹¹⁷

¹¹⁰ See above.

¹¹¹ See above.

¹¹² Section 147 III CCP.

¹¹³ Section 147 IV CCP.

¹¹⁴ Section 147 IV CCP.

¹¹⁵ Section 147 V CCP.

¹¹⁶ H Laufhütte, in *Karlsruher Kommentar zur Strafprozessordnung (Karlsruher Kommentar)* (7th edn, 2013, Munich, C.H.Beck) § 147 n 25.

¹¹⁷ BGH, StV 1993, 118.

The impossibility to challenge the prosecutions office's decision is considered to be insignificant as the accused can repeat his demand of access to the material in front of the court after the bill of indictment has been submitted.¹¹⁸ It is assumed that this is sufficient to enable him to claim legal protection in a timely manner.¹¹⁹ If the public prosecution office refuses access to the case file after noting the termination of the investigations in the file, or if the accused is not at liberty, a decision by the competent court may be applied for. These decisions can be given without reasons if their disclosure might endanger the purpose of the investigation.¹²⁰

4.2. Derogations on the right to access a lawyer

The EU Directive on the right to access a lawyer were implemented in German law in the 2012. The accused person may request the assistance of a defence counsel of his choice at any stage of the proceedings.¹²¹ Furthermore, the accused person has the right to communicate with his defence counsel in writing as well as orally, including when he is detained.¹²² The lawyer's presence must be permitted during questioning.¹²³ This applies to questioning by a judge or by a prosecutor.¹²⁴ Recently, this right has been extended to the questioning by a police officer.¹²⁵ This codification only concerns the accused's right to have a lawyer present during questioning in the pre-trial stage. The right to ask questions is only expressly regulated by law for the main trial.¹²⁶ However, in practice, the lawyer is granted the possibility to ask questions and submit statements in the pre-trial stage as well.

This is derived from the right to a fair hearing.¹²⁷ The same right

¹¹⁸ H Laufhütte (n 115) § 147 n 25.

¹¹⁹ See above.

¹²⁰ Section 147 V 2 CCP.

¹²¹ Section 137 I 1 CCP.

¹²² Section 148 I CCP.

¹²³ Section 58 II CCP new version (nv); this amendment resulted from the implementation of Directive 2013/48/EU.

¹²⁴ Sections 168c I and 163 a III CCP.

¹²⁵ Section 163 IV CCP nv; this amendment resulted from the implementation of Directive 2013/48/EU.

¹²⁶ Section 257 II CCP.

¹²⁷ H-H Kühne (n 6) § 12 n 264.

applies to a hearing during a judicial inspection.¹²⁸ The lawyer also has the right to be present during a confrontation and an identification procedure, such as a line-up.¹²⁹ There are no derogations. Reconstruction of the scene of a crime are not explicitly regulated by law. It can be subsumed, however, under the general clause of the German CCP.¹³⁰ The Federal Ministry of Justice has the opinion that a regulation is not necessary, because in most cases the reconstruction of the scene of a crime implies a questioning that triggers the right for the defence counsel to be present.¹³¹ This must be seen critically with view to the principle of legal clarity (*Bestimmtheitsgrundsatz*). Although practitioners should adopt an interpretation compliant with the EU Directive, a legal clarification of this aspect would be welcomed. Another practical problem is the low payment of duty and court-appointed counsels. Due to a very poor salary, defence counsels quite often can only spend little time on every single case. This leads to a superficial and sometimes deficient defence.

In principle, German law does not restrict the right of access to a lawyer. Section 138a of the CCP gives the possibility of excluding the defence counsel under narrow conditions. For example if the defence counsel is being involved in the offence which constitutes the subject of investigation, or is accused of abusing communication with an accused who is not at liberty for the purpose of committing criminal offences or substantially endangering the security of a penal institution, or is having committed an offence which in the event of the conviction of the accused would constitute accessoryship after the fact, obstruction of justice or handling stolen goods. Also in the event of Endangering to National security.¹³² The legal protection according to § 138d of the CCP applies against the exclusion of the defence counsel. The decision may be appealed against immediately. In very exceptional cases involving special dangers, the accused can be fully isolated (contact ban). This is only an option in cases related to

¹²⁸ Section 168d I CCP.

¹²⁹ Section 58 II CCP nv; this amendment resulted from the implementation of Directive 2013/48/EU.

¹³⁰ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Zweiten Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren (Draft bill of the Federal Ministry of Justice implementing the Directive 2013/48/EU)11.

¹³¹ See above.

¹³² Section §138b of the CCP

terrorist organizations, if there is a danger to life.¹³³ However, the defence is only affected by such isolation to the extent that the contact between defence counsel and the accused is interrupted; just as contact to all other persons is interrupted unless they are granted special permissions to see the accused. The derogation complies with Article 3 VI of the Directive 2013/48/EU in the pre-trial stage but not in the main-stage.¹³⁴ Therefore, this exception applies only to prisoners against whom the public claim has not yet been brought or who are finally convicted.¹³⁵ The measure is limited to thirty days.¹³⁶ Full isolation of the accused person happens very rarely. The court will appoint a counsel if the defence counsel chosen by the accused is excluded from the proceedings.¹³⁷ This may be the case in special circumstances, for example where the defence lawyer is also implicated in the crime which is the object of the investigation, or if the defence lawyer abuses his or her contact with the accused to conduct criminal activities, or if the lawyer poses a substantial danger to the security of a prison.¹³⁸ This could be the case where the lawyer smuggles drugs or weapons into the prison or is acting as a courier between members of a criminal organisation.¹³⁹

In the German legal system, there also exists a remedy against the contact ban and the fully isolation of the accused person. Where the communication ban is imposed because of the risk of a terrorist organizations,¹⁴⁰ a application challenging the decision is possible pursuant Section 37 Introductory Law of the Courts Constitution Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*, EGGVG, hereinafter ILCCA). The Higher Regional Court has subject-matter jurisdiction for the review.¹⁴¹ The prisoner, his defence counsel and other persons concerned can challenge the decision. The scope of the review encompasses the proportionality, the question of whether the

¹³³ Sections 31 Introductory Law of the Courts Constitution Act (ILCCA) and 148 II CCP.

¹³⁴ Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Zweiten Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren (Draft bill of the Federal Ministry of Justice implementing the Directive 2013/48/EU), 11 and 12.

¹³⁵ Section 31 ILCCA.

¹³⁶ Section 36 ILCCA.

¹³⁷ Sections 138a – 138 d CCP.

¹³⁸ G Pfeiffer, *Strafprozessordnung* (5th edn, 2005) §138a n 2.

¹³⁹ J-P Graf, in BeckOK StPO (n 10) §138a n 6.

¹⁴⁰ Section 31 and 33 ILCCA.

¹⁴¹ Section 25 II ILCCA.

person is a member of the terrorist organisation, and if the legal situation predicating the ban still exists.¹⁴² The judgement is issued in form of an order.¹⁴³ After the conclusion of the measure an appeal can still be sought.¹⁴⁴

4.3. Decisions finding that there is no need for interpretation

In 19.12.2012, the *Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten* implemented the Directive 2010/64/EU is implemented into German law. Previously, there was no right, independent of the circumstances of the individual case to have a verdict translated into the mother tongue.¹⁴⁵ Section 187 Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG, hereinafter CCA) stipulates the main legal requirements implementing Directive 2010/64/EU. It provides that the court shall appoint an interpreter or a translator for an accused or convicted person that does not understand the German language or is hearing or speech impaired, insofar as this is necessary for the exercise of his rights under the Law of Criminal Procedure.¹⁴⁶ The requirement in Section 163 a V CCP provides that Section 187 CCA is applicable in the judicial inquiry as well.

The public prosecution office is competent for granting or rejecting assistance of an interpreter during questioning and the pre-trial stage.¹⁴⁷ During the judicial examination, the judge is competent. In the German criminal procedure, an interpreter will usually be assigned if it is necessary. The public prosecution office has to investigate the case as much as it is reasonable and necessary to enable the further procedure leading to a main trial.¹⁴⁸ This includes interviewing the accused. It is therefore useful for the public prosecution office to assign an interpreter, if the accused person does not have sufficient knowledge of the German language. Because of this, there is no jurisprudence concerning the possibilities to challenge a decision denying the need

¹⁴² H Mayer, in *Karlsruher Kommentar zur Strafprozessordnung (Karlsruher Kommentar)* (7th edn, 2013, Munich, C.H.Beck) § 37 ILCCA, n 6 ff.

¹⁴³ *Ibid* § 37 ILCAA, n 11.

¹⁴⁴ BVerfGE 49, 24, 51, NJW 1978, 2235.

¹⁴⁵ OLG Köln, NJW-Special 2011, 762.

¹⁴⁶ Section 187 CCP.

¹⁴⁷ K Sackreuther, in BeckOK StPO (n 10) § 161a n 19-20, section 160 and section 161 a of the CCP.

¹⁴⁸ *Ibid* § 160 n 5.

for interpretation. The absence of a necessary interpreter can be challenged during the trial stage in the appeal on fact and law, in most cases only absence during the main procedure will support such an appeal.¹⁴⁹ During the investigation procedure, the judgment must be based on the injury of the right for interpretation. Therefore, there is no compelling need for the possibility to challenge a decision denying the need for interpretation during the pre-trial stage of proceedings, especially because the evidence, such as testimony, or statements of the accused or the defendant have to be repeated in the main hearing.¹⁵⁰ Hence, the accused person has the possibility to revoke, to change or to improve his statements made during the pre-trial stage.¹⁵¹ The old statements may not be used directly by the court. The German criminal procedure follows the principles of immediacy and orality, which prohibits the direct use of pre-trial statements.¹⁵² The question of whether there is the possibility for the accused person to challenge the decision in accordance with Section 23 ILCCA is not completely clear. In our view, there are no practical interests for such a legal remedy. The questioned national experts confirmed that the German system governing the right to interpretation is treated very liberally in Germany. The judicial practice seems to follow the principle ‘rather too much than too little’. Sometimes this leads to an abusive use of the right to linguistic assistance for delaying tactics by the defence. Generally, the right to interpretation leads to the prolongation of the proceedings, very much to the displeasure of all participants. Therefore, the defence counsel sometimes makes a statement in the name of the defendant to abbreviate the proceeding.

¹⁴⁹ BGH NJW 1953, 114 ff; BGH NStZ 2002, 275; BGH, NStZ 2011, 233; T Fischer, in *Karlsruher Kommentar zur Strafprozessordnung (Karlsruher Kommentar)* (7th edn, 2013, Munich, C.H.Beck) Introduction n 322; different opinion: BGH BeckRS 2002, 09201; H Dahs, B Müssig, in E Müller, R Schlothauer (eds), *MAH Strafverteidigung* (2nd edn, 2014) n 134.

¹⁵⁰ D Burhoff, *Handbuch für die strafrechtliche Hauptverhandlung* (8th edn, 2015) n 2690 ff.

¹⁵¹ See above.

¹⁵² But there is the (very restricted) possibility to hear an indirect witness; compare S Schork, in D Dölling, G Duttge, S König, D Rössner(eds), *Gesamtes Strafrecht* (n 78) § 250 StPO n 3-5.

4.4. *Decisions finding that there is no need for translation*

The right to translation was implemented with the same law as the right to interpretation. The formulation is very similar. If it is necessary, the defendant has the right to translations of summons, warrants of arrest, bills of indictment and other court decisions.¹⁵³ However, the right to translation does not extend to final judgments against the defendant, nor to judgments that are enacted against a co-defendant, nor the testimony of a co-defendant being prosecuted separately.¹⁵⁴ This limitation has to be seen critically. The translation of a testimony of a co-defendant and a final judgment against him are essential materials to ensure that the defendant is able to exercise his right of defence and to safeguard the fairness of the proceedings. Objections can also be found in the literature.¹⁵⁵ According to the Federal Court of Justice, a non-German-speaking defendant must be handed over a translated version of the bill of indictment.¹⁵⁶ An example which is relevant for practice is the case where the accused lodges a remedy with a pleading in his mother tongue. The court language is German, so a foreign language declaration does not have legal effects.¹⁵⁷ However, the declaration has to form an integral part of the file and must be translated as essential to the exercise of the rights of the defense. The translation right requires both, translations into the mother tongue and translations from the mother tongue into the procedural language.¹⁵⁸

There can be an exception to the right to translation, where an oral summary or interpretation is sufficient.¹⁵⁹ The courts have expressed the opinion that the exceptions are consistent with the derogations in Article 3 (7) Directive 2010/64/EU.¹⁶⁰ The Higher Regional Court of Stuttgart decided, that even if a defendant who does not understand the German language lodges an appeal on law only against a

¹⁵³ A Walther, in BeckOK StPO (n 10) § 181 CCA n 8 ff.

¹⁵⁴ Higher Regional Court of Hamburg (OLG Hamburg), Judgement of 6.12.2013 – Ws 253/13, BeckRS 2014, 00586; Wistra 2014, 158.

¹⁵⁵ See A Oehmichen, 'Fachdienst Strafrecht: Neuigkeiten zum Strafrecht' (2014) FD-StrafR, 354626.

¹⁵⁶ BGH, NJW Spezial 2014, 570.

¹⁵⁷ Section 184 CCA.

¹⁵⁸ H Schneider (2015) StV, 379 ff.

¹⁵⁹ Section 187 II 4, 5 of the CCA.

¹⁶⁰ OLG Hamm, Judgement of 11.3.2014 – 2 Ws 40/14; OLG Hamburg, in (2014) Zeitschrift für Wirtschaft, Steuer, Strafrecht (wistra), 158; OLG Köln, NStZ 2014, 229.

judgement which has 278 pages, a written translation of the judgment is not required, when he has a German legal counsel and an interpreter was available for the oral interpretation of the reasoning after the judgement's pronouncement.¹⁶¹ Whilst the decision was approved by other Higher Regional Courts,¹⁶² the reception in the literature was unanimous.¹⁶³ Several authors speak against the courts' opinion. First, an effective defence requires the collaboration of the accused himself, he cannot be entirely replaced by the legal counsel, as the accused is best informed of the facts.¹⁶⁴ Secondly, in practice, the written judgments frequently differ from the oral reasoning and are way more detailed.¹⁶⁵ In a preliminary question referred by the German authorities to the CJEU, the General State Prosecutor argued that a document such as the penal order in the sense of Sections 407 ff. CCP constitutes an 'essential document', which must be translated if the person to whom it is addressed to isn't able to understand the German language. The Court adopted the same conclusion in its ruling.¹⁶⁶

According to established case law, foreign-language pleadings are fundamentally irrelevant, even if the author does not adequately control the German language.¹⁶⁷ That case law applies in any event where the appellant is defended by a lawyer. However, the non-defended accused may use a foreign language to lodge an appeal.¹⁶⁸ In order to exercise his rights of defence, the accused is not equally dependent on official translations of his writings. Section 187 II CCA does not grant any right to translation of judgements concerning the execution of judicial decisions.¹⁶⁹

Directive 2010/64/EU provides that the Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality that is required.¹⁷⁰ In principle, the appointment of the interpreter and translator is subject to judicial

¹⁶¹ OLG Stuttgart, StV 2014, 536.

¹⁶² See e.g. OLG Hamm StV 2014, 534; OLG Köln NStZ 2012.

¹⁶³ Approving: E Christl (n 47) 376, 380; critical: J Bockemühl (2014) StV 537, 538 ff.; U Eisenberg (2013) JR 442, 445; M Yalcin (2013) ZRP 104, 106.

¹⁶⁴ J Bockemühl (n 161) 539.

¹⁶⁵ P Kotz (2012) StV 626, 629.

¹⁶⁶ Case C-278/16, *Sleutjes* EU:C:2017:757

¹⁶⁷ BGH, NStZ-RR, 2017, 122.

¹⁶⁸ EuGH, NJW 2016 303 (305).

¹⁶⁹ OLG Köln, StV 2014, 552.

¹⁷⁰ Art. 5 (1) Directive 2010/64/EU.

discretion.¹⁷¹ This discretion is narrowed by Article 103 I BL, according to which ‘In the courts every person shall be entitled to hearing in accordance with law’. Therefore, the court must pay attention to consult a highly-qualified translator; otherwise, this poses a ground for an appeal of facts and law.¹⁷² The interpreter shall swear an oath affirming that he will translate faithfully and conscientiously.¹⁷³ A deliberately false translation is a punishable offense (perjury).¹⁷⁴ This also guarantees a high quality of the interpretation. Lastly, the interpreter or translator shall observe secrecy concerning circumstances which become known to him in his professional activity.¹⁷⁵

The court (or judge) is competent for granting or rejecting a request of translation during the main-trial. During the investigation proceeding (pre-trial) the public prosecution office is competent. The defendant has the possibility to lodge a complaint. Complaints can be filed against court decisions that precede the final judgment and do not involve compulsory measures.¹⁷⁶ The chief judge of the competent court is responsible for reviewing the decision of a request of translation; a decision of the court instead of the chief judge is also possible.¹⁷⁷ This engenders a review of questions of both fact and law. In the end, the complaint is decided by the court immediately above the court whose decision is being challenged.¹⁷⁸

4.5. Violations of the right to information

Section 136 CCP provides the right to be informed about rights during the proceeding. The information is given orally or in writing and has to be signed by the suspect in acknowledgment of being informed.¹⁷⁹ It is postulated that he should promptly be given detailed information about the criminal offence he is suspected of and of the applicable criminal law provisions.¹⁸⁰ He has to be advised that the

¹⁷¹ E Christl (n 47) 376, 381.

¹⁷² BVerwG NVwZ 1983, 668.

¹⁷³ Section 189 I CCA.

¹⁷⁴ OLG Koblenz, BeckRS 2017, 107877.

¹⁷⁵ Section 189 IV CCA

¹⁷⁶ Section 305 CCP.

¹⁷⁷ OLG Hamburg, Judgement of 6.12.2013 – 2 Ws 253/13.

¹⁷⁸ See especially sections 73, 120 and 135 CCA.

¹⁷⁹ Answer from the questioned experts.

¹⁸⁰ Section 136 I CCP.

law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his examination, to consult with defence counsel of his choice.¹⁸¹ In appropriate cases the accused must also be informed that he may make a written statement and of the possibility of perpetrator-victim mediation.¹⁸²

There is no possibility to challenge the failure to provide information during the pre-trial stage of proceedings. Of course, there is always the possibility to lodge a disciplinary appeal against the processing official. The lack of information can lead to an exclusion of evidence at the trial stage of the criminal proceedings.¹⁸³ The instruction has to be made up and the information has to be given subsequently.¹⁸⁴ The accused person must be especially cautioned (*qualifizierte Belehrung*)¹⁸⁵ where the previous testimony is not usable in any way.¹⁸⁶ Afterwards, in principle, there is the possibility to lodge an appeal on law only. This takes effect only after the trial at first instance.

5. Sanctions against illegal or improperly obtained evidence

German criminal procedure provides for two types of exclusionary rules: the relative and the absolute exclusionary rules.¹⁸⁷ Absolute exclusion of evidence is set in law without further prerequisites. The relative exclusionary rules are developed by the case law of the Federal Court of Justice on a case-by-case basis.¹⁸⁸ The jurisprudence of the Federal Court of Justice, approved by the Federal Constitutional Court, takes into consideration the sense of the prohibition, the individual interests of the accused and the governmental interest of criminal prosecution.¹⁸⁹ Thereby, the Federal Court of Justice has created the so called *Abwägungslehre*.¹⁹⁰ A

¹⁸¹ See above.

¹⁸² C Monka, in BeckOK StPO (n 10) § 136 n 14.

¹⁸³ BGHSt 38, 214; BGHSt 47, 172; BGH NStZ 2008, 55, 56; BGHSt 38, 372.

¹⁸⁴ C Monka (n 180) §114a n 21 ff.

¹⁸⁵ BGH NStZ 2009, 281 ff.; BGH StV 2007, 450 ff.

¹⁸⁶ C Monka (n 180) §114a n 27b.

¹⁸⁷ See Section 338 CCP.

¹⁸⁸ L Meyer-Goßner, in L Meyer-Goßner, B Schmitt (eds), *Strafprozessordnung* (n 15) Introduction n 55.

¹⁸⁹ Ibid 55a.

¹⁹⁰ C Hauf (1993) NStZ 457.

distinction is made according to whether the prohibition aims to protect the accused's interests or not.¹⁹¹ This means, for instance, that a failure to inform a witness of his or her right to refuse to give evidence does not prevent the use of his or her testimony against the accused, because the right to refuse to give evidence exists for the purpose of protecting the person who is being questioned, not for the purpose of protecting the accused person. Most of the exclusionary rules are relative ones. The prohibition of the use of evidence following this jurisprudence is a rare exception.¹⁹²

5.1. Infringements of the right to access the case file

As regards breaches of the right to access the case file, an exclusionary rule is not stipulated in the written law. Only a relative exclusionary rule comes into question.¹⁹³ In principle, there is no possibility to censure the refusal of access to the material of the case during the pre-trial. However, this can be subject to the appeal of law only,¹⁹⁴ because the refusal may lead to the violation of the right to be given an effective and fair legal hearing (*Rüge der Verletzung rechtlichen Gehörs*).¹⁹⁵ The right to a fair hearing further prohibits the removal of documents related to the circumstances of the case that have been generated in the course of the proceedings.¹⁹⁶ The court must verify whether the judgement relies on the violation of right to an effective and fair legal hearing,¹⁹⁷ or rather of infringements to the right of access to the case file.

5.2. Statements obtained in breach of the right to access a lawyer

Not informing an accused of the right of consultation with a defence counsel evokes a relative exclusionary rule in relation to statements

¹⁹¹ H Lesch, in J Bockemühl (ed), *Handbuch des Fachanwalts Strafrecht* (7th edn 2017, Carl Heymann Verlag, Köln) n 87.

¹⁹² Bundesgerichtshof (Federal Court of Justice, BGH) in 44, *Entscheidungen des Bundesgerichtshofs in Strafsachen* (Decisions of the German Federal Court of Justice in Criminal Law Cases: hereinafter BGHSt), 243; BGHSt 51, 285.

¹⁹³ See above.

¹⁹⁴ Other Opinion OLG Hamm, NJW 1972, 1096.

¹⁹⁵ OLG Köln, BeckRS 2015, 06568.

¹⁹⁶ B Schmitt (n 15) § 147 n 14.

¹⁹⁷ BVerfG NJW 1991, 2811.

made by the accused.¹⁹⁸ The same applies to the breach of the right of consultation in writing as well as orally, including when the accused is deprived from his liberty.¹⁹⁹ If the accused does not have access to a lawyer during the main trial and defence counsel is required by law, a lack of legal assistance leads to an absolute ground for appeal on law only.²⁰⁰ The participation of a defence counsel is mandatory in the following cases: the main hearing at first instance is held at the Regional Court or the Higher Regional Court; the accused is charged with a felony, or during detention; the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation; it is evident that the accused cannot defend himself.²⁰¹ Exclusionary rules also apply if the defendant has not been adequately informed of his right to access a defence counsel at any time.²⁰² The same is true, if, following proper information and despite a request, the contact with the defence counsel was refused and the accused was nonetheless heard immediately.²⁰³ Only in the case of a mandatory defence, the absence of the defence lawyer systematically leads to an annulment.²⁰⁴ If the involvement of a defence counsel is not required, either because of the gravity of the offence or due to the difficulty of the factual or legal situation, the fact that the accused is a non-German speaker does not lead to mandatory defence, because of the protection guaranteed under Section 187 CCA.²⁰⁵

5.3. Breaches of the right to translation and interpretation

Breaches of the right to interpretation can also be notified in the appeal of fact and law.²⁰⁶ The accused who cannot participate in the main trial because of language difficulties is equalled to an accused who is absent. That is why breaches of the right to translation and interpretation lead to an absolute ground for an appeal on fact and

¹⁹⁸ BGHSt 38, 372, 373.

¹⁹⁹ BGHSt 36, 332.

²⁰⁰ Section 338 no 5 CCP.

²⁰¹ Section 140 CCP.

²⁰² BGHSt 47, 172, BGH NStZ 2008, 55, 56.

²⁰³ BGHSt 38, 372.

²⁰⁴ L Meyer-Goßner (n 186) § 338 n 41.

²⁰⁵ OLG Nürnberg NStZ-RR 2014, 183.

²⁰⁶ BGHSt 3, 285; also BVerfGE 64, 135, 149.

law. That means that the court does not have review whether the judgement relies of the violation. If the defendant can communicate in the German language, the temporary absence of the interpreter is harmless.²⁰⁷

5.4. Failure to provide information about rights and about accusation

Section 114b CCP does not provide for immediate consequences in case of breaches of the right to information. However, the failure to provide information or sufficient information about rights and about the accusation results in a relative exclusionary rule.²⁰⁸ Trial courts do not often apply such rule. Because the competent authorities must inform once again the accused at the first official questioning,²⁰⁹ such a guarantee cures previous procedural defects.²¹⁰ With regard to failure to inform the accused about his right to consult a defence counsel before a hearing, the trial court may found breaches of defence rights in case the apprehended, without being subjected to a judicial hearing, talked to fellow prisoners or even police officers about the act which he is accused of or indicates at least the circumstances surrounding the perpetration, during the period between arrestment and first interrogation or appearance before the detention judge.²¹¹ If the defendant has not been informed about his right to make a statement or to remain silent, this leads to an exclusionary rule.²¹² There is also an exclusionary rule if the defendant has not or not adequately been instructed about his right to a defence counsel at any time.²¹³

6. Appeals on facts and law

An appeal on fact and law is admissible against judgments of the Criminal Court Judge and of the Court with Lay Judges.²¹⁴ This

²⁰⁷ L Meyer-Goßner (n 186) § 338, n 44.

²⁰⁸ BGH NSTZ 1992, 294; BayOblG STV 2002, 179.

²⁰⁹ Section 136 I 1 CCP

²¹⁰ J P Graf (n 65) § 114b n 16.

²¹¹ Krauß, in: Graf (ed), *Strafprozessordnung* (Graf StPO), 3. edition 2016 (Munich, C.H. Beck) §114b n 10.

²¹² BGHSt 38, 214.

²¹³ BGHSt 47, 172, BGH NStZ 2008 55, 56.

²¹⁴ Section 312 CCP.

means that the appeal on fact and law is not admissible against judgments of the Regional Court or Higher Regional Court. In these cases, there is no second instance review on the merits. This is problematical considering the jurisdiction of the Regional Court to deal with serious criminal offences, such as murder and rape. Having regards the sanctions and potential judicial consequences in these cases, it is questionable that there exists only one instance judicial review on facts. An appeal on fact and law must be filed with the court of first instance either orally to be recorded by the registry or in writing within one week after pronouncement of the judgment.²¹⁵

In case of an appeal on points of both facts and law, the competent court carries out a full and fresh review of the case.²¹⁶ The subject-matter of the new main hearing is the accusation and not the appealed judgment.²¹⁷ Hence, the court undertakes a review on the merits and is not limited to errors of law. The appellate court can examine and gather old and fresh evidence. As mentioned above, this invaluable appeal is not admissible against convictions of the Regional Court.

The competent appellate court is a second instance trial court that delivers a new judgment, which replaces the previous one.²¹⁸ The judgment in first instance, as far as it relates to the legal qualification of the offence and the related sanctions, may not be amended to the defendant's detriment where only the defendant or his statutory representative filed the appeal on fact and law, or the public prosecution office appealed on fact and law in his favour.²¹⁹ It is significant that all the interviewed experts have confirmed that there are no existing problems herein. Indeed, the appeal of fact and law is a very effective remedy under German criminal procedure. This is due to the fact that the appeal on fact and law is a completely new instance with an original decision having force of *res judicata*.

7. Appeals limited on errors of law

An appeal limited on errors of law only is admissible against judgments of the Criminal Divisions and of the Criminal Divisions with Lay Judges and against judgments of the Higher Regional Courts

²¹⁵ Section 314 CCP.

²¹⁶ L Meyer-Goßner (n 186) Preliminary notes to § 312 n 1.

²¹⁷ See above.

²¹⁸ See above.

²¹⁹ Section 331 I CCP.

pronounced at first instance.²²⁰ It has to be filed with the court whose judgment is being contested, either orally to be recorded by the registry or in writing, within one week after pronouncement of judgment.²²¹ A judgment against which an appeal on fact and law is admissible may be contested by an appeal on law in lieu of an appeal on fact and law.²²² If one of the participants files an appeal on law against the judgment, and another participant files an appeal on fact and law, the appeal on law only, if filed in time and in the prescribed form, shall be treated as an appeal on fact and law as long as the appeal on fact and law is not withdrawn or dismissed as inadmissible.²²³ The appeal on law only serves to review the legal basis of the judgement.²²⁴ Consequently, the review is limited to errors of law.²²⁵ Failure to apply a legal norm or the erroneous application of a legal norm, constitute an error on law.²²⁶

The contested judgment must be quashed if the appeal on law is considered well-founded.²²⁷ Where the judgment is quashed solely because of a violation of the law occurring on its application to the findings on which the judgment was based, the court hearing the appeal on law shall itself decide on the merits.²²⁸

In other cases, the matter shall be referred back to another division or chamber of the court whose judgment is being quashed or to another court of the same rank located in the same Federal State.²²⁹ Only the notices of appeal on law and, in so far as the appeal on law is based on defects in the proceedings, only the facts specified when the notices of appeal on law were submitted, are subject to review by the court hearing the appeal.²³⁰ The case law interprets this provision very restrictively, thus posing a high obstacle for lodging an appeal on law only. Another difficulty arises from the wording of Section 349 II CCP. This provision enables the court to reject the appeal by an order if the judges unanimously deem the appeal on law to be manifestly

²²⁰ Section 333 CCP.

²²¹ Section 341 CCP.

²²² Section 335 CCP.

²²³ Section 335 III CCP.

²²⁴ L Meyer-Goßner (n 186) § 333 n 1.

²²⁵ Section 337 CCP.

²²⁶ Section 337 II CCP.

²²⁷ Section 353 CCP.

²²⁸ Section 354 I CCP.

²²⁹ Section 354 II CCP.

²³⁰ Section 352 I CCP.

ill-founded. The order can be issued without giving any reasons of the decision. We know of a case of an appeal of law only against a decision of the Regional Court in Chemnitz, where the supporting letter of the defence counsel compasses 549 pages. Nevertheless, the appellate court decided that it is manifestly ill-founded. No reasons were given. This shows that this legal provision can be abused in order to save the time of the court. Once again, the immense workload of German courts is leading to doubtful practices. This aspect often has a detrimental effect on defendants and justice.

8. Access to the Constitutional Court

Every individual claiming a violation by a public authority of one of his or her fundamental rights guaranteed in the BL may lodge a constitutional complaint to the Federal Constitutional Court (BVerfG).²³¹ All judgments are acts of public authority. If any legal remedy with other courts exists, these remedies have to be exhausted before the constitutional complaint may be lodged.²³² The BVerfG may however derogate to this rule if the complaint is of general relevance or if prior recourse to other courts were to the complainant's severe and unavoidable disadvantage.²³³ The constitutional complaint can be lodged and substantiated within one month.²³⁴ This time period begins with the delivery of the judgement.

Applications which initiate proceedings must be submitted to the BVerfG in writing. They must be substantiated and must list the necessary evidence.²³⁵ The reasons for the complaint must specify the right that has allegedly been violated.²³⁶ The Federal Constitutional Court only reviews breaches of specific rights of the BL.²³⁷ Accordingly, the court does not verify the correct application of the statutory law by the ordinary court.

²³¹ Section 90 I Law on the Federal Constitutional Court (FCC).

²³² Section 90 I FCC.

²³³ Section 90 II FCC.

²³⁴ Section 93 I FCC.

²³⁵ Section 23 FCC.

²³⁶ Section 92 FCC.

²³⁷ BVerfGE 18, 85 (92).

9. Judicial review and the EAW

9.1. Competent judicial authorities

In Germany, a European arrest warrant (EAW)²³⁸ has to be issued by the Higher Regional Courts in a written warrant of arrest. The Attorney General within the prosecution office is competent for executing the EAW.²³⁹ Whilst executing the request,²⁴⁰ he examines whether the legal requirements for the execution are met.

9.2. Judicial review by the German executing authorities

Section 187 CCA stipulates that the court shall appoint an interpreter or a translator for the accused or convicted person who does not understand the German language as far as this is necessary for the exercise of his rights under the Law of Criminal Procedure. Section 77 of the German ILA provides that Section 187 CCA applies in proceedings for the execution of a EAW. The application of § 187 CCA poses some problems. First, the provision is applicable only with respects to the competent court and not to the Ministry of Justice, which is responsible for receiving EAWs, or the General Prosecutor Office as executing authority.²⁴¹ Secondly, Section 187 CCA applies to the exercise of criminal procedural rights. For this reason, Section 77 I ILA calls for the application of the CCP and CCA only as a meaningful application. The text of this section does not preclude this.²⁴² It is doubtful whether this is in line with the requirements of determinations of the Directive. Thirdly, the EAW can only be subject to Section 187 I 1 CCA, so that the decision to grant linguistic assistance would always be subject to discretion.²⁴³ Even if one accepts a reduction of the discretion due to particular circumstances, this does not suffice for a clear implementation of the Directive.²⁴⁴ Therefore, the current regulations represent an insufficient solution. No case law exists on the question whether there

²³⁸ Hierinafter EAW.

²³⁹ B Heintschel-Heinegg, in MüKoStPO (n 46) § 37 n 7.

²⁴⁰ Section 13 II of the Law on International Legal Assistance (ILA).

²⁴¹ H Schneider (2015) StV 379, 384.

²⁴² Ibid.

²⁴³ Section 187 I 1 CCA.

²⁴⁴ H Schneider (n 241).

is the possibility to challenge a decision denying the need for interpretation in proceedings for the execution of a EAW.

The surrender person benefit from the rights granted to suspects and accused persons in national criminal proceedings (see above). This includes the right to be informed about the reasons for arrest, the right to be provided with a letter of rights at the time of arrest, as well as the right to access a lawyer. The surrender person convicted in absentia shall receive without delay a copy of the judgement after surrender.²⁴⁵

German judicial authorities fully review the proportionality of the EAW issued by their counterpart in another Member State.²⁴⁶ This is derived from the German constitutional law and Article 49 III of the European Charter of Fundamental Rights. The proportionality is to be assessed on a case-by-case basis.

German law does not provide additional grounds for refusal other than those set forth under the Framework Decision 2002/584/JAI. It is worth mentioning that Germany implemented Article 5 (2) of the Framework Decision allowing the Member States to oppose to surrender if the offence is punishable by custodial life sentence and the law of the requesting State does not provide review of the detention at latest after 20 years.²⁴⁷ Likewise, no additional grounds for refusal based on breaches of defence rights can be found under German law. Article 4a (1) of the Framework Decision 2002/584 provides that the execution of the EAW can be subject to the condition, that, in the case of a decision rendered *in absentia*, the issuing judicial authority gives an assurance deemed adequate to guarantee the right to a new trial in the issuing Member State and to be present in court. Accordingly, the national implementing measures under German law provide a ground for refusal, if the decision is rendered *in absentia* and without a defence counsel and if the requesting State does not guarantee a new trial.²⁴⁸ In case the executing judgement results from a decision delivered in absentia, the execution is permitted if it is conducted pursuant to a procedure in accordance with the ECHR.²⁴⁹ In particular, this implies a fair

²⁴⁵ Section 83 IV ILA.

²⁴⁶ OLG Stuttgart, Judgement of 25.02.2010 – 1. Ausl. 1246/09; NJW 2010, 1617.

²⁴⁷ Section 83 I no 4 ILA.

²⁴⁸ Kammergericht (Superior Court of Justice in Berlin, KG), Judgement of 10.10.2013 – (4) 151 AuslA 127/13 (194/13).

²⁴⁹ Section 49 I 2 ILA.

hearing, a fair defence and a decision issued by an independent court.²⁵⁰ Only blatant infringements of the provisions provoke the refusal to surrender.²⁵¹

²⁵⁰ I Fromm, 'Europäischer Haftbefehl, Auslieferungsverfahren und Ersuchen um Übernahme der Strafvollstreckung' (2016) *Neue Justiz: Zeitschrift für Rechtsentwicklung und Rechtsprechung* (NJ) 360.

²⁵¹ O Lagodny, in U Sieber, H Satzger, B Heintschel-Heinegg (eds), *Europäisches Strafrecht* (2nd edn, 2014, Baden-Baden, Nomos) § 31 n 25.

CHAPTER IV
LUXEMBOURG

Valentina Covolo

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Competent judicial authorities. – 2.2. Scope of review. – 2.3. Exceptions for urgent cases. – 2.4. Remedies available to the defendant. – 3. Deprivation of liberty: Arrest and pre-trial custodial measures. – 3.1. Information about available remedies. – 3.2. Arrest, *habeas corpus* and judicial review. – 3.3. Detention pending trial. – 3.4. Arrest and detention order for questioning. – 4. Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information about the accusation. – 5. Sanctions against illegal or improperly obtained evidence. – 5.1. Infringements of the right to access the case file. – 5.2. Statements obtained in breach of the right to access a lawyer. – 5.3. Breaches of the right to translation and interpretation. – 5.4. Failure to provide information about rights and about accusation. – 6. Appeals against conviction and sentence. – 7. Appeals in cassation. – 8. Access to the Constitutional Court. – 9. Judicial review and the EAW. – 9.1. Competent judicial authorities. – 9.2. Defence rights in the execution of a EAW. – 9.3. Judicial review and grounds for refusal.

1. Constitutional guarantees

Luxembourg Constitution does not expressly guarantee the right to access a court. However, several provisions governing the organization of the national judicial system reflects the guarantees of fair trial enshrined in Article 6 ECHR. First, Article 84 of the Constitution grants ordinary courts exclusive jurisdiction over disputes related to civil liberties. Second, any court or tribunal must be established by law. Such a guarantee constitutes a fundamental right under Article 13

of the Constitution, which rules out the possibility to establish extraordinary courts.¹ Third, other constitutional provisions set forth further components of the right to fair trial, in particular the right to a public hearing,² the duty to state reasons and the public pronouncement of judgements,³ irremovability of judges⁴ and independence of the judiciary *vis-à-vis* the government.⁵ Furthermore, Article 12 of the Constitution explicitly refers to both prior judicial authorisation of pre-trial custody and ex-post review of the lawfulness of detention. On the one hand and except in case of *flagrante delicto*, no one can be arrested without a reasoned judge's order that must be served at the time of arrest or at the latest within twenty-four hours. On the other, Article 12 of the Constitution specifies that the arrested person has the right to be informed without delay about the available remedies for regaining his liberty.

By contrast, no constitutional provisions guarantee the right to appeal in criminal proceedings under Luxembourg law. However, the Code of Criminal Procedure (*Code de procédure pénale*, hereinafter CCP) provides that appeal can be lodged with a higher court having jurisdiction to review both facts and points of law against any judgement delivered by a first instance court in criminal proceedings.⁶ Moreover, domestic courts have consistently given direct effect to the right to appeal (*double degré de juridiction*) enshrined in Article 2 of Protocol 7 ECHR,⁷ which Luxembourg ratified in 1989.⁸ In this regard, it is worth recalling that Luxembourg jurisprudence adopted over the years a monist approach towards the legal status of international treaties in domestic law.⁹ As

¹ Art. 86 Luxembourg Constitution.

² Art. 88 Luxembourg Constitution.

³ Art. 89 Luxembourg Constitution.

⁴ Art. 91 Luxembourg Constitution.

⁵ Art. 93 Luxembourg Constitution.

⁶ In particular, Art. 172 CCP refers to judgements delivered by national courts having jurisdiction over offences punished by a fine only (*tribunaux de police*), Art. 199 CPP guarantees the right to appeal against judgments rendered by courts having jurisdiction over offences punished by imprisonment not exceeding 5 years (*tribunal correctionnel*), whilst Art. 221 CPP relates to judgements delivered by courts having competence in case of most serious crimes (*chambre criminelle du tribunal d'arrondissement*).

⁷ See for instance, CJS cass (Court of Cassation) 6 March 2008, n°2494; CSJ cass (Court of Cassation), 18 November 2004, n° 2120.

⁸ Law of 27 February 1989 ratifying Protocol n°7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mém. A n°12, 07.03.1989.

⁹ J Gerkrath, 'The Constitution of Luxembourg in the Context of EU and

consequence thereof are the frequent references by criminal courts to the ECHR and the related case law of the Strasbourg Court.¹⁰ Luxembourg judges give direct effect to the fundamental rights guaranteed under the Convention as well as to EU Directives harmonising defence rights in criminal proceedings, which prevail over national legal provisions.

2. Investigative measures subject to prior judicial authorization

2.1. Competent judicial authorities

Under Luxembourg law, investigative measures that imply the use of coercion are subject, as a principle, to the prior authorisation delivered by the Investigating Judge (*juge d'instruction*).¹¹ The latter plays a central role in the pre-trial phase of criminal proceedings through the exercise of both jurisdictional and investigative powers.¹² Indeed, the Investigating Judge is an independent judicial authority, which is under the legal duty to investigate even-handedly (*à charge et à décharge*) in regard to the prosecution and the defense.¹³ Besides the impartiality requirement, independence is further guaranteed by the prohibition for the Investigating Judge to take part in the judgement of a case he investigated.¹⁴

Orders (*ordonnances*) whereby the Investigating Judge authorizes coercive measures intervene in two situations. First, a case may be referred to the Investigating Judge by the initial submission of the Prosecutor (*réquisitoire*) or by a complaint of the victim who presents a petition to become a civil party (*partie civile*).¹⁵ A judicial investigation (*instruction*)¹⁶ is then carried out under the authority of the Investigating Judge, who is empowered to take all measures,

International Law as 'Higher Law' in A Albi, *The Role and Future of National Constitutions in Europe and Global Governance* (Asser Press, forthcoming 2017).

¹⁰ M Petschko, M Schiltz, S Tosza, 'Luxembourg' in K.Ligeti, *Toward a Prosecutor for the European Union*, Vol 1, (Oxford and Portland, Hart Publishing, 2013) 449 – 472, at 450.

¹¹ Pursuant Article 28 (3) CCP, the Investigating Judge has the right to enlist the assistance of the law enforcement agencies in the performance of his duties.

¹² For a detailed analysis of the historical origins and the role of the Investigating Judge, G Vogel, *Lexique de procédure pénale* (Brussels, Larcier, 2001) 96 ff.

¹³ Art. 51(1) CCP.

¹⁴ Art. 27(2) CCP.

¹⁵ Art. 28-1 (1) CCP.

¹⁶ Pursuant Article 49 CCP, judicial investigations are compulsory for felonies (*crimes*) and optional in the case of misdemeanor (*délits*).

which he considers necessary to establish the truth.¹⁷ Second, in order to reduce the burden of work on the Investigating Judge's Office and thereby the length of investigations, in 2006, the Luxembourg legislature has enacted a reform of criminal inquiries strongly influenced by the so-called '*mini-instruction*' under Belgian law.¹⁸ When conducting a preliminary investigation of minor offences punished by imprisonment not exceeding one year, the Public Prosecutor may request the Investigating Judge to order searches, seizures, hearings of witnesses or expertise.¹⁹ Once seized, the Investigating Judge decides whether he authorizes the specific measures referred to in the Public Prosecutor's request or he takes over the investigation.²⁰

With regard to formal legal requirements, the prior authorization of investigative acts takes the form of a written order (*ordonnance*) that must be dated and signed by the Investigating Judge.²¹ Additional formalities apply with respect to measures executed over a certain period of time. For instance, orders authorizing monitoring of telecommunication are valid for one month upon the date of the order.²² The Investigating Judge may prolong the surveillance measure for an additional month without exceeding an overall period of one year.²³ Given the intrusive character of special surveillance measures, each prolongation must be approved by the President of the

¹⁷ Art. 51 (1) CCP. It should however be stressed that, when seized by the Public Prosecutor, the Investigating Judge is bound by the facts put forward in the submission (*saisie in rem*). Consequently, facts that are not referred to in the public prosecutor's request cannot be subject to the investigative judge's enquiries. Such new facts must be reported back to the Public Prosecutor, who has exclusive authority to decide whether and how to investigate the case.

¹⁸ *Projet de loi n°5354 portant introduction notamment de l'instruction simplifiée, du contrôle judiciaire et réglementant les nullités de la procédure d'enquête*, 30.6.2004, 12.

¹⁹ Art. 24-1 (1) CCP.

²⁰ Art. 24-1 (2) para 1 CCP. In the latter case, the Investigating Judge requests the Prosecutor to seize him by a submission describing the facts and thereby defining the material scope of the judicial investigation. Art. 24-1 (2) para 2 CCP.

²¹ Information, documents, objects and data collected by enforcing the authorized investigative act must be inventoried in a police report (*procès-verbal*). This is for instance the case for house searches (Art. 66 (5) CCP) and the so-called 'special surveillance measures' which encompass interception and monitoring of telecommunications (Art. 88-1 ff CCP).

²² Art. 88-1 CCP.

²³ Similar rules apply to orders authorizing the real-time monitoring of bank transactions that must specify the duration of the measure, which cannot exceed an overall duration of three months. Art. 66 -3 CIC.

pre-trial chamber of the Court of Appeal.²⁴ Finally, the strength of the duty to state reasons incumbent to the Investigating Judge varies depending on the exceptional character Luxembourg criminal procedure confers to certain investigative measures and specific fundamental rights that the enforcement of such measures is likely to undermine.

2.2. Scope of review

Investigative acts ordered by the Judge must be proportionate and necessary. As for the latter, Luxembourg CCP imposes a specific obligation to justify the necessity of investigative measures that bare an exceptional character and therefore are allowed only when conventional investigation methods seems ineffective given the facts and circumstances of the case. For instance, interception and monitoring of telecommunications must be duly justified (*décision spécialement motivée*) relying on the factual background of the case.²⁵ By contrast, the duty to state reasons is less stringent with regard to searches of premises. Such a measure is considered the ultimate act of judicial enquiries (*instruction*) that the Investigating Judge can order without justifying the urgency of the measure.²⁶ According to case law, the necessity of search warrants is sufficiently motivated as long as the warrant indicates the goal of the search, namely the need to collect objects and information necessary to determine whether a specific criminal offence has been committed.²⁷

Searches of premises further illustrates the proportionality requirement that prior judicial authorizations must fulfill. In particular, the subject matter of searches and seizures must be sufficiently circumscribed with the aim to prevent that items not relevant to the material scope of the investigation are seized.²⁸ Thus defined, the ‘speciality principle’ (*principe de spécialité*) has been set out by the Luxembourg Courts while reviewing the legality of searches and seizure in the office of a lawyer.²⁹ In such circumstances, the proportionality of the authorized search is reviewed *proprio motu* by

²⁴ Art. 88-1 CCP.

²⁵ Art. 88-1 CPP.

²⁶ G Vogel (n 12) 145.

²⁷ CSJ Ch. c. C. 9 July 2013 n°375/13.

²⁸ CJS Ch. c.C. 23 April 2013, n°224/13.

²⁹ CSJ Ch. c. C. 9 November 2012 n° 731/12.

the competent court,³⁰ which sanctions the unlimited scope of the investigative measure that would infringe the right of defense and most particularly the legal privilege between lawyer and client. The case law thereby reflects the requirements stemming from the ECHR. Indeed, the Strasbourg Court found in the past Luxembourg authorities liable for the violation of Articles 8 and 10 of the Convention resulting from the disproportionate character of searches conducted in the office of a lawyer³¹ and a journalist.³² In both cases, the Court focused on the wide wording of the order taken by the Investigating Judge,³³ who failed to ascertain beforehand whether less intrusive measures other than searches could have been sufficient.³⁴

2.3. Exceptions for urgent cases

As an exception, the police can undertake coercive acts without the prior authorization of the Investigating Judge in case of *flagrante delicto* (*enquête de flagrante*).³⁵ This condition is met when the offence is in the course of being committed or has just been committed, or where immediately after the facts the person suspected is chased by hue or is found in the possession of items, or has on or about him traces or clues that give grounds to believe that he participated in the commission of the offence.³⁶ Because of the particularly intrusive character of the investigative measures in question, 2006 legislation introduced an ex-post judicial review of preliminary investigations (*nullités de procédures d'enquête*).³⁷ The aim is to protect the rights of the persons involved as well as to ensure an early judicial scrutiny of investigative acts undertaken by the police that often lead to the

³⁰ CSJ Ch. c. C. 3 December 2013 n° 694/13.

³¹ *Roemen and Schmit v. Luxembourg*, App no 51772/99 (ECtHR, 25 February 2003).

³² *Saint-Paul Luxembourg S.A. v. Luxembourg*, App no 26419/10 (ECtHR, 18 April 2013).

³³ *Roemen and Schmit v. Luxembourg*, App no 51772/99 (ECtHR, 25 February 2003) para 70.

³⁴ *Saint-Paul Luxembourg S.A. v. Luxembourg*, App no 26419/10 (ECtHR, 18 April 2013) para 44.

³⁵ In case of felony (*crime*), the police is empowered, in particular, to search the scene of the crime and seize any item, document or data that were used or intended to be used to commit the crime, are the object or the proceeds of such crime or, more generally, are considered necessary to establish the truth.

³⁶ Art. 30 CCP.

³⁷ Art. 48-2 CCP.

opening of a judicial investigation.³⁸ According to Article 48-2 CCP, the Public Prosecutor and any person demonstrating a legitimate interest have the possibility to submit to the pre-trial chamber of the District Court (*Chambre du conseil du tribunal d'arrondissement*) a request for annulment of the preliminary investigation or any act of such investigation.

2.4. Remedies available to the defendant

In the pre-trial stage of proceedings, remedies available to the defendant differ according to the nature of the Investigating Judge's order that is subject to review. On the one hand, jurisdictional orders (*ordonnance juridictionnelle*) determine how the Investigative Judge decides between different options that either are foreseen by the law or derive from applications by the parties.³⁹ Examples are the order refusing to conduct an investigative measure that a party has applied for, such as the decision whereby the Investigating Judge refuses the appointment of an expert requested by the parties, or the order stating that a person has no standing before the court (*irrecevabilité d'une partie civile*).⁴⁰ Jurisdictional orders are subject to appeal (*appel*) before the pre-trial chamber of the Court of Appeal (*Chambre du conseil de la Cour d'appel*).⁴¹ On the other hand, orders that do result from a claim are of an administrative nature.⁴² This category encompasses warrants since the Investigating Judge could alternatively have adopted a passive attitude or have refrained from taking any step.⁴³ Typical examples are orders for house searches or the appointment of an expert without a request by the parties.⁴⁴ This category of orders is subject to petitions instituting nullity proceedings (*nullités*).⁴⁵

According to Article 126 CPP, the Public Prosecutor, the accused, the person incurring civil liability and any third party holding a

³⁸ *Projet de loi n°5354 portant introduction notamment de l'instruction simplifiée, du contrôle judiciaire et réglementant les nullités de la procédure d'enquête*, 30.6.2004, 19 ff.

³⁹ M Petschko, M Schiltz, S Tosza (n 10) 453.

⁴⁰ G Vogel (n 12) 133.

⁴¹ Art. 133 CPP.

⁴² G Vogel (n 12) 133.

⁴³ M Petschko, M Schiltz, S Tosza (n 10) 454.

⁴⁴ G Vogel (n 12) 133.

⁴⁵ Art. 126 CCP.

legitimate interest can submit to the competent court a request for annulment of the whole judicial investigation or any act taken by the Investigating Judge during the pre-trial stage of proceedings.⁴⁶ Requests for annulment are brought before the pre-trial chamber of the competent District Court.⁴⁷ Only when the nullity is attributable to a court magistrate or affects the legality of the order to refer the case for trial or a dismissal of the criminal proceeding delivered by the pre-trial chamber of the District Court, the request for annulment is submitted to the pre-trial chamber of the Court of Appeal.⁴⁸ Both chambers are composed of three professional judges⁴⁹ and constitute the so-called 'Instruction Courts' (*jurisdiction d'instruction*). The latter are tribunals within the meaning of Article 6 ECHR, which are fully independent and distinct from trial courts.⁵⁰ Such a strict distinction entails two consequences. Firstly, trial courts have no power to review the legality of decisions taken by instruction courts, in particular the order referring the case for trial.⁵¹ Secondly, any procedural flow that would invalidate an act of or the entire judicial investigation falls within the exclusive jurisdiction of the instruction courts and, therefore, cannot be subsequently raised before trial courts.⁵²

The division of jurisdictional competences among criminal courts emphasizes the importance of admissibility requirements and, most importantly, the time limit for bringing an action. The request annulment must first identify with sufficient precision the contested act(s).⁵³ Second, the defendant must bring a request for nullity, under penalty of foreclosure, within 5 days from the moment he becomes aware of the contested act.⁵⁴ The starting point of the time period begins to run as soon as the applicant has knowledge of the existence of the impugned order.⁵⁵ It is worth noting that Luxembourg courts

⁴⁶ Art. 126 (1) CCP.

⁴⁷ Art. 126 (1) CCP.

⁴⁸ Art. 126 (2) CCP.

⁴⁹ Art. 24 and 48 Law of 7 March 1980 on the judicial organization, Mém. A n° 12, 14.03.1980.

⁵⁰ CSJ corr. 14 February 2006, no 77/06 V.

⁵¹ CSJ corr. 20 June 2006, no 329/06V.

⁵² CSJ corr. 10 July 2007, no 363/07 V; CSJ cass. 11 February 2010, no 2711.

⁵³ CSJ Ch. c. C. 12 May 2009 no 342/09 and 344/09.

⁵⁴ Art. 126 (3) CCP.

⁵⁵ Opinion of the Conseil d'Etat, *Projet de loi n° 2980 portant suppression de la cour d'assises et modifiant la compétence et la procédure en matière d'instruction et de jugement des infractions*, 12.5.1986, doc. 2980/1.

have consistently adopted a strict interpretation of the rule enshrined in Article 126(3) CCP. In particular, the time limit for lodging request for annulment does not depend upon the knowledge by the applicant or his lawyer of the content and wording of the order.⁵⁶ Although Luxembourg courts have declared themselves competent to review whether the time limit of 5 days undermine the right of access a tribunal guaranteed in Article 6 ECHR, it is for the applicant to show, with regard to the specific circumstances of the case, an unjustified restriction on his rights.⁵⁷ Finally, the time for lodging a request applies to any ground for nullity raised, whether based on national or international provisions,⁵⁸ and irrespective of the seriousness of the alleged violation.⁵⁹ The case law has acknowledged one exception to this rule, when the ground for nullity raised is based on facts and circumstances that substantially compromised the regularity of the judicial investigation by seriously infringing the right of the parties and particularly defense rights.⁶⁰

With regards the scope of review, the pre-trial chamber does not assess the advisability of the contested measure.⁶¹ Their jurisdiction encompasses all grounds for nullity affecting judicial investigations. Within this framework, national courts also verify the compliance with procedural guarantees granted by EU directives where the provisions in question have a direct effect.⁶² If the court finds a nullity, it declares null and void the contested act as well as the subsequent acts of the judicial investigation taken in consequence and as a result (*en suite et comme conséquence*) of the former.⁶³ Thus, evidence gathered by means of an investigative measure which is declared void, are excluded. By contrast, the regularity of subsequent orders taken by the Investigative Judge, irrespective of the annulled act, is not affected.⁶⁴

Similar provisions apply when the defendant challenges the legality of a specific measure authorized by the Investigating Judge during

⁵⁶ CSJ Ch.c.C. 16 December 2011, n° 913/11 and 194/11.

⁵⁷ CSJ Ch.c.C. 22 October 2012, n° 674/13.

⁵⁸ CSJ cass. 31 January 2013, n° 7/2013.

⁵⁹ CSJ Ch.c. C. 8 October 2013, n° 553/13.

⁶⁰ G Vogel (n 12) 125.

⁶¹ Ibid 127.

⁶² On the right to access the case file guaranteed under Directive 2012/13/EU, CSJ Ch.c.C. 11 November 2015, n° 897/15.

⁶³ Art. 126 – 1 (1) CCP.

⁶⁴ For instance, CSJ Ch.c.C. 26 October 2010, n° 770/10.

preliminary investigations.⁶⁵ In particular, persons concerned can raise a ground for nullity within two months from the execution of the contested act.⁶⁶ However, specific time limits apply with regards to actions taken by the defendant. When the warrant led to the opening of a judicial investigation, the accused must bring an action before the pre-trial chamber of the District Court within 5 days, under penalty of foreclosure, from the moment the Investigating Judge charges him with a criminal offence (*inculpé*).⁶⁷ If no judicial investigation is open, the accused must raise nullities of investigative acts before the trial court prior to any defense on the merits of the case.⁶⁸ Finally, it should be stressed that the defendant has the possibility to bring an appeal before pre-trial chamber of the Court of Appeal against the order (*ordonnance*) delivered by the pre-trial chamber of the District Court, which rejects requests for annulment under Article 126 CCP.⁶⁹

3. Deprivation of liberty: Arrest and pre-trial custodial measures

3.1. Information about available remedies

The 2017 law implementing Directive 2012/13/EU enshrines the right of arrested persons to be provided promptly with a written letter of rights, indicating information about *inter alia* any possibility to challenge unlawful arrest and detention as well as to request interim release.⁷⁰ The newly adopted provisions echoes Article 12 of the Constitution, which requires the competent authorities to provide without delay information about the available remedies for regaining liberty.⁷¹ In particular, the law codifies the duty for the police officers to inform the person arrested *in flagrante delicto* in a language he understands, about judicial remedies available under Luxembourg law against police custody (*rétenion*).⁷² Likewise, the letter of right provides the person arrested on the basis of arrest warrants (*mandat d'arrêt*) and detention orders for questioning (*mandat d'amener*) with information about available remedies for challenging the lawfulness of

⁶⁵ Art. 24-1 (5) ff. CCP.

⁶⁶ Art. 24-1 (6) CCP.

⁶⁷ Art. 124-1 (7) CPP.

⁶⁸ Art. 124-1 (7) CPP.

⁶⁹ Art. 133 CCP.

⁷⁰ Art. 39 (2) and art. 52-1 (1) CCP.

⁷¹ Art. 12 Luxembourg Constitution.

⁷² Art. 39 (2) para 1 CCP.

arrest.⁷³ It is worth noting that the judicial practice already complied with Article 4 Directive 2012/13/EU before the 2017 reform of the CCP. Indeed, when the Investigating Judge ordered detention-pending trial after having questioned the accused, he communicated to the latter an information sheet indicating available judicial remedies against pre-trial custodial warrants and procedures governing requests for provisional release.⁷⁴ In a similar way, the police provided the person arrested red-handed with a written letter of rights (*formulaire infodroit*), which exists in 17 different language versions.⁷⁵

3.2. Arrest, habeas corpus and judicial review

As a general principle, arrest and detention warrants are delivered during the pre-trial stage of proceedings by the Investigating Judge. In particular, he may issue an arrest warrant (*mandat d'arrêt*) against a suspect who is fugitive or does not reside in Luxembourg if the offence he/she is suspected of having committed is punished by imprisonment.⁷⁶ Arrest warrants must be reasoned in a detailed manner, specifying the particular circumstances of the case that leads to the conclusion that the above-mentioned conditions are met.⁷⁷ As regards procedural requirements, the Investigating Judge can deliver an arrest warrant only after having consulted the Public Prosecutor.⁷⁸ The arrested person is brought before the Investigating Judge within 24 hours following his arrival at the penitentiary center.⁷⁹ Exception to the competence of the Investigating Judge is the police custody (*rétenion*) in case of *flagrante delicto* within the meaning of Article 39 CCP.⁸⁰ In such circumstances, the Public Prosecutor may

⁷³ Art. 52-1 (1) para 1 CCP.

⁷⁴ See for instance CSJ Ch.c.C. 20 January 2014, n° 37/14.

⁷⁵ *Projet de loi n°6758 renforçant les garanties procédurales en matière pénale*, 23.12.2004, doc. 6758/00, at 28

⁷⁶ Art. 94-1 para 1 CCP. In practice, the arrest warrant is accompanied by the authorization by which the Investigating Judge requests the police officers to enforce the warrant (*commission rogatoire*) and empowers them to interrogate the suspect. Art. 52 (1) CCP.

⁷⁷ Art. 94-1 para 3 CCP.

⁷⁸ Art. 94-1 para 2 CCP.

⁷⁹ Art. 93 CCP.

⁸⁰ As mentioned above, this condition is met when the offence is in the course of being committed or has just been committed, or where immediately after the facts the person suspected is chased by hue or is found in the possession of items, or has on or

authorize the police officers to hold in custody the person against whom there are sufficiently reliable and consistent evidence to justify pressing charges.⁸¹ The period of detention cannot exceed 24 hours from the moment of the arrest.⁸² Upon expiration of this period, the person must be released or brought before the Investigating Judge, who decides after the questioning whether detention should be prolonged.

Arrest warrants taken by the Investigating Judge are assimilated to orders having an administrative nature. Therefore, the person under arrest can submit a request for nullity (*requête en nullité*) of the warrant before the pre-trial chamber of the competent court according to the procedure set forth in Article 126 CCP.⁸³ The lawfulness of police custody may be subject to judicial review pursuant Article 48-2 CCP. The provision provides the possibility for the defendant to submit a request for nullity against the preliminary investigation or any act of such investigation.⁸⁴ If the enquiries lead to the opening of a judicial investigation, the defendant may introduce a request for annulment to the pre-trial chamber of the District Court within 5 working days after his indictment.⁸⁵ In the contrary case, the request for nullity shall be submitted to the competent Trial Court before presenting any defence on the merits of the case.⁸⁶ In this context, the competent court verifies whether procedural rules, such as the maximum period of detention were respected.⁸⁷ Judicial review also encompasses respect of defense rights, such as the right to information⁸⁸ and the right to legal assistance.⁸⁹

In this regard, the law of 8 March 2017 considerably enhances the rights of suspects that are subject to arrest warrants or in police custody. As regards the former, the police officers must at the time of arrest provide the arrested person with a written letter of rights indicating the reasons for arrest (date and facts constituting the offence allegedly

about him traces or clues that give grounds to believe that he participated in the commission of the offence.

⁸¹ Art. 39(1) CCP.

⁸² Art. 39(1) CCP.

⁸³ See above.

⁸⁴ Art. 48-2 CCP.

⁸⁵ Art. 48-2 (3) CCP.

⁸⁶ Art. 48-2 (3) CCP.

⁸⁷ Ch.c.Lux. 18 December 2012, n° 3312/12.

⁸⁸ Ch.c.C. 22 May 2009, n° 443/09.

⁸⁹ Ch.c.C. 11 February 2011, n° 96/11. The assessment aims to ensure that the procedural guarantees provided by law were adequate and effective in the specific circumstances of the case. Ch.c.C. 8 July 2013 n° 374/13; Ch.c.C. 11 February 2011, n° 96/11.

committed), available remedies for challenging the lawfulness of arrest and regaining his liberty, as well the procedural guarantees that benefit to him, namely the right to translation and interpretation, the right to of access to a lawyer, the right to make statements or remain silent.⁹⁰ The letter of rights also specifies that the arrested person will be brought before the Investigating Judge within 24 hours.⁹¹ If the information cannot be provided in writing, an oral communication is provided, if necessary with the assistance of an interpreter.⁹² A written copy shall be in any event provided without undue delay. If the arrested person cannot be found, the arrest warrant is served on his last address of residence.⁹³ Where the arrested person does not speak or understands the language of the proceedings, arrest warrants are translated *ex-officio*.⁹⁴ Moreover, the right to interpretation is explicitly guaranteed during any questioning before the Investigating Judge, irrespective of whether the person is under custody.⁹⁵ Luxembourg CCP further guarantees the person subject to arrest warrants the right of access to a lawyer⁹⁶, the right to be examined by a doctor,⁹⁷ the right to communicate with consular authorities when the suspect is of foreign nationality unless the exigencies of the investigation dictate otherwise⁹⁸ and a third party.⁹⁹ In exceptional circumstances, the police officers may temporarily derogate from the latter guarantee upon authorization of the Investigating Judge. The conditions upon which such a derogation is allowed are identical to those set forth under Article 5(3) and 8 Directive 2013/48/EU. In order to make

⁹⁰ Art. 52-1 (1) CCP.

⁹¹ Art. 52-1 (1) para 1 CCP.

⁹² Art. 52-1 (1) para 2 CCP.

⁹³ Art. 102 para 1 CCP. In this case, the procedure is recorded in a report drawn up by the police officers in presence of two nearest neighbors of the wanted person. Art. 102 para 2 CCP.

⁹⁴ Art. 3-3 (3) CCP .

⁹⁵ Art. 3-2 CCP.

⁹⁶ Art. 3-6 (1) CCP. In this regard, it worth mentioning that before the entry into force of the 2017 law, Luxembourg CCP did not explicitly guarantee the right of access to a lawyer during the interrogation conducted by the police officers. However, the note of General Public Prosecutor of 13 May 2011 implementing guidelines for the compliance with the ECtHR judgement *Salduz v. Turkey* acknowledged that legal assistance must be provided during the police questioning. Indeed, denial of access to a lawyer would amount to a violation of article 6 §3 c) ECHR. See *A.T. v. Luxembourg*, App no 30460/13 (ECtHR, 9 April 2015), para 69 et seq.

⁹⁷ Art. 52-1 (2) CCP.

⁹⁸ Art. 52-1 (4) CCP.

⁹⁹ Art. 52-1 (3) CCP.

judicial review of alleged breaches of defence rights more effective, the report of the police questioning following the arrest must indicate whether the suspect was duly informed about the above-mentioned procedural guarantees, eventual waiver of the right by the arrested person of the right to access a lawyer, the length of the interrogation, time and date of the arrest and of the subsequent appearance before the Investigating Judge.¹⁰⁰ Finally, the arrested person and his lawyer have access to the entire case file at the latest 30 minutes before the questioning.¹⁰¹

As a result of the 2017 legislative reform, Luxembourg CCP applies the same procedural guarantees to police custody.¹⁰² As regards the right to access a lawyer, case law provides that the information provided by the police officer shall encompass the right to free legal aid.¹⁰³ Temporary derogations from the right to communicate with a third party must be authorized by the Public Prosecutor.¹⁰⁴

3.3. *Detention pending trial*

As previously, mentioned, the person deprived of his liberty on the basis of an arrest warrant or under police custody shall be brought within 24 hours before the Investigating Judge.¹⁰⁵ Following questioning, the latter verifies whether the conditions for delivering a pre-trial custodial warrant (*mandat de dépôt*) are met.¹⁰⁶ The substantial grounds justifying detention pending trial vary depending on whether the accused reside or not in the national territory.¹⁰⁷ As regards residents, a warrant may be issued against the accused who has been questioned by Investigating Judge where there are strong indications that he/she has committed a criminal offence and that the presumed facts would give rise to at least two years of imprisonment.¹⁰⁸ In addition, one of the following criteria must be fulfilled: danger of flight, risk of suppression of evidence - which is presumed when the

¹⁰⁰ Art. 52-2 (6) CCP.

¹⁰¹ Art. 85 (1) CCP.

¹⁰² Art. 39 CCP.

¹⁰³ Ch.c.C. 8 July 2013, n° 369/13, 370/13, 371/13, 372/13 and 374/13.

¹⁰⁴ Art. 39 (4) CCP

¹⁰⁵ Art. 93 CCP

¹⁰⁶ Art. 94 para 1 CCP.

¹⁰⁷ G Vogel (n 12) at 55.

¹⁰⁸ Art. 94 para 1 CCP.

facts are punished by imprisonment of more than five years (*crime*) - or risk that the accused will commit further offences.¹⁰⁹ If the warrant is delivered against a non-resident, less stringent criteria apply, namely strong indications that the accused has committed a criminal offence and the presumed facts would give rise to imprisonment.¹¹⁰ Warrants of pre-trial detention must be reasoned in a detailed manner, mentioning specific circumstances of the case that leads to the conclusion that the above-mentioned requirements are fulfilled.¹¹¹ Regard must be paid in particular to the gravity of the offence and the soundness of the submitted evidence.¹¹²

The Investigating Judge in charge of conducting the investigation has exclusive jurisdiction to issue arrest and pre-trial detention warrants.¹¹³ The lawfulness of the decision is not subject to *ex-officio* review by another judicial authority providing greater guarantees of independence. It should also be noted that Luxembourg law does not provide for a maximum length of detention pending trial, nor does it require an automatic review at regular intervals.¹¹⁴ Article 94-3 CCP only foresees an 'information procedure', according to which the Public Prosecutor is informed of the continued detention two months after the first interrogation of the accused by the Investigating Judge and every two months thereafter until the pre-trial chamber of the competent court confirms the charges and decides whether the case should be referred for trial.¹¹⁵ Once informed, the competent Prosecutor or the General Public Prosecutor may request interim release if the conditions for continued detention are no longer fulfilled. Finally, the Investigating Judge can, at any time, lift the pre-trial custodial detention (*mainlevée*).¹¹⁶

¹⁰⁹ Art. 94 para 2 CCP.

¹¹⁰ Art. 94 para 3 CCP.

¹¹¹ Art. 94 para 4 CCP.

¹¹² M Petschko, M Schiltz, S Tosza (n 10) 456.

¹¹³ The Investigating Judge provides the guarantees of impartiality and independence required under Article 5§3 ECHR.

¹¹⁴ Until 2006, Luxembourg law provided for an automatic review of detention pending trial before the pre-trial chamber of the competent court, which was called upon to prolong continued detention at intervals of one month. This automatic review of pre-trial detention was repealed and replaced by an 'information procedure'. *Projet de loi n°5354 portant introduction notamment de l'instruction simplifiée, du contrôle judiciaire et réglementant les nullités de la procédure d'enquête*, 30.6.2004, at 29.

¹¹⁵ Art. 94-3 CCP.

¹¹⁶ Art. 94-2 CCP.

Judicial review of pre-trial detention is undertaken upon request of the accused. First, the person under pre-trial detention can submit a request for annulment (*requête en nullité*) against the warrant issued by the Investigating Judge before the pre-trial chamber of the competent court.¹¹⁷ This remedy enables the detained person to seek judicial review of the lawfulness of detention, by assessing in particular, whether the legal requirements for ordering detention pending trial have been met.¹¹⁸

The court undertakes an assessment *in concreto* and verifies whether the challenged act is sufficiently reasoned. According to the consistent case law, the warrant shall not necessarily recall in a detailed and exhaustive manner all elements recorded in the case file.¹¹⁹ However, a decision is not sufficiently reasoned where it uses stereotyped formulas, which do not refer to the concrete and actual situation of the detained person.¹²⁰ Nonetheless, the Court can substitute its own assessment of the challenged decision and decide that the accused should continue to be detained if the conditions set forth in Article 94 CCP are still met.¹²¹ The judicial review undertaken also encompasses the respect of defense rights guaranteed under national law as well as international legal instruments that are directly applicable.¹²²

Second, the accused held in pre-trial detention, can at any time, submit a request for interim release.¹²³ For the sake of reducing the number of manifestly unfounded judicial actions, the 2017 law implementing EU Directives enables the person under detention to submit subsequent requests for interim release at intervals of at least one month.¹²⁴ As for the authority undertaking judicial scrutiny, requests for interim release submitted during the judicial investigation fall within the competence of the pre-trial chamber of the competent

¹¹⁷ Art. 126 CCP. The request must be introduced, under penalty of foreclosure, within 5 days from the moment of the arrest.

¹¹⁸ CSJ Ch. c. C. 28 March 2012, n° 191/12.

¹¹⁹ CSJ Ch.c.C. 28 May 2014, n° 369/14; CSJ Ch.c.C. 7 July 2014, n°408/14.

¹²⁰ CSJ Ch.c.C. 7 July 2014, n° 408/14

¹²¹ CSJ Ch.c.C. 28 May 2014, n° 369/14.

¹²² In particular, before the entry into force of the 2017 law implementing EU directives on the rights of suspects and accused persons in criminal proceedings, Luxembourg Courts acknowledged the direct effect of Article 3 Directive 2010/64/EU guaranteeing the right to a written translation of decisions depriving a person of his liberty. CSJ Ch. c.C. 20 January 2014, n° 37/14.

¹²³ Art. 113 and 116 (1) CCP.

¹²⁴ Art. 116 (3) para 2 CCP.

District Court.¹²⁵ The latter rules as a matter of urgency within three days after the submission of the request.¹²⁶ Moreover, the accused can lodge an appeal against the decision rejecting a request for interim release according to the procedure set forth in Article 133 CCP.¹²⁷ Likewise, the Public Prosecutor can appeal within one day against the decision for interim release.¹²⁸ The accused remains in detention until the expiry of the time limit for lodging an appeal. The appeal is lodged before the pre-trial chamber of the Court of Appeal, which rules within 10 days if the appeal was lodged by the Prosecutor¹²⁹ and 20 days where the judicial action was instituted by the defendant.¹³⁰ In the case where the court does not comply with such a time-limit for taking a decision, the accused must be released.¹³¹

Requests for interim release under Article 116 CCP enable the competent court to verify whether the legal requirements justifying continued detention are still fulfilled.¹³² In this regard, judicial review entails an assessment *in concreto* based on the factual background of the case and the situation of the detained person.¹³³ According to case law, the risk of suppression of evidence must be actual and supported by facts (*risque réel et circonstancié*).¹³⁴ Likewise, the professional, the economic and the family situation of the accused in pre-trial detention is taken into account in order to appreciate whether alternatives to detention are more suitable in the given case.¹³⁵ In doing so, the court reviews the necessity and proportionality of continued detention by verifying whether less restrictive measure

¹²⁵ Art. 116 (1) a) CCP. If the request for interim release is jointly presented with an action against the decision to refer the case for trial taken by pre-trial chamber of the District Court, the competent court is the pre-trial chamber of the Court of Appeal. Art. 116 (1) b) CCP.

¹²⁶ Art. 116 (3) CCP.

¹²⁷ Art. 116 (8) CCP.

¹²⁸ Art. 116 (7) CCP.

¹²⁹ Art. 116 (7) CCP.

¹³⁰ Art. 116 (8) CCP.

¹³¹ Art. 116 (7) CCP. In this case, the appeal lodged by the Public Prosecutor will lapse. See for instance CSJ Ch.c.C. 17 February 2009, n° 106/09.

¹³² CSJ Ch.c.C. 17 July 2014, n° 526/14.

¹³³ See for instance, CSJ Ch.c.C. 11 December 2012, n° 813/12.

¹³⁴ CSJ Ch.c.C. 7 August 2012, n° 522/12.

¹³⁵ The proportionality test also applies with respect to obligations attached to a decision for interim release, such as release on bail. See for instance CSJ Ch.c.C. 5 June 2009, n° 487/09.

could be taken to achieve the legally defined objectives for which pre-trial custody is allowed.¹³⁶

If the pre-trial chamber annuls the warrant issued by the Investigating Judge, the acts are declared void and the accused is released.¹³⁷ Likewise, when a request for interim release is submitted by the detainee, the court is under the obligation to order interim release where any of the conditions set forth under Article 94 for continued detention are no longer met.¹³⁸ The release may be conditioned upon the respect by the accused of specific conditions, such as prohibition on visiting certain places or obligation to undergo medical treatment (*contrôle judiciaire*). The power to impose alternative measures to imprisonment is granted to both the Investigating Judge when he decides to lift continued detention¹³⁹ and the pre-trial chamber of the competent court called upon to rule on a request for interim release.¹⁴⁰ Finally, the decision for interim release is always conditioned on the respect of the accused of obligations to appear in person that apply in respect of acts of the proceedings and the execution of the judgement on the merits of the case.¹⁴¹ Indeed, if after having obtained interim release the accused does not appear, the Investigating Judge or the competent court may issue a new pre-trial detention warrant.¹⁴²

The person in detention has the right to access documents essential in order to effectively challenge the lawfulness of continued detention. First, the accused must receive a written copy of the decision ordering detention pending trial, and indicating the reasons justifying deprivation of liberty.¹⁴³ Second, access to essential documents overlaps with the right to access the case file enshrined in Article 85 CCP. In particular, after the questioning by the Investigating Judge, the person under detention pending trial and his lawyer can consult at any time the entire case file¹⁴⁴ or request a copy of the file or specific materials of it.¹⁴⁵ It should be noted that restrictions on the

¹³⁶ CSJ Ch.c.C. 28 May 2014, n° 369/14.

¹³⁷ Art. 126 CCP.

¹³⁸ Art. 116 (5) CCP.

¹³⁹ Art. 94-2 CCP.

¹⁴⁰ Art. 116 (6) CCP.

¹⁴¹ Art. 113 CCP.

¹⁴² Art. 119 CCP.

¹⁴³ Art. 97 CCP.

¹⁴⁴ Art. 85 (2) CCP.

¹⁴⁵ Art. 85 (3) CCP.

access to the case file as provided under the new wording of Article 85 CCP¹⁴⁶ seems to apply irrespective of whether the defendant is free or under detention. However, Luxembourg case law had held that denial of access shall not undermine the fundamental rights of the accused to adequately prepare his defense, to exert the rights conferred by law and to institute judicial actions available to him.¹⁴⁷ Moreover, the Luxembourg CCP guarantees the right of the person who does not speak or understand the language of the procedure to obtain a written translation of the warrant ordering detention pending trial.¹⁴⁸ In 2014, the pre-trial chamber of the Court of Appeal held that Article 3 Directive 2010/64/EU does not require the Member States to provide immediately a written translation of the pre-trial custodial warrant.¹⁴⁹ Pursuant Article 3-3 CCP, such a document must be provided within a reasonable time. In the case referred to, no violation of defense rights was found since, during the questioning by the Investigating Judge, the accused was assisted by a lawyer and an interpreter, who provided an oral translation of the warrant as well of the documents informing the accused about remedies available under national law to challenge the lawfulness of arrest and detention.¹⁵⁰ In this respect it is worth noting that the law of March 2017 implementing Directive 2012/13/EU expressly guarantees the right to oral interpretation during the questioning by the Investigating Judge as well as when he appears before the pre-trial chamber called upon to rule on a request for interim release.¹⁵¹

In addition, Luxembourg law requires the person in detention to appear in person before the Court having jurisdiction to review a request for interim release.¹⁵² To this end, Article 116 requires that both the detainee and his lawyer be informed about the place and date of the hearing.¹⁵³ The applicant has also the opportunity to submit

¹⁴⁶ See question 14.

¹⁴⁷ CSJ Ch.c.C. 23 October 2009, n° 810/09. In particular, denial of access to the case file must be justify in a reasoned decision that puts into balance, on the one hand, the needs related to the conduct of investigations, particularly as regards risks of suppression of evidence and, on the other, the rights of the accused. CSJ Ch.c.C. 27 June 2012, n° 460/12.

¹⁴⁸ Art. 3-3 (3) CCP.

¹⁴⁹ CSJ Ch.c.C. 20 January 2014, n° 37/14.

¹⁵⁰ *Ibid.*

¹⁵¹ Art. 3-2 CCP.

¹⁵² Art. 116 (3) CCP.

¹⁵³ Art. 116 (4) CCP. Likewise, if the Prosecutor lodges an appeal against the

written observations.¹⁵⁴ When the tribunal having jurisdiction on the request is the pre-trial chamber of the District Court, the Investigating Judge submits a written and reasoned report.¹⁵⁵ The failure to comply with this procedural rule shall not prevent the court from ruling on the request for interim release.¹⁵⁶ The right to be heard in person constitutes a substantial formal requirement (*formalité substantielle*) that enables the detained person to effectively defend himself and challenge the lawfulness of pre-trial detention.¹⁵⁷ Consequently, the violation of this right automatically leads to release.

Finally, the CCP guarantees arrested persons and persons formally indicted by the Investigating Judge the right of access to a lawyer.¹⁵⁸ It therefore encompasses persons under pre-trial custodial detention. As regards to the scope of and restrictions on the right to legal assistance, the rules laid down under article 3-6 CCP apply.¹⁵⁹

3.4. Arrest and detention order for questioning

The Investigating Judge can issue a warrant for the purpose of questioning the accused¹⁶⁰ or hearing a witness duly summoned who refuses to appear (*mandat d'amener*).¹⁶¹ With respect to the accused (*inculpé*), such a warrant can be issued if there is a risk of flight, suppression of evidence, or if the whereabouts of the accused are unknown.¹⁶² The risk of flight is presumed when the potential charge carries a term of imprisonment of more than five years (*crime*).¹⁶³ Luxembourg law requires the Investigating Judge to give specific reasons for the warrant, in particular by reference to the factual

order for interim release, the accused in detention and his lawyer are informed about the date and place of the hearing. Art. 116 (7) CCP.

¹⁵⁴ Art. 117 para 2 CCP. In a similar way, the Public Prosecutor shall submit written conclusions and be heard before the court. Art. 116 (3) CCP.

¹⁵⁵ Art. 116 (3) CCP.

¹⁵⁶ CSJ Ch.c.C. 6 March 2012, n° 127/12.

¹⁵⁷ CSJ Ch.c.C. 18 February 2009, n° 108/09.

¹⁵⁸ Art. 3-6 CCP.

¹⁵⁹ See below question 15.

¹⁶⁰ Art. 91 (3) CCP.

¹⁶¹ Art. 92 CCP. If the person refuses to comply with a *mandat d'amener*, the police is entitled to use force (Art. 99 CCP). Such a binding character distinguishes the *mandat d'amener* from the *mandat de comparution*. See Opinion of the Conseil d'Etat, 28.12.1971, *Projet de loi n°1549, portant modification du régime de la détention préventive*, at 909.

¹⁶² Art. 91 (3) CCP.

¹⁶³ Art. 91 (3) CCP.

circumstances of the case showing that the conditions set forth by the law are met.¹⁶⁴ Warrants for the purpose of questioning the suspect entails in practice the authorization given to the police officers to enforce the warrant and interrogate the accused.¹⁶⁵ This is without prejudice to the right of the arrested person to be brought before the Investigating Judge within 24 hours following deprivation of liberty.¹⁶⁶

Warrants issued by the Investigating Judge are assimilated to orders having an administrative nature. Therefore, the person arrested for the purpose of questioning can submit a request for nullity (*requête en nullité*) of the warrant before the pre-trial chamber of the competent court according to the procedure set forth in Article 126 CCP.

As for pre-trial detention warrants, the right to access documents essential to challenge the lawfulness of detention is first guaranteed by the duty to provide the arrested person with a copy of the warrant delivered for the purpose of questioning.¹⁶⁷ In this regard, it is worth mentioning that the 2017 law implementing EU Directives harmonizing defense rights in criminal matters has filled a legal lacuna. Since its entry into force, police officers must, at the time of arrest, provide the arrested person with a written letter of rights indicating the reasons for arrest (date and facts constituting the offence allegedly committed), available remedies for challenging the lawfulness of arrest and regaining his liberty, as well the procedural guarantees that may be of benefit to him, namely the right to translation and interpretation, the right to of access to a lawyer, the right to make statements or remain silent.¹⁶⁸ If the information cannot be provided in writing, an oral communication shall be guaranteed, if necessary with the assistance of an interpreter. A written copy shall be provided in any event without undue delay.¹⁶⁹ Where the arrested person does not speak or understands the language of the proceedings, the warrant is translated *ex-officio*.¹⁷⁰ Access to documents essential to challenge detention for the purpose of questioning is further guaranteed through the right to access the case file. In particular, the arrested person and his lawyer have access to the entire case file at the latest 30 minutes before the questioning by the Investigating

¹⁶⁴ Art. 94 para 4 CCP.

¹⁶⁵ Art. 52 - 1 CCP.

¹⁶⁶ Art. 93 CCP.

¹⁶⁷ Art. 97 CCP.

¹⁶⁸ Art. 52-1 (1) para 2 CCP.

¹⁶⁹ Art. 52-1 (1) para 2 CCP.

¹⁷⁰ Art. 3-3 (3) CCP.

Judge.¹⁷¹ Moreover, after the questioning, they can consult the entire case file at any time¹⁷² or request a copy of the file or specific materials from it.¹⁷³

Furthermore, the person subject to a ‘*mandat d’amener*’ has to be heard by the Investigating Judge within 24 hours following arrest.¹⁷⁴ It is worth recalling that right to interpretation is explicitly guaranteed during any questioning before the Investigating Judge, irrespective of whether the person is under custody.¹⁷⁵ Finally, Luxembourg law guarantees the person subject to warrants for the purpose of questioning the right of access to a lawyer within undue delay under the conditions set forth under Article 3-6 CCP.¹⁷⁶ Legal assistance must be further provided during police questioning and the interrogation by the Investigating Judge.¹⁷⁷

4. Specific remedies for alleged breaches of defence rights

4.1. Restrictions on the right to access the case file

The 2017 law implementing *inter alia* the Directive 2012/13/EU considerably strengthens the right to access the case file during judicial investigations. First, among the most significant changes is the right of the defendant to access the entire case file, exceptions are made for materials related to acts the execution of which is underway, before the first questioning in front of the Investigating Judge.¹⁷⁸ In the case of the issuance of a non-binding summons for questioning (*mandat de comparation*), the file must be available for consultation at the latest 3 days before the interrogation. Accordingly, the protection afforded by the new legal provisions goes beyond the

¹⁷¹ Art. 85 (1) CCP.

¹⁷² Art. 85 (2) CCP.

¹⁷³ Art. 85 (3) CCP.

¹⁷⁴ Art. 93 CCP.

¹⁷⁵ Art. 3-2 (1) CCP.

¹⁷⁶ See below question 15.

¹⁷⁷ Art. 3-6 (4) CCP.

¹⁷⁸ Art. 85 (1) CCP. Before the entry into force of the law implementing EU directives harmonizing defence rights in criminal proceedings, Article 85 made the case file available to the accused only after his first questioning before the Investigating Judge, the eve of each subsequent interrogation and of any act (*devoirs*) for which the assistance of a lawyer was admitted.

restrictive interpretation previously adopted by case law. Indeed, Luxembourg courts have consistently held that the lack of access the case file before the first interrogation by the Investigating Judge does not constitute a breach of Article 6 ECHR,¹⁷⁹ nor of Article 7 Directive 2012/13/EU.¹⁸⁰ Second, after the first questioning before the Investigating Judge or any subsequent formal indictment, the accused and his lawyer can access the case file at any time, without prejudice to the good functioning of the Investigating Judge's office and except in case of urgency, to three days prior to any interrogation or other acts for which the assistance of a lawyer is provided.¹⁸¹

Whilst in the above-mentioned situations the defendant and his legal counsel can consult the materials of the case at the registry of the Court, the 2017 law provides for the transmission of the case file to the parties.¹⁸² Article 85(3) CCP enables the accused and his lawyer to request free of charges a copy of the case file or of specific materials after indictment.¹⁸³ The requested copies shall be provided within one month. However, the Investigating Judge may oppose to the communication of the requested documents within 5 days by taking a duly reasoned order in the light of the specific circumstances of the case.¹⁸⁴ Digitalized copies might also be provided if available.

Finally, access to the case file must be granted when the judicial investigation is closed, at the latest 8 days before the pre-trial chamber of the competent court decides whether the case shall be referred for trial.¹⁸⁵ The accused receives a copy of the entire file, exception made of items and documents, which were seized, within a reasonable delay before the first hearing at the trial court.¹⁸⁶

The 2017 law further clarifies admissible restrictions in the light of Article 7 §4 Directive 2012/13/EU.¹⁸⁷ Indeed, after the first

¹⁷⁹ CSJ Ch.c.C. 5 May 2014, n° 291/14.

¹⁸⁰ CSJ Ch.c.C. 28 February 2014, n° 69/14; CSJ Ch.c.C. 21 January 2014, n° 44/14.

¹⁸¹ Art. 85 (2) par 1 CCP.

¹⁸² Such a communication was not contemplated before the reform of Luxembourg CCP, not even when a request for access specific material of the case was submitted. CSJ Ch.c.C. 4 October 2012, n° 363/12; CSJ Ch.c.C. 1 July 2014, n° 463/14; CSJ Ch.c.C. 18 June 2014, n° 420/14.

¹⁸³ Art. 85 (3) para 1 CCP.

¹⁸⁴ Art. 85 (3) para 3 CCP.

¹⁸⁵ Art. 127(6) CCP.

¹⁸⁶ Art. 182-1 CCP.

¹⁸⁷ Before the 2017 legislative reform, no specific legal provisions defined legitimate grounds for restriction. According to the case law, the Investigating Judge

questioning, the decision restricting access to the case file can be adopted by the Investigating Judge either *proprio motu* or upon request of the Public Prosecutor.¹⁸⁸ Access to the case file may be refused by a reasoned decision and only in exceptional circumstances, if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm national security.¹⁸⁹ The restriction must be lifted as soon as it is no longer necessary and, in any event, when the Investigating Judge orders the closing of the investigation.¹⁹⁰ The same grounds may justify the decision whereby the Investigating Judge rejects a request by the defendant to obtain a copy of the case file or of a specific document.¹⁹¹ In this context, the restriction can also be justified where the requested access to the case file entails risks of pressure on victims, witnesses or any persons being a party or participating into the proceedings. Nevertheless, access to experts' reports can never be denied.¹⁹²

A decision by the Investigating Judge denying access to the case file constitutes a jurisdictional act and therefore can be subject to appeal (*appel*) under Article 133 CCP.¹⁹³ In this regard, the 2017 law specifies that the defendant can lodge an appeal against the decision whereby the Investigating Judge exceptionally restricts the access to the case file after indictment,¹⁹⁴ rejects the defendant's request to revoke such a restriction¹⁹⁵ or opposes to the communication of materials of the case file requested by the parties.¹⁹⁶ According to the appeal procedure under Article 133 CCP, the decision taken by the Investigating Judge is notified within 24 hours to the accused,¹⁹⁷ who can lodge an appeal with the pre-trial chamber of the Court of

shall decide taking into account the interests of the proceeding, especially risk of suppression of evidence and the right to adequately assume one's own defense. See for instance, CA 13 March 2007, Pasicrisie 34, 16.

¹⁸⁸ Art. 85 (2) para 2 CCP.

¹⁸⁹ Art. 85 (2) para 2 CCP.

¹⁹⁰ Art. 85 (2) para 2 CCP.

¹⁹¹ Art. 85 (3) para 5 CCP.

¹⁹² Art. 85 (3) para 3 CCP.

¹⁹³ CSJ Ch.c.C. 1 July 2013, n° 359/13.

¹⁹⁴ Art. 85(2) para 2 CCP.

¹⁹⁵ Art. 85(2) para 3 CCP.

¹⁹⁶ Art. 85(3) para 6 CCP.

¹⁹⁷ Art. 133(5) CCP.

Appeal¹⁹⁸ within 5 days from the date of the notification.¹⁹⁹ Although the hearing is not public,²⁰⁰ Luxembourg CCP guarantees the right of the applicant and his lawyer to attend the hearing and put forward their defence. To this end, they are informed as to the place, date of the hearing at the latest 8 days beforehand, and have the possibility to submit oral and written arguments.²⁰¹ Violation to these formal requirements are subject to an action of nullities.²⁰²

With regards to the scope and powers of review, the competent Court must verify whether the contested decision is sufficiently reasoned and whether one of the grounds set forth under article 85 CPP justifies the denial to access the case file in the light of the specific circumstances of the case.²⁰³ It is worth noting that before the entry into force of the 2017 law, the competent court would substitute its own assessment to the Investigative Judge's decision by putting into balance, on the one hand, the need to preserve the secrecy of judicial investigations and in particular with regards risks of suppression or loss of evidence and, on the other, the fundamental rights of the accused to adequately prepare his defense, to exert the rights conferred by law and to institute judicial actions available to him.²⁰⁴

4.2. Derogations on the right to access a lawyer

The 2017 law strengthening procedural guarantees in criminal matters enhances the right to access a lawyer whilst operating an almost verbatim implementation of Directive 2103/48/EU.²⁰⁵ In addition to the persons deprived from their liberty during the pre-trial

¹⁹⁸ Art. 133(4) CCP.

¹⁹⁹ Art. 133(5) CCP.

²⁰⁰ Art. 133(7) para 1 CCP.

²⁰¹ Art. 133 (7) para 2 CCP.

²⁰² Art. 133 (7) para 3 CCP.

²⁰³ CSJ Ch.c.C. 23 October 2009, n° 810/09.

²⁰⁴ CSJ Ch.c.C. 23 October 2009, n° 810/09.

²⁰⁵ The legislative reform broaden the scope of the right of access to a lawyer and codifies the judicial practice. Indeed, although Luxembourg CCP did only guarantee the access to a lawyer when the suspects is under police custody, a note of the General Public Prosecutor allowed the access to a legal counsel during the questioning undertaken by the police upon request of the suspected person who is not under detention. Note of the General Public Prosecutor, 13 May 2011, implementing guidelines for the compliance with the ECtHR judgement, *Salduz v. Turkey*.

stage of criminal proceedings, legal assistance is first granted to the person against whom the Prosecutor requests the opening of a judicial investigation (*inculpé*),²⁰⁶ as well as to the persons questioned during preliminary enquiries (*enquête préliminaire ou instruction simplifiée*),²⁰⁷ investigations of *flagrante delicto* offences²⁰⁸ and judicial investigations.²⁰⁹ Moreover, the new Article 3-6 CCP refers to ‘persons’ questioned by the police, the Prosecutor or the Investigating Judge, a category that might encompass witnesses.²¹⁰

The right to access a lawyer implies the possibility for the defendant to appoint the counsel of his choice. If the designated lawyer cannot be found or refuses to attend the questioning, the competent authority shall appoint a duty counsel (*avocat commis d’office*).²¹¹ By contrast, where the person who was duly informed of his right to legal assistance appears voluntary for interrogation without a lawyer, the competent authority will proceed to the questioning unless the suspect or accused expressly requests the presence of a lawyer.²¹² Access to a lawyer is further guaranteed by free legal aid that is granted to the defendant who lacks sufficient resources or where serious reasons related to the social, family and material situation of the person justify the granting of free legal assistance.²¹³ Moreover, the 2017 law lays down more precise requirements related to the waiver of the procedural safeguards by implementing Article 9 Directive 2013/48/EU.²¹⁴ Indeed, the person may waive voluntarily and unequivocally his right to legal assistance after having been provided with clear and sufficient information about the content of the right, the possible consequences of waiving it, as well as the possibility to revoke the waiver at any subsequent stage of the criminal proceedings.

Legal assistance does not merely entail the presence of the lawyer.

²⁰⁶ Art. 3-6 (1) sub 9 CCP.

²⁰⁷ Art. 3-6 (1) sub 3 and 4 CCP.

²⁰⁸ Art. 3-6 (1) sub 2 CCP.

²⁰⁹ Art. 3-6 (1) sub 7 and 8 CCP.

²¹⁰ By contrast, before the entry into force of the 2017 law, legal assistance was not guaranteed to witnesses during police questioning. However, the instruction courts seized of a request for nullity under article 48-2 CCP annulled the report of questioning if at the time of interrogation there were sufficient reliable and consistent evidence against the witness. In that circumstances, he shall be regarded as a suspect benefiting from the right of access to a lawyer. CSJ Ch.c.C. 25 April 2013, n°229/13.

²¹¹ Art. 3-6 (2) CCP.

²¹² Art. 3-6 (9) CCP.

²¹³ Law of 10 August 1991 on the lawyer profession, Mém. A n° 58, 27.08.1991.

²¹⁴ Article 3-6 (8) CCP.

The latter can, at the end of the questioning, request the police officer or the Investigating Judge to ask questions to his client or make oral observations.²¹⁵ The authority conducting the questioning may oppose this only when the questions or remarks are such as to impair the conduct of investigations. Refusals to give the lawyer the possibility to ask questions and observations are recorded in the questioning report.

The right to legal assistance further entails the possibility for the accused to meet and communicate in private with his counsel before the questioning.²¹⁶ A statutory provision guarantees indeed the confidentiality of communications between the defendant and his lawyer.²¹⁷ The 2017 law thereby filled a legal gap, since the Luxembourg CCP only guaranteed the right to communicate with a lawyer after the first questioning before the Investigating Judge.²¹⁸ It should be stressed, however, that the consultation with a lawyer before interrogation was already allowed in practice as a result of the ECtHR judgement in *A.T. v. Luxembourg*.²¹⁹ Indeed, the Court held in 2015 that the actual wording of Article 84 CCP ‘gives the impression that no communication is possible before the interrogation’.²²⁰ This prevents the lawyer from providing ‘effective and practical assistance, not just abstract via his presence’ during the first questioning by the Investigating Judge²²¹ and, therefore, constitutes a breach of Article 6§3 c) of the Convention.

Finally, the right of access to a lawyer entails the presence of a legal counsel during investigative acts if the suspect or accused person is required or permitted to attend the act concerned.²²² This encompasses confrontations²²³ and reconstructions of the scene of a crime.²²⁴ With regard to certain investigative acts, the legal assistance provided goes beyond the mere attendance by the lawyer. For instance, during confrontations the defendant’s counsel has the possibility to request the Investigating Judge to ask witnesses any questions that are useful to ascertain the truth. The Investigating

²¹⁵ Art. 3-6 (4) CCP.

²¹⁶ Art. 3-6 (3) CCP.

²¹⁷ Art. 3-6 (7) CCP.

²¹⁸ Art. 84(4) CCP.

²¹⁹ *A.T. v. Luxembourg*, App no 30460/13 (ECtHR, 9 April 2015), paras 85 *et seq.*

²²⁰ *Ibid* para 87.

²²¹ *Ibid* para 87.

²²² Art. 3-6 (5) CCP.

²²³ Art. 82(2) CCP.

²²⁴ Art. 63 (2) CCP.

Judge may also authorize the parties to directly ask questions to the witness. Any refusal by the Investigating Judge must be recorded.²²⁵

The new Article 3-6 (6) CCP clarifies the rules governing temporary derogations to the right of access to a lawyer. In this regard, the provision operates a literal implementation of Articles 3(6) and 8 Directive 2013/48/EU. In exceptional circumstances and only during preliminary or judicial investigations, the competent authority may temporarily derogate from the application of the rights to legal assistance to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons: where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.²²⁶ Such temporary derogations shall in addition be proportionate and not go beyond what is necessary, be strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence and not prejudice the overall fairness of the proceedings.²²⁷

As regards the authority entitled to authorize such derogation, one should distinguish two situations. During judicial investigations, the Investigating Judge, takes the decision on whether the right of access to a lawyer is temporary restricted.²²⁸ In the case of a preliminary enquiry, a derogation may be authorized by the police officer after the oral authorization of the Public Prosecutor that must be confirmed by a written and reasoned act.²²⁹ In the second case, the decision is taken by a non-judicial authority but can nonetheless be submitted to subsequent judicial review within the meaning of Article 8 (2) Directive 2013/48/EU. Indeed, not only the report of the questioning or the investigative act conducted without the defendant's lawyer being present, but also the decision itself that derogates from the right to legal assistance can be subject to action for nullities.

Indeed, the 2017 law transposing Directive 2013/48/EU enhances the judicial protection of the right to access a lawyer in a twofold way. First, besides the possibility for the defendant to submit an action for nullity against the report of the questioning or the

²²⁵ Art. 82(3) CCP.

²²⁶ Art. 3-6 (6) para 1 CCP.

²²⁷ Art. 3-6 (6) para 2 CCP.

²²⁸ Art. 3-6 (6) para 3 CCP.

²²⁹ Art. 3-6 (6) para 3 CCP.

investigative act conducted without the presence of a lawyer,²³⁰ the law introduces the possibility to challenge directly the decision whereby the competent authority derogates from the right to legal assistance. In both cases, requests for nullity are submitted to the pre-trial chamber of the competent court.²³¹ Second, the 2017 law clarifies the standards of judicial review since it specifies the requirements governing temporary derogations. Indeed, the Instruction Courts are entitled to verify in the light specific circumstances of the case,²³² whether the requirements set forth under Article 3-6 (6) CCP were met. Judicial review aims notably to assess whether derogations on the right to access a lawyer are reasoned, proportionate and do not undermine the fairness of the proceedings.²³³ If one the above mentioned requirements is not fulfilled, the competent court must declare the decision authorizing the temporary derogation null and void. The nullity is further extended to subsequent acts taken in consequence and as a result of the annulled decision. Therefore, the report of a questioning conducted in breach of the right of access to a lawyer would result null and consequently constitute an inadmissible evidence.

4.3. Decisions finding that there is no need for interpretation

The law of 8 March 2017 introduced a single provision defining the right to interpretation in criminal proceedings with the aims to clarify the scope of the procedural guarantee and, thereby, the remedies available to the defendant.²³⁴ According to the law, free assistance of an interpreter is a right of a person who does not speak or understands the language of the proceedings when he/she is questioned by the police or the Investigating Judge as a person suspected of having committed an offence, or when he/she appears before a trial court until the end of the criminal proceeding.²³⁵ Accordingly, the authority that conducts the questioning has competence to grant free linguistic assistance.²³⁶

²³⁰ See for instance CSJ cass. 31 January 2013, n° 3108.

²³¹ Requests for nullities against decisions taken by the Investigating Judge under Article 126 CCP or under Article 48-2 where the derogation is authorized by the Prosecutor during preliminary enquiries.

²³² CSJ Ch.c.C. 8 May 2012, n° 552/13.

²³³ Art. 3-6 (6) CCP.

²³⁴ Law of 8 March 2017 strengthening procedural guarantees in criminal matters, Mém. A n° 346, 30.03.2017.

²³⁵ Art. 3-2 (1) CCP.

²³⁶ Art. 3-2(3) CCP.

The right to interpretation further encompasses the communication between the suspect and his lawyer.²³⁷ In this regard, the 2017 law operates a literal implementation of Article 4 (2) Directive 2010/64/EU. Accordingly, interpretation is available for communication between the suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.²³⁸ Linguistic assistance is granted upon request of the defendant or his lawyer by the authority that conducts the questioning, namely the police officer or the Investigating Judge. If the request for oral interpretation relates to a hearing, requests or judicial actions available under national criminal procedure, the decision granting the assistance of an interpreter is taken by the court having jurisdiction to rule on the judicial action. The law designates thereby the pre-trial chamber of the competent court and consequently prevents the situation in which the Investigating Judge would decide whether to provide linguistic assistance in connection with an appeal against an act taken by the Investigating Judge himself.²³⁹

As regards legal requirements for granting linguistic assistance, the authority which interrogates the suspects has the obligation to verify whether he speaks or understands the language of the proceedings if there are doubts as to his linguistic ability.²⁴⁰ If it appears that he does not speak or understand the language, the assistance of an interpreter must be provided without delay.²⁴¹ The assistance of an interpreter²⁴² as well as the information provided about the right to interpretation²⁴³ must be recorded.

Doubts may nonetheless arise as to the incorrect implementation of Article 1(3) Directive 2010/64/EU. Indeed, according to Luxembourg law, the right to interpretation does not apply to criminal proceedings

²³⁷ Art. 3-2 (4) CCP.

²³⁸ Art. 3-2 (4) CCP.

²³⁹ *Projet de loi n°6758 renforçant les garanties procédurales en matière pénale*, 23.12.2014, doc. 6758/00, 33

²⁴⁰ Art. 3-2 (3) CCP.

²⁴¹ Art. 3-2 (3) CCP. It is worth mentioning that the right to interpretation enshrined in Article 3-2 CCP includes appropriate assistance for persons with hearing or speech impediments (Art. 3-2 (2) CCP). Moreover, where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings (Art. 3-2 (5) CCP).

²⁴² Art. 3-2 (6) CCP.

²⁴³ Art. 3-2 (8) CCP.

relating minor offences not punishable by imprisonment (*contraventions*).²⁴⁴ Admittedly, the Directive does not require Member States to provide the assistance of an interpreter during the pre-trial stage of proceedings, enabling an authority other than a court having jurisdiction in criminal matters to impose penalties regarding minor offences. However, the right to interpretation must still apply to proceedings before a court having jurisdiction to review the appeal against such a sanction.²⁴⁵

Depending on the authority competent for granting the assistance of an interpreter, Luxembourg law provides the defendant with different judicial remedies.²⁴⁶ In particular, the person undergoing interrogation does not only have the possibility submit a request for nullity against the report of the questioning.

Since the entry into force of the 2017 law strengthening procedural guarantees, Luxembourg CCP provides the possibility to challenge directly the decision whereby the competent authority decides whether the assistance of an interpreter is needed.²⁴⁷ Nullities pronounced by the pre-trial chamber prevent admissibility of the questioning report at trial.

Third, if the assistance of an interpreter is requested by the defendant or his lawyer, the decision of the Investigating Judge can be subject to appeal under Article 133 CCP. In addition, the 2017 law grants the possibility for the defendant to challenge the quality of the interpretation provided and to make oral observations regarding the lack of linguistic assistance that are recorded either

²⁴⁴ Art. 3-8 CCP. Nonetheless, it is worth noting that Article 184 CCP requires that competent authorities to inform the accused who is summoned to appear before the District Court about his right to interpretation, translation and access to a lawyer. Since District Courts have jurisdiction to review appeals lodged against convictions for minor offences pronounced in first instance, it seems that Luxembourg law does not totally exclude the application of defence rights granted by the ABC Directives at the trial stage of the criminal proceedings.

²⁴⁵ Thus defined, the scope of the directive has been confirmed by the interpretation held by the CJEU in Case C-216/14, *Covaci*, EU:C:2015:686, para 42.

²⁴⁶ Art 3-2 (7) CCP.

²⁴⁷ *Projet de loi n°6758 renforçant les garanties procédurales en matière pénale*, 06.10.2016, doc. 6758/03, at 15. Indeed, when the police officer who questions the suspect considers that there is no need for interpretation, the defendant can request the annulment of the decision not to provide linguistic assistance and the questioning report. Second, the defendant can lodge a request for annulment against the decision taken by the Investigating Judge not to provide linguistic assistance as well as against the questioning report.

immediately in the report of the questioning or subsequently included in the case file.²⁴⁸

As regards the scope of review, the competent court verifies whether the failure to provide the assistance of an interpreter prevented the suspect or accused from understanding the charges against him, to prepare and put forward his defense. It is worth noting that, before the entry into force of the 2017 law, the judicial practice conformed to the standards of protection enacted by Directive 2010/64/EU. While case law acknowledged the direct effect of the Directive,²⁴⁹ in 2014 the General Public Prosecutor adopted a note for the purpose of implementing the EU Directive on the right to interpretation and translation pending the adoption of the national transposition law.²⁵⁰

4.4. Decisions finding that there is no need for translation

Likewise, the 2017 law significantly clarified the scope of the right to translation.²⁵¹ The suspected or accused person who does not understand the language of the criminal proceedings is, within a reasonable period of time and free of charge, provided with a written translation of all documents that are served upon them or that they have the right to access which are essential to ensure that they are able to exercise their rights of defence and to safeguard the fairness of the proceedings.²⁵² More specifically, Article 3-3 distinguishes between documents that must be automatically translated and those translated upon request of the defendant. The former category encompasses the letter of notice of rights provided by the police

²⁴⁸ Art 3-2 (7) CCP.

²⁴⁹ CSJ Ch.c.C. 20 January 2012, n° 37/14.

²⁵⁰ Note du Parquet général du 20 janvier 2014 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales.

²⁵¹ Despite the judicial practice already implemented the guarantees provided under the directive, very few provisions in Luxembourg CCP expressly related to the right to translation before the 2017 reform. See Note du Parquet général du 20 janvier 2014 relative au droit à l'interprétation et à la traduction dans le cadre des procédures pénales. Legal vacuum was nonetheless filled by Luxembourg case law that implements the right to translation in the light of the ECtHR case law. For instance, the pre-trial chamber held that the defendant who does not understand the language of the proceedings must be provided with a written translation of the decision referring the case for trial must. CSJ Ch.c.C. 12 February 2011, n° 52/11.

²⁵² Art. 3-3 (1) CCP.

during preliminary investigations, any warrant depriving the person of his liberty, the decision ordering or rejecting a request for *contrôle judiciaire*, the request of the Public Prosecutor or the civil party to refer the case for trial, the decision of pre-trial chamber to refer the case for trial or dismiss the proceedings, the order to appear in trial courts and any court decision imposing penalties including penal orders.²⁵³ In addition to the *ex-officio* translation, the suspect or accused has the possibility to submit a reasoned request to obtain written translations of other documents that he has the right to access provided that such documents are essential to ensure the exercise of defence right and to safeguard the fairness of the proceedings.²⁵⁴ This does not prevent the competent authority to provide *proprio motu* the translation of those acts. It must be underlined, however, that the right to interpretation does not apply to criminal proceedings regarding minor offences not punished by imprisonment (*contraventions*).²⁵⁵ As for the right to interpretation, this raises concerns as for the proper implementation of Article 1(3) Directive 2010/64/EU.²⁵⁶

The distinction between essential documents translated *ex-officio* and other essential documents is of relevance to the designation of the authority competent for granting linguistic assistance. As to the former category, the authority that is the author of an essential document within the meaning of Article 3-2 (3) also decides whether a translation is needed.²⁵⁷ Depending on the legal act, the decision might be taken by the Prosecutor, the Investigating Judge or the pre-trial chamber of the competent court. Exceptions to this rule are requests submitted by the civil party, the translation of which falls within the competence of the Public Prosecutor. As for documents that might be considered essential, the decision granting or rejecting a request for translation falls within the competence of the Public Prosecutor during preliminary investigations and the Investigating Judge during judicial investigations.²⁵⁸ The law requires the authority which interrogates the defendant or the court before which he appears to verify whether the defendant speaks or understands the language of the proceedings if there are doubts as to his linguistic

²⁵³ Art. 3-3 (3) CCP.

²⁵⁴ Art. 3-3 (4) CCP.

²⁵⁵ Art. 3-8 CCP.

²⁵⁶ See *supra* Section 4.3.

²⁵⁷ Art. 3-3 (5) para 1. Exception to the rules are acts whereby the *partie civile* request the referral of the case for trial or the appearance of the defendant in court.

²⁵⁸ Art. 3-3 (5) para 2 CCP.

ability.²⁵⁹ However, under exceptional circumstances, an oral translation of essential documents may be provided instead of a written translation provided that such an oral translation does not prejudice the fairness of the proceeding.²⁶⁰

The 2017 law does not introduce new specific remedies enabling the suspect or the accused to challenge the decision finding that there is no need for translation. Nonetheless, it enhances the effective protection of the defendant's rights, since it specifies what authority and under which criteria does it orders written translation of essential documents.²⁶¹ The defendant may notably request the adjournment of a court hearing, precluding the applicability of a time-limit for instituting a judicial action, where the lack of translation prevents the applicant from having knowledge of the contested act or makes it impossible for him to bring a judicial action,²⁶² submit requests for nullities under Article 126 CCP where the Investigating Judge fails to provide a written translation of an essential document, or request for nullities under Article 48-2 CCP where such a decision is taken by the Public Prosecutor during preliminary enquiries. Moreover, the decision whereby the Investigating Judge rejects a request for translation is subject to appeal before the pre-trial chamber of the competent court under Article 133 CCP.²⁶³ In a similar way, the competent court may order the adjournment of the hearings where the Public Prosecutor has failed to order translation of an essential document despite the request of the accused. In addition, this reform granted defendants the possibility to make oral observations regarding the lack of linguistic assistance that are recorded either immediately in the report of the questioning or subsequently in the case file.²⁶⁴

Regarding the scope of judicial review, Luxembourg courts are called upon to identify documents which are essential to ensure that the suspect and accused are able to exercise their rights of defence

²⁵⁹ Art. 3-3 (2) CCP.

²⁶⁰ Art. 3-3 (7) CCP.

²⁶¹ Projet de loi n°6758 renforçant les garanties procédurales en matière pénale, 06.10.2016, doc. 6758/03, 35.

²⁶² The time-limit for lodging a judicial action is suspended (*relevé de déchéance*) where the defendant is not provided with a written translation of the decision referring the case for trial that he intends to challenge. CSJ Ch.c.C. 12 February 2011, n°52/11.

²⁶³ Projet de loi n°6758 renforçant les garanties procédurales en matière pénale, 23.12.2004, doc. 6758/00, 35.

²⁶⁴ Art. 3-3 (8) CCP.

and to safeguard the fairness of the proceedings within the meaning of Article 3-3 (4). This also encompasses a case-by-case assessment of the need to translate passages of essential documents, which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.²⁶⁵ Finally, the 2017 law codifies the conditions upon which the suspect or the accused may waive his right to translation. In this regard, the competent authority must verify whether the waiver is unequivocal and given voluntarily by the person who has been informed about the scope of the right to translation and the consequences of the waiver.²⁶⁶

4.5. *Violations of the right to information about the accusation*

In the course of judicial investigations, the indictment of a suspect (*inculpation*), irrespective of whether he is under detention, occurs after the first questioning by the Investigating Judge.²⁶⁷ Before the interrogation, the latter must inform the accused (*inculpé*) about the facts to which the interrogation relates, the legal characterization of those facts as well as of the investigative acts previously undertaken by the police during preliminary enquiries or *flagrante delicto* investigations.²⁶⁸ If the Investigating Judge proceeds by indictment after having questioned the suspect and heard observation by his lawyer, he is required to inform the accused about the charges against him.²⁶⁹ The information provided encompasses the facts he is accused of having committed and their legal characterization, unless these information was already communicated. It is worth noting that the 2017 law implementing Directive 2012/13/EU further requires the Investigating Judge to indicate in non-binding summons to appear for questioning the nature and date of the offence to which the interrogation relates.²⁷⁰ In addition, where the Investigating Judge modifies the legal characterization of the charges communicated to the accused, the latter must be informed.²⁷¹

The 2017 law introduced similar provisions in the case of

²⁶⁵ Art. 3(4) Directive 2010/64/EU.

²⁶⁶ Art. 3-3 (10) CCP

²⁶⁷ Art. 81 (7) CCP.

²⁶⁸ Art. 81(1) CCP.

²⁶⁹ Art. 81(7) CCP.

²⁷⁰ Art. 91 (2) CCP.

²⁷¹ Art. 86-2 CCP.

preliminary investigations²⁷² and investigations of *flagrante delicto* offences.²⁷³ Where there is evidence indicating that the person under police questioning participated in a criminal offence punishable by imprisonment,²⁷⁴ he has the right to be informed as to the nature and date of the offence allegedly committed.²⁷⁵ Article 46 CCP grants the same guarantee to witnesses if, during the interrogation, reliable evidence appears to indicate that he likely took part to the perpetration of the offence.²⁷⁶ Where the suspect is summoned to appear for questioning, information regarding the charges must be provided beforehand in writing.²⁷⁷ Information given orally regarding the charges and rights must be recorded in the minutes of the interrogation.²⁷⁸

In any event, the accused is informed about the charges against him before submission of the merits of the accusation to the competent court. To this end, Article 184 CCP requires the summoning actor to appear before the competent trial court to indicate the nature, legal characterization and date of the offence, as well as the nature of the participation by the accused person.²⁷⁹ Nonetheless, where the decision to refer the case for trial falls within the jurisdiction of the pre-trial chamber of the District Court,²⁸⁰ such information is provided in the decision to refer the case for trial notified to the accused. Indeed, the pre-trial chamber is called upon to verify after the closing of the preliminary enquiries or the judicial investigation whether the evidence collected are sufficiently reliable and accurate to justify the holding of a trial.²⁸¹ The review does not aim to establish the guilt or innocence of the accused, but merely to identify and refer the case to the court having jurisdiction to rule on the charges. The order delivered by the pre-trial chamber to that effect (*ordonnance de renvoi*) is notified to the accused²⁸² and provides him detailed information about the accusation, including the nature and legal

²⁷² Art. 46 CCP.

²⁷³ Art. 39-1 CCP.

²⁷⁴ Art. 46 (2) CCP.

²⁷⁵ Art. 46 (3) CCP.

²⁷⁶ Art. 46 (2) and art. 39-1 (2) CCP.

²⁷⁷ Art. 46 (3) para 2 CCP.

²⁷⁸ Art. 46 (3) para 3 CCP.

²⁷⁹ Art. 184 para 2 CCP.

²⁸⁰ Art. 127 CCP.

²⁸¹ G Vogel (n 12) 138.

²⁸² Art. 127(9) CCP.

classification of the criminal offence, as well as the nature of participation by the accused person.²⁸³

The suspect or accused has the possibility to submit a request for annulment to the pre-trial chamber of the competent court against the act of the investigative investigation²⁸⁴ or the preliminary enquiry²⁸⁵ adopted in violation of the right to be informed. It should be stressed that the review undertaken by the Instruction Courts may encompass the violation of defence rights resulting from an indictment that was unduly delayed. In particular, Article 73 CCP prevents the competent magistrate or police officer from questioning a person as a witness where serious and consistent evidence against him justify the pressing of charges. In such circumstances, the contested act would be declared null and void when the delayed indictment irreparably deprive the accused of the ability to exercise defense rights.²⁸⁶ Likewise, the failure to notify the order of the pre-trial chamber which refers the case for trial is sanctioned by nullity.²⁸⁷ The accused may file a motion before the competent trial court before any submission on the merits of the case.²⁸⁸ Judicial review may also concern the accuracy of the charges indicated in the summons to appear for trial. In case of re-characterization of the charges, the court verifies whether the accused was informed in a detailed manner as to the nature and reasons of the accusation against him in order to provide him with sufficient time and facilities to prepare his defense.²⁸⁹

5. Sanctions against illegal or improperly obtained evidence

As mentioned above, Luxembourg law sanctions evidence gathered in breach of defense rights by nullities. During judicial investigations, requests for nullities fall within the jurisdiction of the instruction courts.²⁹⁰ Nullities against investigative acts carried out in the course preliminary enquiries which did not lead to the opening of judicial investigations shall be raised before the competent trial courts prior to

²⁸³ G Vogel (n 12) 140.

²⁸⁴ Art. 126 CCP.

²⁸⁵ Art. 48-2 CCP.

²⁸⁶ CSJ Ch.c.C. 24 October 2012, n° 690/12.

²⁸⁷ Art. 127(9) CCP.

²⁸⁸ G Vogel (n 12) 141.

²⁸⁹ CSJ corr. 13 mars 2007, n° 155/07 V.

²⁹⁰ Art. 126 CCP.

any review on the merits.²⁹¹ One should distinguish two categories of nullities. On the one hand, formal nullities are explicitly provided by a statutory provision. On the other, substantial nullities are developed by case law with the aim of sanctioning violations of substantial procedural requirements and, in particular, breaches of defence rights. Since 2012, Luxembourg case law considers that a request for nullity can be based on alleged violations of the right to fair trial guaranteed under Article 6 ECHR.²⁹² Thus, breaches of defense rights that would hinder the fairness of the proceedings in light of the specific circumstances of the case lead instruction courts to declare the contested act null and void.²⁹³ Nonetheless, breaches of defense rights do not automatically entail substantial nullities. Restrictions might be justified by legitimate purposes, provided that the fairness of the criminal proceedings as a whole is ensured.²⁹⁴

If the defendant fails to submit a request for nullity, or if the instruction court rejects his request, the competent trial court does not have the power to apply nullities after the competent instruction court refers the case for trial (*purge des nullités*). Nonetheless, trial courts assess freely the admissibility and probative value of evidence.²⁹⁵ In particular, they exclude illegally obtained evidence from being used at trial in the following situations: violations of formal requirements that are prescribed by a legal provision under penalty of nullity; the irregularity vitiates the evidentiary value of an act; the use of evidence would entail a breach of the right to a fair trial.²⁹⁶ Luxembourg case law seems to adopt a stringent interpretation of the latter condition. Even though the Court of Cassation seems to allow the use of illegally obtained evidence where such use does not prejudice the fairness of the proceedings,²⁹⁷ the Luxembourg Court of Appeal has held that the adversarial discussion of evidence at trial is not sufficient to repair irregularities in the gathering of evidence.²⁹⁸

²⁹¹ Art. 48-2 CCP.

²⁹² CSJ Ch.c.C. 16 May 2012, n° 301/12.

²⁹³ CSJ Ch.c.C. 22 October 2012, n° 674/12.

²⁹⁴ CSJ Ch.c.C. 12 February 2014, n° 102/14.

²⁹⁵ V Bolard, *Preuve et Vérité* (2013) 23 *Annales du droit luxembourgeois* 39, 77 ff.

²⁹⁶ CSJ cass. 22 November 2007, n° 2474.

²⁹⁷ CSJ cass. 22 November 2007, n° 2474.

²⁹⁸ CSJ corr. 26 February 2008, n°106/08 V; A Elwinger, 'Le triomphe des droits fondamentaux. Du contrôle de la légalité des pièces au contrôle du procès équitable. La portée juridique des décisions rendues à la suite de l' « Affaire KB »' (2011) 48 *Bulletin Droit et Banque* 29,41 ff.

5.1. Infringements of the right to access the case file

Trial courts may sanction the lack of access to materials of the case file as a violation of the right to an adversarial hearing. The latter prevents the judge from basing a conviction on evidence, which was not included in the case file and was not subject to an adversarial debate among the parties to the criminal proceeding.²⁹⁹ For instance, an official record providing incriminating evidence that is presented by a police officer after having testified in front of a court must be excluded, where the defendant did not have access to it and therefore was not able to adequately prepare his defence.³⁰⁰ However, the right to access the case file can be limited. In 2013, the Constitutional Court outlined the scope of review that trial court must undertake in order to guarantee the rights of the defendant.³⁰¹ The judgement recalled that legitimate interests, notably national security and protection of witnesses, could justify restrictions on access to the case file, provided that such restrictions are strictly necessary. Where the trial court is unable to review the proportionality of the lack of access, the rights of the accused would be violated. For instance, intelligence services cannot oppose in a discretionary manner, the disclosure of evidence gathered by foreign intelligence services, where the reliability of such evidence cannot be assessed by Luxembourg courts. In any event, if the evidence is not available, it cannot constitute the basis of the decision to be taken by the trial court.

It should be stressed, however, that Luxembourg law also sanctions violation of the right to access the case file by nullities. In particular, when the judicial investigation is closed, access to the case file must be granted under penalty of nullity, 8 days before the pre-trial chamber decides whether the case shall be referred for trial.³⁰² Given that Luxembourg CCP grants the defendant access to the case file before he is questioned by the Investigating Judge,³⁰³ the violation of such right might constitute a ground for nullity of the minutes of the questioning. In particular, the case law acknowledges that delayed access to the materials of the case might constitute a ground for

²⁹⁹ CSJ corr. 5 May 2015, n° 165/15 V.

³⁰⁰ CSJ corr. 16 June 2006, n° 308/06 V.

³⁰¹ Cour const. 25 October 2013, n°104/13. The case in question dealt with the lack of communication of an informant's identity and certain documents by intelligence services.

³⁰² Art. 127 (6) CCP.

³⁰³ Art. 85 CCP.

substantial nullity, where the defendant is able to show an irreparable breach of his defense rights in the light of the specific circumstances of the case.³⁰⁴

5.2. Statements obtained in breach of the right to access a lawyer

The right to access a lawyer constitutes a ground for nullity against the questioning by the Investigating Judge.³⁰⁵ By contrast, it does not guarantee the right to legal assistance during a police questioning under penalty of nullity. However, the instruction courts has consistently held that breaches to such procedural safeguard might constitute a ground for substantial nullity and therefore remove the record of the police questioning from the case file. This is for instance the case where the police officers failed to provide the suspect with adequate information about his right to access a lawyer and to legal aid. In this circumstance, the resulting waiver of the right to legal assistance does not fulfill the requirements stemming from Article 6 ECHR.³⁰⁶ Likewise, if at the time of the interrogation, there was sufficient reliable and consistence evidence against a witness, he must benefit from the right to access a lawyer during the police questioning.³⁰⁷

However, the pre-trial chamber of the Luxembourg Court of Appeal has held that incriminating statements made by the suspect during the police questioning without the assistance of a lawyer do not irretrievably prejudice the rights of defence, where such statements do not constitute the sole or decisive basis for prosecution.³⁰⁸ Trial courts apply the same threshold whilst assessing the probative value of incriminating statements made during police questioning without access to a lawyer.³⁰⁹ Finally, communication between the defendant and his lawyer that relates to the exercise of defence rights are protected by the legal privilege and therefore cannot be used as incriminating evidence for the purpose of prosecution.³¹⁰

³⁰⁴ CSJ Ch. c. C. 12 February 2014, n° 102/14.

³⁰⁵ Art. 81-10 CCP.

³⁰⁶ CSJ, Ch.c.C. 8 July 2013, n° 396/13, 370/13, 371/13, 372/13 and 374/13.

³⁰⁷ CSJ Ch. c. C. 25 April 2013, n° 229/13.

³⁰⁸ CSJ Ch.c.C. 21 January 2014, n° 44/14.

³⁰⁹ CSJ corr. 23 March 2015, n° 109/15 VI.

³¹⁰ CSJ Ch.c.C. 23 May 2012, n° 316/12.

5.3. Breaches of the right to translation and interpretation

In the pre-trial stage of proceedings, the CCP empowers instruction courts to ascertain whether alleged violation of the right to interpretation and translation constitutes a substantial nullity and thereby prevents the admissibility of unlawful collected evidence. At trial, statements made by the accused during a police questioning without the assistance of an interpreter must be excluded when it appears during the hearings at the trial court that he does not understand the language in which his statements were recorded.³¹¹

5.4. Failure to provide information about rights and about accusation

A set of provisions of the CCP sanction violations of different aspects of the right to information. Nullities apply to acts of the Investigative Judge where, before the interrogation, he fails to inform the accused about the accusation³¹², to provide information about the right to access a lawyer³¹³ and the right to make statement or to remain silent during the questioning,³¹⁴ to comply with the duty to record the compliance with the above mentioned procedural safeguards in the report of questioning.³¹⁵ Luxembourg law also provides formal nullities against breaches of the right to information about the right to access the case file 8 days before the pre-trial chamber of the competent court decides whether to refer the case for trial³¹⁶, as well as the date and place of the trial hearing, where the summons to appear for trial does not comply with the formalities set forth by the law and the accused does not appear in court.³¹⁷

6. Appeals against conviction and sentence

Luxembourg law guarantees the right for the convicted person to appeal against judgements delivered in first instance by trial court.³¹⁸

³¹¹ CSJ corr. 13 October 2015, n° 400/15.

³¹² Art. 81 (1) and 81-10 CCP.

³¹³ Art. 81 (2) and 81 (10) CCP.

³¹⁴ Art. 81 (3) and 81-10 CCP.

³¹⁵ Art. 81 (4) and 81-10 CCP.

³¹⁶ Art. 127(6) CCP.

³¹⁷ Art. 146 para 4 (1) CCP.

³¹⁸ Conversely, appeals on questions on law and facts cannot be lodged against

The time limit for lodging an appeal is 40 days from the pronouncement of the contested judgement if it was delivered after an adversarial debate or from the notification of the contested judgement if the latter was delivered *in absentia*.³¹⁹ While determining the admissibility of the appeal, the competent court must verify whether the defendant was informed about the first instance decision.³²⁰ Moreover, where a public prosecutor challenges a judgement before a court of second instance, the defendant has the right to cross-appeal within 5 additional days.³²¹ Within the above-mentioned time limits, the applicant is required to submit a declaration of appeal either in person or through a mandated lawyer at the registry of the court that has delivered the contested judgement by either the accused or his legal counsel.³²² It is worth mentioning that Luxembourg law does not provide specific requirements related to pleas and arguments that the defendant should put forward in the declaration of appeal.

The scope of the right to appeal guaranteed under national law is broader than the one enshrined under Article 2 of Protocol 7 ECHR. On the one hand, appeal is available against any judgement wherein a first instance court rules on the merits of the case or orders investigatory and interim measures while ruling on the substance of the case.³²³ This encompasses any decision that determines whether the accused is innocent or guilty and, in the latter case, imposes penalties,³²⁴ irrespective of the seriousness of the offence.³²⁵ On the other hand, the parties to the criminal proceeding can lodge an appeal before a second instance court against a judgement ruling on procedural objections and pleas that put an end to the proceedings.³²⁶ For instance, the public

judgement rendered on appeal (*appel sur appel ne vaut*). See CSJ corr. 8 May 2007, n° 228/07 V.

³¹⁹ Art. 203 CCP.

³²⁰ If there is no proof of notification in the case file or the competent authority failed to provide the information, the limitation period for lodging an appeal is suspended. CSJ corr. 11 October 2010, n° 381/10 VI; CSJ crim. 29 April 2012, n° 217/12 VI.

³²¹ Art. 203 para 7 CCP.

³²² Art. 203, para 4 CCP.

³²³ Art. 579 para 1 New Code of Civil Procedures, thereafter NCCP.

³²⁴ CSJ corr. 3 February 2009, n° 64/09 V.

³²⁵ Indeed, appeal is available against convictions and sentences pronounced by criminal courts having jurisdiction over misdemeanors (art. 172 CCP), felonies (art. 199 CCP) and crimes (art. 221 CCP). Likewise, penal orders can also be subject to appeal (art. 401 c) CCP). By contrast, a decision related to the admissibility of testimony or a judgement that orders an expertise without ruling on the culpability of the defendant nor on the penalties to be imposed cannot be directly subject to appeal. CSJ corr. 7 July 2000, n° 225/ V; CSJ corr. 16 April 2002, n° 99/02 V

³²⁶ Art. 579 para 2 NCCP.

prosecutor has the possibility to appeal the first instance decision that terminates the prosecution by virtue of the *ne bis in idem* principle.³²⁷ As an exception to the above-mentioned conditions, Luxembourg case law acknowledges the possibility to appeal against a judgement, which did not rule on the merits of the case nor put an end to the proceedings, where the first instance court delivering the impugned decision, has committed an abuse of power. Such derogation refers to specific cases where the lower tribunal acted *ultra vires* or infringed a fundamental principle governing the criminal justice system, such as a first instance decisions that deprive the defendant the possibility to be heard in person.³²⁸

Luxembourg law empowers appellate courts to review the case both on questions of law and facts. The scope of review is however limited in a twofold way. First, it encompasses issues that have been settled by the first instance court in the impugned judgement (*tantum devolutum, quantum judicatum*).³²⁹ Second, the scope of review can also be limited to selected issues where the appeal lodged by the parties to the proceeding is limited to the correspondent parts of the first instance decision only (*tantum devolutum quantum appellatum*).³³⁰

The review undertaken by second instance courts encompasses the examination of new evidence and new grounds presented by the parties in support of their claims. An exception is made for pleadings in law that must be presented before the competent court, wherein the reviewing court then would undertake a review on the merits.³³¹ Appeals on the merits do not necessarily imply, however, a complete and fresh examination of the case.³³² In particular, appellate courts are not required to hear all witnesses called by the defence who have already testified before the first instance tribunal.³³³ If the hearing is manifestly unnecessary for the sake of establishing the truth, the appeals court may reject any request of the defendant that would simply delay the hearings or is not likely to provide relevant

³²⁷ CSJ corr. 16 October 2012, 454/12 V.

³²⁸ CSJ corr. 26 mai 2015, 215/15 V.

³²⁹ An exception to this rule applies as regards decisions rendered by first instance courts that are quashed on appeal for breach of, or for non-corrected failure to comply with any formalities prescribed by law under penalty of nullity. In order to guarantee the right for the defendant to a fair trial, the Court of Appeal is under the obligation to undertake a review *de novo* of the case, including matters of facts and law on which the first instance court did not ruled (*évocation*). Art. 215 CCP.

³³⁰ *Ibid*, p. 277.

³³¹ G Vogel (n 12) 277.

³³² CSJ corr. 18 November 2015, 511/15X.

³³³ G Vogel (n 12) 397.

elements. Nonetheless, the decision rejecting the defendant's submission must be duly reasoned in order to avoid arbitrary exclusion of testimonial evidence.³³⁴ Moreover, the court ruling on appeal is not compelled to review *ex officio* grounds related to alleged breaches on defence rights that the defendant failed to raise, unless the sanction provided for such violations are nullities.³³⁵

Regarding the gathering of new evidence, appellate courts enjoy the same powers as first instance tribunals.³³⁶ The powers referred to are particularly extended where the prosecution relates to serious crimes (*crimes*). Indeed, the President of the criminal chamber of the first instance District Court, as well as the President of the Court of Appeals, has discretionary powers to order any measure necessary for establish the truth.³³⁷ This entails the power to summon a witness to appear and order the presentation of new items of the case file that the judge considers relevant.³³⁸

Appellate courts in criminal proceedings have the power to quash and reverse all or parts of the lower court decision. Thus, the Court of Appeals can substitute its own assessment of the case to the first instance judgement. This encompasses the power of appellate courts to characterize the facts, provided that the right of the defendant to be informed of accusation and to defend himself are guaranteed. This further implies the power to repeal and alter the penalty imposed by the lower tribunal.

The above-motivated powers of review are nonetheless limited by the prohibition of *reformation in pejus*. The latter prevents the competent court of appeal from putting the defendant, where he is the sole appellant, in a worse position than before the filing of the appeal.³³⁹ Accordingly, if the prosecutor does not appeal against the first instance judgement, the appellate court cannot increase the penalty pronounced in first instance nor apply a new aggravating factor.³⁴⁰ Likewise, the defendant who institutes the appeal proceedings cannot be convicted of the charges of which he was acquitted by the first instance court.³⁴¹ Conversely, where the appeal

³³⁴ CSJ corr 12 March 2012, 141/12 VI.

³³⁵ CSJ cass. 19 mars 2015, n°3453.

³³⁶ Art. 211 CCP ; Art. 222 CCP.

³³⁷ Art. 218 (1) CCP.

³³⁸ Art. 218 (2) CCP.

³³⁹ CSJ cass. 16 May 2002, n° 1890.

³⁴⁰ CSJ cass. 24 May 2011, n°271/11 V.

³⁴¹ CSJ corr. 21 June 2011, n° 325/11 V. Thus defined, the prohibition of

lodged by the public prosecutor refers the case as a whole, including incriminating and exculpatory aspects, to a second instance court (*devolution complète*),³⁴² the Court of Appeals has the power to impose a higher sentence³⁴³ and convict the defendant, even though the prosecutor requested the acquittal in first instance.³⁴⁴

7. Appeals in cassation

The defendant has the right to appeal final convictions rendered in last instance before the Court of Cassation (*pourvoi en cassation*).³⁴⁵ The time limit for filing an appeal in cassation is two months from the date of notification of the contested judgement delivered by a trial court.³⁴⁶ The law extends the time limit where the applicant does not reside in Luxembourg.³⁴⁷ However, appeals in cassation must be instituted within one month where the contested judgement was pronounced by a court having jurisdiction over minor offences.³⁴⁸ Within the time limit prescribed by the law, the applicant must submit at the registry of the Court a copy of the decision subject to appeal as well as a memorial signed by a lawyer indicating the contested part of the judgement, grounds for appeal and arguments thereto.³⁴⁹ In this regard, it should be mentioned that Luxembourg law does not allow the applicant to defend himself in person before the Court of Cassation. Only qualified lawyers are admitted to plead before the highest instance court.³⁵⁰

reformation in pejus also apply to Appellate Courts to which the Court of cassation remand the case after quashing a judgement on appeal. CSJ cass. 2 February 2012, n°3029.

³⁴² CSJ corr. 18 February 2009, n° 92/09 X.

³⁴³ CSJ cass. 27 January 2011, n° 2817; CSJ corr. 18 February 2009, n° 92/09 X.

³⁴⁴ CSJ corr. 14 June 2010, n° 259/10 X.

³⁴⁵ Art. 407 CCP.

³⁴⁶ Art. 7 Modified Law of 18 February 1885 governing appeals in cassation and related procedures, Mém. A n°23, 18.04.1885, hereinafter Law governing appeals in cassation. Luxembourg law does not apply any similar provisions to the conclusions submitted by the General Public Prosecutor. The case law consistently held that such a discrepancy does not infringe the principle of equality of arms, since the prosecutor is not a party to the proceedings but plays an advisory role before the Court of Cassation. CSJ cass. 3 July 2008, n°2583 ; CSJ cass. 9 June 2011, n°2841; *Ewert v. Luxembourg*, App no 49375/07 (ECtHR, 22 July 2010), para 97 – 98.

³⁴⁷ Art. 7 Law governing appeals in cassation.

³⁴⁸ Art. 41 Law governing appeals in cassation.

³⁴⁹ Art. 10 Law governing appeals in cassation.

³⁵⁰ Art. 20 Law governing appeals in cassation.

Under Luxembourg law, appeals in cassation constitute an extraordinary remedy that is governed by restrictive procedural rules. Indeed, the Court of Cassation does not intervene as a third instance court undertaking a full judicial review of the case.³⁵¹ The scope of review is limited to question of law only³⁵² and, more specifically, to the pleas in law put forward by the applicant in support of the appeal.³⁵³ Thus, the defendant who lodges an appeal must indicate in a precise errors of law in the impugned decision,³⁵⁴ including the way in which a specific legal provision was violated³⁵⁵ as well as the correct interpretation that the lower court should have adopted.³⁵⁶ Nonetheless, the requirement for precision and clarity in the wording of grounds for cassation should not lead to excessive formalism, which would constitute a disproportionate restriction on the right to access the court of higher instance.³⁵⁷ By contrast, pleas, which call into question the assessment of the facts and the appraisal of evidence by the court whose decision is challenged, are inadmissible.³⁵⁸ In a similar way, the applicant is not entitled to raise in front of the Court of Cassation new pleas of law.³⁵⁹ For instance, nullities against a first instance decisions are inadmissible if the applicant failed to raise the grounds for nullity in question before the appellate court, exception made for pleas advocating the lack of jurisdiction.³⁶⁰

Cassation proceedings may lead to three different outcomes. If the Court of Cassation holds that the lower court correctly applied the law, it would dismiss the appeal (*rejet du pourvoi*). By contrast, where the Court of Cassation finds that the lower court made an error of law, it is empowered to quash the impugned judgement either in its entirety or partially (*casse et annule*).³⁶¹ In such a case, the Court of

³⁵¹ CSJ cass. 6 June 2013, n° 3227.

³⁵² Art. 407 CCP.

³⁵³ CSJ cass. 11 March 2010, n°2747.

³⁵⁴ CSJ cass. 18 January 2007, n°2334.

³⁵⁵ CSJ cass. 7 February 2008, n°2538.

³⁵⁶ CSJ cass. 12 February 2009, n°2623.

³⁵⁷ *Petrovic v. Luxembourg*, App no 32956/08 (ECtHR, 17 February 2011), para 27. In this regard, the ECtHR found that Luxembourg violated Art. 6 of the Convention where the expected higher accuracy was not essential for the Court of Cassation to review the case. *Ewert v. Luxembourg*, App no 49375/07 (ECtHR, 22 July 2010), para 93.

³⁵⁸ CSJ cass. 19 October 2006, n° 2325.

³⁵⁹ CSJ cass. 8 March 2007, n° 2388.

³⁶⁰ Art. 410 CCP.

³⁶¹ Art. 28 Law governing appeals in cassation.

Cassation may refer the case back to a court (*renvoi*) of the same level as the one whose decision has been overturned or to the same court composed by different judges.³⁶² The lower court having jurisdiction to review the merits of the case is not bound by the assessment of the facts in the quashed judgement, but must comply with the ruling delivered by the Court of Cassation.³⁶³ The latter may however annul a judgement without remanding the case to a lower instance court where the action of quashing the judgment does not imply any further ruling on the merits.³⁶⁴

8. Access to the Constitutional Court

The parties to criminal proceedings do not have direct access to the Luxembourg Constitutional Court. However, if the defendant challenges the conformity of applicable laws with the national Constitution, the competent court must refer the question to the Constitutional Court for a preliminary ruling.³⁶⁵ The court before which exception of unconstitutionality is raised is not under the obligation to refer the case to the Constitutional Court where one of the following conditions is met: the decision on the constitutionality question is not necessary to solve the dispute, the claim is manifestly unfounded, or the Constitutional Court has already ruled on the same matter.³⁶⁶ The public nature of hearings before the Constitutional Court entail the possibility for the parties to the main proceeding to present their case and submit written conclusions.³⁶⁷ The decision taken by the lower court in the main proceedings must comply with the legally binding judgement delivered by the Constitutional Court.³⁶⁸

³⁶² Art. 27 Law governing appeals in cassation.

³⁶³ Art. 29 Law governing appeals in cassation.

³⁶⁴ Only under exceptional circumstances, the Court of cassation may substitute its own decision without exerting its power to remand if the facts as ascertained and assessed by the trial court enable it to apply the appropriate rule of law. Art. 27 and 29 Law governing appeals in cassation.

³⁶⁵ Law of 27 July 1997 on the organization of the Constitutional Court, Mém. A n°58, 13.08.1997.

³⁶⁶ Art. 6 Law on the organization of the Constitutional Court.

³⁶⁷ Art. 11 Law on the organization of the Constitutional Court.

³⁶⁸ Art. 15 Law on the organization of the Constitutional Court.

9. Judicial review and the EAW

9.1. Competent judicial authorities

The Framework Decision 2002/584/JHA was implemented in Luxembourg by the 2004 Act governing the EAW³⁶⁹. Pursuant Article 26 of the law, the designation of the issuing authorities reflects the jurisdiction conferred to judicial bodies within the Luxembourg criminal justice system.³⁷⁰ On the one hand, the competence for issuing a national arrest warrant, which is conferred to investigating judge, instruction courts and trial courts, is extended to EAW issued for the purpose of prosecution.³⁷¹ On the other hand, the Chief Public Prosecutor (*Procureur général d'Etat*) has the power to issue a EAW for the purpose of executing a sentence.³⁷² Likewise, the competence for executing a EAW falls within the jurisdiction of different authorities. In particular, the decision to surrender the requested person is taken by the pre-trial chamber the District Court having jurisdiction over the place of arrest (*chamber du conseil du tribunal d'arrondissement*) upon request of the prosecutor.³⁷³ However, if the arrested person consents to surrender, his consent amounts to a decision executing the EAW.³⁷⁴

9.2. Defence rights in the execution of a EAW

The person subject to a EAW has the right to challenge alleged

³⁶⁹ Law of 17 March 2004 on the European Arrest Warrant and surrender procedures among Member States of the European Union, Mém. 2004, p. 588, as modified by the Law of 17 October 2010, Mém. 2010, p. 3172, the Law of 3 August 2011, Mém. 2011, p. 2962 and the Law of 8 March 2017, Mém. n° 346, 30 March 2017. Hereinafter Law implementing the EAW.

³⁷⁰ The current wording of the provision referred to was modified in 2011 with the aim to clarify what is the authority having competence for issuing a EAW where preliminary investigations have been completed.

³⁷¹ Art. 26(1) Law implementing the EAW.

³⁷² Art. 26(2) Law implementing the EAW. Luxembourg legislator excluded the power of the prosecuting authorities to issue a EAW for the purpose of prosecution given that the Prosecutor does not have competence under national law for ordering an arrest except in cases of *flagrante delicto*. Avis du Conseil d'Etat, 8 April 2011, Projet de loi n°6178 portant modification de la loi du 17 mars 2004 relative au mandat d'arrêt européen at aux procédures de remise entre Etats membres de l'Union européenne.

³⁷³ Art. 12 Law implementing the EAW.

³⁷⁴ Art. 10 Law implementing the EAW.

violations of defence rights committed by the Luxembourg executing authorities in front of national judicial bodies. In this regard, it should first be stressed that the 2017 law grants the person subject to the EAW the right to be provided at the time of arrest with a written notice of rights in a language that he understands.³⁷⁵ The information provided encompasses the right of access to a lawyer in Luxembourg and in the issuing State, the right to interpretation and translation services, the right to consent to surrender and the right to renounce entitlement of the ‘speciality rule’ and the right to be heard by a judicial authority.³⁷⁶

The arrested person who does not understand the language of the proceedings has the right to obtain a written translation of the notice of rights.³⁷⁷ The EAW, or the alert in the SIS, shall also be notified to him in a language that he understands.³⁷⁸ Moreover, the 2017 law implementing Directive 2010/64/EU extends the right to interpretation to the entire surrender procedure, namely from the arrest until the surrender or the refusal to surrender.³⁷⁹ Linguistic assistance is granted, *ex-officio* or upon request of the person or his lawyer, by the authority competent to question the person or the authority called upon to rule on the request or other application brought before it.³⁸⁰

Regarding the implementation of Article 2(5) of the Directive 2010/64/EU, the person subject to a EAW may challenge the absence or the decision finding that there is no need for interpretation or translation, as

³⁷⁵ Art. 7 para 2 Law implementing the EAW.

³⁷⁶ Art. 7 para 2 Law implementing the EAW.

³⁷⁷ Art. 7 para 2 Law implementing the EAW.

³⁷⁸ Art. 7 para 1 Law implementing the EAW. As for national arrest warrants, if the information cannot be provided in writing, an oral communication shall be guaranteed, if necessary with the assistance of an interpreter. A written copy shall be in any event provided without undue delay.

³⁷⁹ Art. 7-1 (5) Law implementing the EAW. Before the entry into force of the 2017 reform, Luxembourg law expressly guaranteed a person, who does not understand French or German, the right to interpretation at two stages of the surrender procedure. At the time of his arrest, an interpreter assists the arrested person, who is informed of his rights by the police authorities. The presence of an interpreter is further required where the person consents to surrender and renounces his entitlement of the ‘speciality rule’ before the competent magistrate of the Prosecution Office. As for the recording procedure, the interpreter shall sign the arrest report and the minutes of the hearing above-mentioned.

³⁸⁰ Luxembourg law also provides appropriate assistance for persons with hearing or speech impediments as well as the possibility to use communication technology such as videoconferencing, telephone or the Internet, unless the presence of the interpreter is required in order to safeguard the fairness of the proceedings.

well as to complain about the quality of the interpretation or translation provided.³⁸¹ A surrendered person can formulate observations with respect to the alleged violation, which are recorded immediately in the transcripts (*procès-verbaux*) of the surrender procedure or in the case file if the comments are raised subsequently. This is without prejudice to legal remedies available to the arrested person throughout the surrender procedure. In particular, the compliance with procedural safeguards fall within the jurisdiction of the pre-trial chamber of the competent district court, when it is called upon to rule on a request for interim release³⁸² or the decision to execute a EAW where the person does not consent to his surrender.³⁸³ Likewise, violations of the right to interpretation can be raised before the pre-trial chamber of the court of appeal, notably where the arrested person challenges the decision to execute the EAW.³⁸⁴ No further appeal before the Court of Cassation (*recours en cassation*) can be filed.

Finally, the 2017 reform enhanced the right of access to a lawyer in proceedings executing a EAW in order to fully comply with Article 10 of the Directive 2013/48/EU.³⁸⁵ The scope of the procedural guarantee and related remedies reflects the right to legal assistance of persons subject to a national arrest warrant.³⁸⁶ Moreover, Luxembourg law also guarantees the right for the arrested person to retain a lawyer in the requesting State.³⁸⁷ The role of that counsel is to assist the lawyer in the executing Member State by providing that him with information and advice with a view towards the effective exercise of the rights of requested persons. Where requested persons wish to

³⁸¹ Art. 7-1 (5) para 7 Law implementing the EAW.

³⁸² Art. 9 Law implementing the EAW.

³⁸³ Art. 12 Law implementing the EAW.

³⁸⁴ Art. 13 Law implementing the EAW.

³⁸⁵ Before the legislative reform, Luxembourg law implementing the EAW granted the requested person the right of access to a lawyer where he/she is heard by the Luxembourg executing authorities and in connection with remedies related to the execution of a EAW. In particular, the presence of a lawyer was mentioned in relation to the hearing before the examining magistrate to establish the arrested person's identity (*intérogatoire d'identité*), where the arrested person indicates that he consents to surrender or renounces his entitlement to the "speciality rule", the hearing before the pre-trial chamber competent to rule upon the execution of the EAW and the appeal against the latter's decision, as well as in the procedure executing a EAW for the purpose of prosecuting other than for which the surrender was requested.

³⁸⁶ Opinion of the Conseil d'Etat, *Projet de loi n°6758*, 3.6.2015, 22.

³⁸⁷ Art. 7-1 Law implementing the EAW. In this regard, the reform foresees a literal implementation of article 10(4) of Directive 2013/48/EU.

exercise this right, the Luxembourg prosecutor acting as an executing authority must promptly inform the competent authority in the issuing Member State. In a similar way, the person subject to a EAW issued by Luxembourg authorities would have the right to appoint a lawyer in Luxembourg.³⁸⁸

9.3. *Judicial review and grounds for refusal*

Luxembourg law does not provide for additional grounds for refusal than those set forth under the Framework Decision. In this regard, the case law has held that violations of Article 6 ECHR do not constitute a ground of non-execution of the EAW.³⁸⁹ Likewise, neither the minor character of the offence, nor the lack of serious damage caused by the offence, can be seen a grounds for refusal the execution of a EAW.³⁹⁰ Conversely, Luxembourg courts have accepted review of a motion against the execution of a EAW on the grounds that detention conditions in the issuing State would expose the surrendered person to actual and real inhuman and degrading treatment.³⁹¹

Regarding the grounds for refusal listed in the framework decision, Luxembourg law introduced specific provisions governing the EAW issued for the purpose of executing a decision rendered *in absentia*.³⁹² Indeed, Article 5 (9) of the 2004 law opposes the surrender of a person who did not appear in person at the trial resulting in the decision referred to in the EAW, unless the EAW indicates that one of following conditions are met. First, the requested person must have received in due time, official information regarding the scheduled date and place of that trial in the issuing Member State and was informed that a decision may be handed down if he does not appear for the trial. Second, he or she gave a mandate to a legal counselor and was indeed defended by that counselor at the trial. Third, after being served with the decision and being expressly informed about the right to a retrial or an appeal, the requested person expressly stated that he or she does not contest the decision or did not

³⁸⁸ Art. 27-1 Law implementing the EAW.

³⁸⁹ CSJ Ch. C. C. 24 janvier 2012, n° 47/14.

³⁹⁰ CSJ Ch. C. C. 4 September 2012, n° 565/12. The decision seems to exclude the principle of proportionality from the scope of review undertaken by the Pre-trial chamber.

³⁹¹ CSJ Ch. C. C., 4 Septembre 2012, n° 565/12.

³⁹² Law of 12 April 2015, Mém. A n°74, 17.04.2015.

request a retrial or appeal within the applicable time frame.³⁹³ In addition, Luxembourg law allows the surrender of a person sentenced *in absentia* provided that the issuing Member States guarantees his right to retrial or appeal against the judgement delivered in his absence. In particular, Article 19 of the 2004 law implementing the EAW requires the issuing judicial authority to give an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State (*droit d'opposition*) and to be present at the Court hearing.³⁹⁴

³⁹³ Art. 5 (9) Law implementing the EAW.

³⁹⁴ Art. 19 Law implementing the EAW.

CHAPTER V

POLAND

Maciej Fingas, Sławomir Steinborn, Krzysztof Woźniewski

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Investigative acts authorized by a court. – 2.2. Scope of review. – 2.3. Exceptions for urgent cases. – 2.4. Remedies available to the defendant. – 3. Deprivation of liberty: Arrest and pre-trial custodial measures. – 3.1. Information about available remedies. – 3.2. Arrest, *habeas corpus* and judicial review. – 3.3. Detention pending trial. – 3.3.1. Competent authorities and procedural requirements. – 3.3.2. Judicial scrutiny upon request and *ex officio*. – 3.3.3. Defence rights and effective judicial review. – 3.4. Arrest and detention order for questioning. – 4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information. – 5. Sanctions against illegal or improperly obtained evidence. – 5.1. Infringements of the right to access the case file. – 5.2. Statements obtained in breach of the right to access a lawyer. – 5.3. Breaches of the right to translation and interpretation. – 5.4. Failure to provide information about rights and about accusation. – 6. Appeals against conviction and sentence. – 7. Judicial review by Courts of Higher instance. – 8. Access to the Constitutional Court. – 9. Judicial review and the EAW. – 9.1. Competent judicial authorities. – 9.2. Defence rights in the execution of a EAW. – 9.3. Judicial review and grounds for refusal.

1. Constitutional guarantees

There are few provisions in the Polish Constitution which regulate the right to an effective remedy in criminal process. The right to a court is guaranteed by Article 45 of the Polish Constitution. In the jurisprudence

of the Constitutional Court,¹ it is assumed that the scope of the generally formulated right to court includes two rights: the right to a court as a right to a judicial system of justice, ie a substantive settlement of the rights of an individual, and the right to judicial review of acts prejudicial to the constitutionally guaranteed rights and freedoms of the individual.

According to the jurisprudence of the Constitutional Court,² such constitutional right to a court consists in particular of the following elements: the right of access to a court, ie the right to start proceedings before a court; the right to a proper judicial process meeting the requirements of fair and public proceedings; the right to a court judgment, ie the right to obtain a legally binding resolution of the case by a court; the right to ‘proper shape’ of institutional requirements and judicial position of the reviewing authority over the case (the right to an impartial, independent and competent court).

Article 78 of the Constitution provides the right of parties to contest judgments and decisions issued at first instance. Undoubtedly, it also covers judgments issued in criminal proceedings. It must be kept in mind, however, that Article 78 of the Constitution does not require that any judgment or other decision issued in proceedings can be challenged. In respect to this constitutional rule, it is also accepted that some incidental decisions issued during criminal proceedings can be contested only in the appeal brought to the court against the judgment (eg challenging in the appeal against the judgment the rejection of an evidence request).

The Constitutional Court in its jurisprudence indicates that exceptions to the principle of suability of decisions and judgments made at first instance cannot, however, be introduced by the legislature in an unrestricted way. They should be rational and justified in the light of the constitutional principle of proportionality.³ An appeal should be available and effective to the parties.

Article 78 of the Constitution is connected with Article 176 Section 1 of the Constitution, which lays down the principle of two-instances judicial proceedings. This provision refers to proceedings before a court (judge). It concerns the cases in which the courts exercise

¹ Constitutional Court 12 May 2003, SK 38/02, OTK-A 2003 No. 5 pos. 38.

² Constitutional Court 9 June 1998, K 28/97, OTK 1998 No. 4 pos. 50; Constitutional Court 16 March 1999, SK 19/98, OTK 1999 No. 3 pos. 36; Constitutional Court 24 October 2007, SK 7/06, OTK-A 2007 No. 9 pos. 108.

³ Constitutional Court 18 October 2004, P 8/04, OTK-A 2004 No. 9 pos. 92.

justice, thus deciding on the merits from the beginning to the end. Outside the scope of this provision are cases in which the courts operate as an examining body of other public authorities' acts which resolve the cases of individuals.⁴ The principle of two instances requires: providing an access to the second instance court; referring the case at second instance, in principle, to a higher court; the appropriate structuring of a procedure before a court of second instance, so that it can thoroughly investigate the matter and issue a substantive decision.

Also, the right to review the lawfulness of detention in criminal proceedings is enshrined in the constitutional framework. Article 41 Section 2 of the Polish Constitution provides that anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for an immediate decision on the lawfulness of such deprivation. This provision refers to all cases of deprivation of liberty on a non-judicial basis, and therefore includes the use of detention on remand. This provision does not require the imposition of a specific measure allowing for this control, but the legislature is required to create such a guarantee mechanism that would provide effective judicial review. However, the combined reading of the guarantees expressed in Article 41 Section 2, Article 45 and Article 78 of the Constitution justify the conclusion that every decision of a court on detention on remand, substantially affecting the liberty of an individual, gives rise to the right of the suspect (accused) to appeal to a higher court or at least to another composition of the same court.⁵

The Constitutional Court points out that the control of the legality of deprivation of liberty should not only cover the legality of the decision on the deprivation of liberty itself, its conditions and mode of execution, but also the way in which it is carried out, in particular, the duration of imprisonment.⁶ The Court underlines the relationship between the guarantee mentioned in Article 41 Section 2 of the Constitution with the right to access a court. The appeal should therefore be dealt with in a judicial procedure, formulated in accordance with the requirements of transparency and fairness.⁷

It should be also mentioned that Poland has ratified Article 2 of

⁴ Constitutional Court 12 May 2003, SK 38/02, OTK-A 2003 No. 5 pos. 38

⁵ Constitutional Court 13 July 2009, SK 46/08, OTK-A 2009 No. 7 pos. 109.

⁶ Constitutional Court 11 June 2002, SK 5/02, OTK-A 2002 No. 4 pos. 41.

⁷ Constitutional Court 6 December 2004, SK 29/04, OTK-A 2004 No 11 pos.

Protocol No 7 to the ECHR without reservation. The European Convention on Human Rights is a ratified international agreement, which is a part of the domestic legal system and is directly applicable by the courts.⁸ It belongs to a group of agreements that have priority over national law, if the law cannot be reconciled with the agreement.⁹ Courts (including the Constitutional Court) use ECHR jurisprudence primarily as an interpreting tool of national law in order to ensure its compliance with the Strasbourg standards. Accordingly, the national courts in their rulings invoke both the provisions of the ECHR and the specific judgments of the ECHR.

2. Investigative measures subject to prior judicial authorization

2.1. Investigative acts authorized by a court

In pre-trial proceedings, the possibility of carrying out the following investigative measures is subject to a prior decision of the court. First, the competence to order surveillance of telecommunication and other communications¹⁰ belongs to the court competent to hear the case, but the order of tapping can only occur to detect and obtain evidence for the pending proceedings or to prevent a new offence from being committed, if the proceeding or new offence belongs to the catalogue of the offences referred to in Article 237 § 3 of the Code of Criminal Procedure (CCP).

Second, police and some other authorities designated to combat specific types of crime are entitled (before the criminal proceedings are instituted, under the so-called undercover operations) to apply to the regional court, having previously obtained the prior consent of the district prosecutor, in order to request operational control. One of the methods of operational control is to obtain and retain the content of conversations conducted using technical means.

Third, the competent court may issue a permit to hear a witness obliged to observe certain types of professional secrets,¹¹ when in the pre-trial proceedings, in the prosecutor's opinion it is necessary to question a notary, defence lawyer, legal adviser, tax adviser, doctor, journalist, or a person required to preserve confidentiality. In this case,

⁸ Art. 91 section 1 of the Constitution.

⁹ Art. 91 section 2 of the Constitution.

¹⁰ Art. 237§ 1 CCP.

¹¹ Art. 180§ 2 CCP.

the prosecutor must request the court to release them from the obligation of professional secrecy. The court, at a session without the participation of the parties, shall decide to allow the prosecutor, or other authority conducting the investigation, to question a witness in the circumstances covered by the secrets if it finds that two conditions are met: the necessity in the interest of justice and at the same time, if the circumstances of the crime cannot be established on the basis of the other evidence.

Forth, prior judicial authorization is required for obtaining information constituting a bank secret.¹² The prosecutor may only request information about a natural person who is a party to an agreement with the bank and against such person criminal proceedings are under way. Obtaining other data subject to banking secrecy (eg on a person other than the person against whom criminal proceedings are pending) is subject to the prior approval of the District Court. The law does not specify the conditions for that decision. It is required that the prosecutor proves that there is a special situation justifying the waiver of bank secrecy. The court consent at this stage of proceedings is necessary to achieve the purpose of criminal proceedings: the role of the court is to examine whether it is suitable to apply this exceptional provision in the case in question or whether the prosecutor can collect the necessary evidence without the need to waive bank secrecy.¹³

Fifth, the court, at the request of the public prosecutor, is entitled to issue a decision to subject the defendant to a psychiatric examination combined with observation in a closed establishment¹⁴ if at the stage of the pre-trial proceedings an expert psychiatrist's request is made to observe the defendant in isolation, if necessary to deliver an opinion on the state of mental health of the accused. The premise is that the evidence gathered indicates on the probability of committing the offence by the defendant. The court also examines whether, on the basis of the circumstances of the case, it can be predicted that the court will sentence the defendant with the penalty of deprivation of liberty exceeding the period of isolation.

¹² Pursuant Art. 105 section 1 point 2b of the Banking Law.

¹³ Court of Appeal Lublin 22 October 2008, II AKz 508/08, LEX no. 477843.

¹⁴ Art. 203 CCP.

2.2. Scope of review

Each of the above-mentioned actions of the court in the pre-trial proceedings may be taken only if the appropriate conditions for its issuance are fulfilled. Proportionality as a constitutional requirement should be examined each time a decision can reduce the constitutional rights and freedoms of an individual. In addition, in the case of operational control in the sphere of undercover operations, a subsidiarity clause is required, namely the use of operational control is permitted only if other means proved to be unsuccessful or useless.

2.3. Exceptions for urgent cases

Surveillance of telecommunication and other conversations may, in urgent cases, be ordered by the prosecutor. He is obliged to apply to the court within 3 days with a request of approval of his decision. If the time limit is exceeded or if the court's decision is not approved, all recordings must be destroyed.

In exceptional cases, operational control may also be ordered without a district court order being issued, but it is still necessary to obtain prior consent from the district prosecutor. This applies to cases of urgency if this could result in loss of information or blurring or destruction of evidence of crime. However, the police must at the same time request the court to issue a decision on the matter. If the court does not agree within 5 days of the inspection order, the operational control must be suspended and the collected materials must be destroyed.

2.4. Remedies available to the defendant

The suspect as a party to the pre-trial proceedings has the right to lodge an interlocutory appeal against the following decisions of the public prosecutor or the authority conducting the proceedings concerning the investigative measures: the prosecutor's order on the confidentiality of personal data of an anonymous witness. The appeal is examined by the court competent to hear the case;¹⁵ decisions and other acts on search and seizure and on material evidences made in pre-trial proceedings. The appeal is made to the district court in which

¹⁵ Art. 184§ 5 CCP.

jurisdiction the proceedings are conducted;¹⁶ the prosecutor's decision on surveillance of telecommunication and other conversations issued in urgent case. The appeal is made to the court having jurisdiction.¹⁷

The rule is that the review of the prosecutor's decision is handled by a single-judge court.¹⁸ The court has the power to review the contested decision to the full extent, and therefore primarily examines whether it complies the statutory conditions for its issuance.

3. Deprivation of liberty: Arrest and pre-trial custodial measures

3.1. Information about available remedies

According to Article 244 §2 CCP, an arrested person is compulsorily and immediately informed of his rights, including the right to bring an interlocutory appeal to the court, in which he may demand the judicial review of the legitimacy, lawfulness and correctness of his or her arrest. This information is provided in writing, in accordance with the formula set out in the Regulation of the Minister of Justice.

In turn, a person who is in detention on remand receives a written notice of his or her rights, in accordance with the formula set out in the Regulation of the Minister of Justice. The instruction contains information about the right to lodge an interlocutory appeal against the detention order and the right to file an application for revocation of a temporary detention or change to non-custodial measures at any time. According to Article 250 §3 CCP, in the pre-trial proceedings, the information to the suspect as to his rights, in the event of the use of detention on remand, should be given by the prosecutor before sending a request to the court for the issuance of a detention order. The content of the notice generally complies with the requirements of Directive 2012/13/EU. It lacks only the detailed definition of the scope of judicial review.

3.2. Arrest, habeas corpus and judicial review

An individual may be arrested when there is a reasonable suspicion

¹⁶ Art. 236 CCP.

¹⁷ Art. 241 CCP.

¹⁸ Art. 329 CCP.

that he or she has committed a crime, and, at the same time, if there is a fear of escaping or go into hiding, or of concealing the traces of the offence, or if his identity cannot be established, or if there are legal grounds for carrying out an accelerated proceedings.¹⁹ A suspected person may also be arrested if he is alleged to have committed an offence with the use of violence against a member of his household and it is feared that such an offence may be repeated, especially if the suspected person is threatening to do so.²⁰ Arrest is mandatory if the crime in question has been committed using firearms, knives or other dangerous objects, and there is a fear that the offender is committing a crime of violence.²¹

The maximum length of the arrest is 48 hours. During those 48 hours the ‘arrested person’ should be sent to the court with the request for detention on remand. The arrested person must be released immediately if he or she has not been presented to the court with a motion to order detention on remand, or if this motion has not been granted within 24 hours of being surrendered to the jurisdiction of the court.

The right to arrest the suspected person is vested in the Police and the authorities which have similar procedural rights of the Police, ie the Border Guard (*Straż Graniczna*), the Internal Security Agency (*Agencja Bezpieczeństwa Wewnętrznego*), the National Administration of the National Treasury (*Krajowa Administracja Skarbowa*), the Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne*) and the Military Police (*Żandarmeria Wojskowa*), and also to other administrative bodies in cases provided in other regulations.

An arrested person in criminal proceedings has the following rights:

- The right to information about the reason of the arrest and to be heard;²²
- The right to make or to refuse to make a statement in his or her case;²³
- The right to contact the lawyer immediately and to speak directly with him;²⁴
- The right to make use, free of charge, of the assistance of an inter-

¹⁹ Art. 244 §1 CCP.

²⁰ Art. 244 §1a CCP.

²¹ Art. 244 §1b CCP.

²² Art. 244 §2 CCP.

²³ Art. 244 §3 CCP.

²⁴ Art. 245 §1 CCP.

preter if the arrested person does not command the Polish language sufficiently;²⁵

- The right to receive a copy of the arrest record;²⁶
- The right to give notice about the arrest to the closest or other designated person, as well as employers, heads of schools, universities, the commander and the person managing the arrested person's company or the company for which he is responsible.²⁷ Regarding the arrest, police are obliged to notify the authority conducting the proceedings against the arrested person in another case, as far as they know about it;
- If the arrested person is not a Polish citizen - the right to contact the consular office or the diplomatic representation of the country of which he or she is a national. If he or she does not have any nationality - the right to contact the representative of the state where the arrested person lives permanently.²⁸ If there is a consular agreement between Poland and the State of whose nationality the arrested is, the competent consular or diplomatic representation must be informed of the arrest, even without his or her request;
- The right to lodge an interlocutory appeal against the arrest to the court within 7 days from the day of arrest;²⁹
- The right to immediate release if the reasons for the arrest have ceased to exist or the maximum length of detention has expired;³⁰
- The right to access to medical aid.

Lastly, the arrested person is entitled to an interlocutory appeal to the court in which he or she may demand the examination of the validity, legality and correctness (indefectibility) of the arrest.³¹ Judicial review takes place only upon request. The judicial review of arrest covers: the legitimacy of the arrest, which must be understood as the factual justification, necessity and proportionality of its use; the legality of the arrest, which should be understood as compliance of the arrest with the law in force;³² the correctness of the arrest, which

²⁵ Art. 72 §1 CCP.

²⁶ Art. 244 §3 CCP.

²⁷ Art. 245 §2 CCP in conjunction with Art. 261 CCP.

²⁸ Art. 612 §2 CCP.

²⁹ Art. 246 §1 CCP.

³⁰ Art. 248 §1 and §2 CCP.

³¹ Art. 246 §1 CCP.

³² The review of the legality of deprivation of liberty covers not only the legality

should be understood as the means of depriving a person of his liberty and the circumstances in which an arrest took place.

An appeal submitted by the arrested person must be immediately serviced to the County Court of the place of arrests or of the procedure, which must immediately examine it. The court is composed of one judge, and the term ‘immediately’ means without delay as soon as it is in this case possible to examine the appeal but not later than the termination of the arrest period. The court examines the appeal at a session in which the arrested person may take part.³³ If the person is imprisoned, the court at his or her request will bring him or her to the hearing unless it considers the presence of a defence lawyer to be sufficient. Regarding the right to submit such an appeal, arrested person must be instructed as to his or right to do so. If the court does not order him or her to be brought to the hearing, and he or she does not have a defence lawyer, a defence lawyer is granted to this person by the court.³⁴ The court must order the immediate release of the arrested person if, after the appeal has been heard, the court finds that the arrest was unlawful (ie was illegal) or was not justified by the circumstances of the case or constituted a disproportionate interference with the right to liberty (ie was unreasonable).

3.3. Detention pending trial

3.3.1. Competent authorities and procedural requirements

According to Article 250 § 2 CCP, the detention on remand is ordered, in the pre-trial proceedings, at the request of the prosecutor by the County Court in whose jurisdiction the proceedings are conducted, or, in urgent cases, another County Court. Detention on remand may be imposed by this court for a period not exceeding 3 months.³⁵ If, due to the extraordinary circumstances of the case, it proves impossible to conclude pre-trial proceedings within the time limit of 3 months, upon the request of public prosecutor, the court of first instance competent to hear the case may, if necessary, extend detention on remand for a period, whose total duration may not

of the decision on deprivation of liberty, but its duration, conditions and mode of carrying out the arrest as well.

³³ Art. 464 §1 CCP.

³⁴ Art. 96 §1 CCP in conjunction with Art. 451 CCP.

³⁵ Art. 263 §1 CCP.

exceed 12 months.³⁶ Theoretically, this is the maximum time for pre-trial detention on remand, and the total period of detention until the judgment of the first instance court can not exceed two years, which represents the maximum total detention time in the entire pre-trial and judicial proceedings until the first judgment issued by the Court of first instance.³⁷ For a period longer than 12 months in pre-trial proceedings, the detention on remand may be extended by a Court of Appeal at the request of the public prosecutor, if such a request arises in connection with the suspension of criminal proceedings, the activities aimed at establishing or confirming the identity of the suspect, taking of evidence of special complexity or beyond the borders of the country, as well as intentional protraction of proceedings by the accused.³⁸ Extension of this period is not permissible, however, if the court finds that the penalty for which the accused is exposed to, in light of the offense, does not exceed 3 years of imprisonment.³⁹

In addition to the above mentioned requirement, further conditions for the correct application of detention on remand must be fulfilled. As a general requirement, the evidence gathered must indicate a high probability that the suspect has committed a crime. Second, the law requires the fulfillment of at least one of the so-called special conditions, namely:

- there is a justified concern of escape or that the suspect will abscond, especially if his or her identity cannot be established or he or she has no permanent place of residence in the country of residence,
- there is a justified concern that the suspect will persuade others to give false testimony or explanations or obstruct the proceedings in any other unlawful way,
- there is the need to apply the detention on remand in order to secure the proper course of proceedings, justified by the severe penalty that the suspect is exposed to when he or she has been charged with a crime or with a misdemeanour that carries the statutory maximum penalty of imprisonment of a minimum of 8 years, or if the court of the first instance sentenced him to a penalty of imprisonment of not less than 3 years;

³⁶ Art. 263 §2 CCP.

³⁷ Art. 263 §3 CCP.

³⁸ Art. 263§4 CCP.

³⁹ Art. 263 §4b CCP.

Exceptionally, detention pending trial is authorized when there is a justified concern that a suspect who has been charged with a crime or intentional offence will commit a offence against life, health or public safety, especially when he or she threatened to commit such a crime. The basis for the decision to apply or extend detention on remand may be based on the findings of evidence accessible to the suspect and his defence lawyer, and also evidence from witnesses at risk, even if the defence has no access to such evidence. Finally, it is mandatory that the suspect must be heard before issuing the order of detention on remand.

3.3.2. *Judicial scrutiny upon request and ex officio*

The court's decision on detention on remand may be appealed according to the general principles, which means that an appeal may be lodged before the court of second instance. If a decision on detention was issued by a court of second instance, the interlocutory appeal shall be examined by another equivalent composition of this court.⁴⁰ There is no doubt that the standard referred to in Article 5 § 3 of the ECHR is fulfilled. The appeal against detention on remand in pre-trial proceedings is examined by an independent and impartial professional single judge (with no lay-judges). Appeal on extended use of detention on remand of over a period of 12 months is examined by the court of appeal, in a panel consisting of three professional judges.

The court must decide the appeal against the decision on the detention on remand immediately, not later than 7 days from the day of the referral to the court of appeal.⁴¹ Interlocutory appeals have no suspensive effect, and therefore do not stop the execution of the order for detention on remand, unless the court decides otherwise, namely to suspend the execution of the order.⁴²

In addition, the detainee may at any time request to quash or change a preventive measure.⁴³ On that request, the prosecutor decides in the pre-trial proceedings within three days. Prosecutor's decision may be appealed before the district court if the request was made after at least

⁴⁰ Art. 426 §2 CCP.

⁴¹ Art. 252 §2 CCP.

⁴² Art. 462 §1 CCP.

⁴³ Art. 254 CCP.

3 months from the date of the previous order concerning preventive measure.

Review of the use of detention on remand is of permanent nature. According to Article 253 § 1 CCP, preventive measures, and therefore detention on remand, should be immediately quashed or changed if the reasons for which it has been previously applied have terminated or cease to exist or if reasons for such a change have arisen. Pre-trial preventive measures applied by the court can be quashed or changed into milder provisions (eg bail) by the prosecutor as well. The law does not provide any deadlines for such a review. The directive on adaptation of a preventive measures to the defendant's situation means that the public prosecutor and the court *sua sponte* (without waiting for any request) should re-assess the need and purpose of the preventive measure, and in particular the detention on remand and, consequently, quash or change the measure, at the moment when the reasons for which it was applied have ceased. It is assumed that such a review may be carried out also by the court by adjudicating incidental questions.⁴⁴ The scope of review is full, ie the fulfillment of factual and legal grounds for the use of detention on remand, as well as the existence of obstacles resulting in the quashing of the order (eg health).

Carrying out the review on the legitimacy and the need for the continued use of detention on remand is also underlined by the fact that, in the Polish criminal trial, the detention on remand is always used for a definite period of time. The court's decision on the application for detention must specify the period for which this measure is applied,⁴⁵ and therefore its continuation depends on the issuing, before its expiry, of another decision to extend the detention for a further period of time. In practice, detention on remand is applied once for a period of 2-4 months, and within this time the courts may examine whether there are grounds for extending further detention of the suspect. In the event of prolongation of the detention on remand, all the above-mentioned criteria shall be examined as well as the fulfillment of conditions justifying the extension of the detention.

⁴⁴ Supreme Court 28 February 2001, IV KO 11/01, OSNKW 2001 No. 5-6 pos. 46.

⁴⁵ Art. 251 §2 CCP.

3.3.3. *Defence rights and effective judicial review*

From Article 248 § 2 CCP follows the rule that a suspect must be served with a copy of the order for detention on remand. This order contains a justification, comprised of an analysis of the evidence indicating that the suspect committed the crime and the circumstances indicating the existence of reasons justifying the use of detention (eg threats to the proper conduct of the proceedings). In addition, the justification should explain why it was not considered sufficient to apply different preventive measures. If a detainee does not participate in the session at which the court made a decision to extend the detention, a copy of such an order is also served him.

On the other hand, information regarding the alleged act of the suspect must be provided to him before the prosecutor goes to court in order to apply for detention on remand. For this purpose, the prosecutor issues a decision on presenting the charges and announces them to the suspect who may also request to be served with a copy of that order.

In the pre-trial proceedings the conducting authority determines in practice the range of available materials (case file), because at this stage of the process the so-called internal confidentiality of pre-trial case files applies.⁴⁶ The Polish CCP provides separate rules on the access of the suspect and his defence lawyer to the file in relation to the use of detention on remand.

Taking into account the existing Strasbourg standards and the content of Article 7 of Directive 2012/13/EU, the Polish legislature did not fully and satisfactorily manage to address the problem of how to provide to the suspect in detention on remand during pre-trial phase proper access to all material evidence. The ECHR rulings on the Polish cases have always emphasized that the goal of withholding from the defence certain information and evidence gathered in the pre-trial proceedings cannot be achieved at the cost of significant restrictions on the right to defence.⁴⁷ Against this background, the

⁴⁶ See *infra* Section 4.1. *Restrictions on the right to access the case file*.

⁴⁷ See M Wąsek-Wiaderek, '*Dostęp do akt sprawy oskarżonego tymczasowo aresztowanego i jego obrońcy w postępowaniu przygotowawczym – standard europejski a prawo polskie*' [Access to the case file of the accused detainee and his lawyer during the pre-trial proceedings – European standard and Polish law], [2003] *Palestra* No. 3-4, 56; P Kardas, '*Standard rzetelnego procesu a prawo wglądu do akt sprawy w przedmiocie tymczasowego aresztowania, czyli historia jednej nowelizacji*' [Standard of a fair trial and the right of access to the file

Polish Constitutional Tribunal in its judgment of 03/06/2008⁴⁸ has concluded that the regulation, which allows the arbitrary exclusion of free access to the pre-trial proceedings' materials on which the request of the public prosecutor for detention on remand is based, is unconstitutional. In the Tribunal's view, these materials, because of the need to ensure the viability of the detainee's defence, should be open to the suspect or his or her lawyer.

An implicit standard was introduced to the procedure act by the amendment of 09/27/2013 CCP, but recently the legislature has decided to restore certain restrictions in this respect. The amending act of 11/3/2016 implemented a new wording of article 156 § 5a CCP, which indeed maintains the principle that in the event of submitting a request, during the pre-trial proceedings, for an order or extension of detention on remand, the suspect and his or her lawyer shall gain access to the case file in the section containing the evidential material attached to the request. However, Article 250 § 2b CCP introduced an exception according to which, if there is a reasonable risk to life, health or freedom of the witness or the person closest to him or her, the statements of these witnesses may be placed in a separate set of documents that cannot be made available to the suspect and his lawyer. It is widely accepted that the court has no authority to decide on its own on pre-trial proceedings' case file access and cannot provide access to them to the suspect and his lawyer, without the consent of the public prosecutor.⁴⁹ Without any restrictions the suspect and his lawyer have free access to the prosecutor's written request for the order or extension of detention on remand. There is no doubt that the return to the possibility to conceal part of the evidence by the prosecutor from the suspect and his lawyer is a 'step backwards' and can make the defence in the detention proceedings illusory, which is in clear opposition to the existing constitutional and international standards.⁵⁰ The possibility of secrecy regarding the evidence, referred to in Article 250 § 2b CCP is not well justified in terms of Article 7 of Directive 2012/13/EU,

concerning detention – the story of one amendment], [2010] Prokuratura i Prawo No. 1-2, 89.

⁴⁸ Constitutional Court 3 June 2008, K 42/07, OTK-A 2008 No. 5 pos. 77.

⁴⁹ See Supreme Court 11 March 2008, WZ 9/08, OSNKW 2008 No. 7 pos. 55; Z Pachowicz in J Skorupka (ed), *Kodeks postępowania karnego. Komentarz* [*Code of Criminal Proceedings. Commentary*] (C.H. Beck 2016) 321; M Kurowski in D Świecki (ed), *Kodeks postępowania karnego. Komentarz* [*Code of Criminal Proceedings. Commentary*] (Wolters Kluwer 2017, vol. 1) 596.

⁵⁰ See Zd Pachowicz (n 49) 321.

which does not provide for the possibility of introducing restrictions in regard to the rule laid down in paragraph 1.

There is also a specific mechanism reinforcing the right of the suspect to obtain access to the file in the section containing the evidence attached to the request for an order or extension of detention on remand. Namely, in accordance with Article 249a § 1 CCP, the decision to order or extend the detention may be based on explicit evidence accessible to the suspect and his lawyer and the evidence of witnesses, for which there is concern mentioned in the earlier quoted Article 250b CCP. In addition, in accordance with § 2 of quoted provision, the court, by giving notice to the prosecutor, may take into account *ex officio*, the files which the prosecutor did not disclose, after their disclosure, if they are favourable to the suspect. The doctrine suggests that the court may, therefore, come to a conclusion that part of the materials of pre-trial proceedings were unjustifiably undisclosed, and - although it may not take independently the decision on disclosure of these materials, it should not rely on these materials when deciding on detention on remand, unless they are beneficial for the suspect.⁵¹

Without prior questioning of a suspect by the court, it is not possible to use detention on remand, unless the accused is believed to be likely to go into hiding in the country or is absent.⁵² However, when a suspect is captured, he should be immediately heard by the court and it should then be decided whether further use of detention is warranted, even if the suspect does not demand it. The standard arising from Article 5 Section 3 of the ECHR is implemented in Article 279 § 3 CCP, according to which, a suspect, who absconded and was captured on the basis of an arrest warrant, should immediately be brought to the court which earlier issued the detention order as that court is entitled to adjudicate, maintain, change or quash the measure.

The legislation does not provide for separate rules on the detainee's the right to translation and interpretation. In this case, general rules concerning the suspect rights shall apply.⁵³ Likewise, Polish law does not provide for separate rules on the detainee's right to legal aid. In this matter, general rules concerning the suspect shall apply.⁵⁴ In such

⁵¹ See M Kurowski (n 49) 154.

⁵² Art. 249 §3 CCP, Article 279 § 2 CCP.

⁵³ See *infra* Sections 4.3. *Decisions finding that there is no need for interpretation* and 4.4. *Decisions finding that there is no need for translation*.

⁵⁴ See *infra* Section 4.2. *Derogations on the right to access a lawyer*.

a case, if a defence lawyer is chosen by the suspect, the court is obliged to allow him to participate in the questioning of the suspect while examining the prosecutor's request for detention on remand.⁵⁵ The court is not obliged to notify the defence of the date of the hearing, unless the defendant requests it, and his absence does not hinder the hearing. It is understood that the notice to the defence may be done in any accessible manner, even some hours before the hearing.⁵⁶ However, it is the court's obligation to notify the prosecutor. In the doctrine it is correctly pointed out that in this respect there is a breach of the principle of equality of arms.⁵⁷

The defence lawyer has the right to take part in the court session concerning the extension of detention on remand and examination of an interlocutory appeal against the order applying this preventive measure or the extension of it. At the request of the suspect, who has not chosen a defence lawyer himself, the court must appoint him defence lawyer *ex officio* for this action. The court is therefore obligated to notify such an appointed defence lawyer about the date of this session, however the failure to appear of the defence lawyer properly notified about the date is not obstacle to the examination on the matter.⁵⁸

There are three possibilities available at the detention hearing: withdrawal, ordering less restrictive or alternative measures or to imprisonment (ie bail, personal or social guarantee, police surveillance, the ban on leaving the country, injunctions or prohibitions of determined behaviour).

3.4. *Arrest and detention order for questioning*

According to Article 247 §1 point 1 CCP, the prosecutor may order the arrest of a suspect or suspected person if there is a justified fear, for example, that he or she will not appear on summon in order to present him the charges and questioning him or her as a suspect. There should

⁵⁵ Art. 249 §3 CCP.

⁵⁶ Court of Appeal Katowice 29 March 2000, II AKz 84/00, OSA 2001 No. 2 pos. 12.

⁵⁷ See P Hofmański, E Sadzik, Kazimierz Zgryzek, *Kodeks postępowania karnego. Komentarz [Code of Criminal Proceedings. Commentary]* (CH Beck 2011, vol. 1) 1386.

⁵⁸ Art. 249 §5 CCP.

be some facts indicating that the suspected person will intentionally fail to appear at the request of the trial authority.⁵⁹

Such an arrest in pre-trial proceedings may be ordered only by the prosecutor. Immediately after bringing the suspect to the police, prosecutor or court, the above-mentioned actions must be carried out, and after completion, the suspect must be released, unless detention on remand is required.⁶⁰ Such an arrest cannot last longer than the time required to complete the proceedings and never longer than 48 hours, unless the prosecutor submits a request to the court to apply for an order of detention on remand.

In accordance with Article 247 § 6 CCP the person detained upon the prosecutor's order has the right to lodge an interlocutory appeal, according to the rules governing the appeal for ordinary arrest pursuant to Article 244 CCP.⁶¹

Immediately after the arrest, the arrested person must be informed of the reasons of the arrest and informed of his or her rights. The legislation does not impose the obligation of personal service of the prosecutor's arrest order. The rule is that arrested person should be immediately brought to the prosecutor where he or she should be heard. Otherwise, the hearing by the court will only occur when the prosecutor submits to the court a request for detention on remand. In addition, the arrested person has his own right to lodge an interlocutory appeal to the court on the arrest.⁶²

Article 156 § 5a CCP connects the defence's access to the files of pre-trial proceedings with the request for an order or extension of detention on remand,⁶³ but ignores the issue of access to the case files in connection with the appeal to the court by the arrested suspect. Meanwhile, there is no doubt that the regulation of Article 5 paragraph 4 ECHR, and therefore also the standard developed in the Strasbourg jurisprudence, is not only concerned with judicial review of the detention on remand, but also a review of the arrest. This provision grants the right to judicial review of deprivation of liberty only to the person who is deprived of liberty at the time of lodging the appeal. It is extremely important that the review of arrest must be scrutinized even when person deprived of liberty is released before

⁵⁹ See Supreme Court 23 May 2006, I KZP 5/06, OSNKW 2006 No. 6 pos. 55.

⁶⁰ Art. 247 § 5 CCP.

⁶¹ See supra Section 3.2. *Arrest, habeas corpus and judicial review.*

⁶² Ibid.

⁶³ See supra Section 3.3.3. *Defence rights and effective judicial review*

the decision is taken by a court⁶⁴. There is therefore a problem of access to files of pre-trial proceedings when the prosecutor has ordered the arrest and compulsory bringing of a suspect on the basis of Article 247 § 1 CCP. In order to guarantee that, under Article 156 § 5a CCP the file is made available to the defence in connection with the interlocutory appeal lodged against the arrest, it is necessary to interpret this provision of the Polish CCP in pro-convention mode.

General rules apply to the person arrested for questioning. These are the same rules that govern the access to the defence lawyer for the person arrested by the police.⁶⁵ Pursuant to Article 247 § 6 CCP, rules governing interlocutory appeals against an arrest by police shall apply accordingly to the arrest and compulsory bringing for the purposes of the hearing.⁶⁶

The person arrested for the purpose of a hearing is entitled to appeal to the court. The court examining the appeal, depending on the circumstances, may: a) order his or her immediate release if the court considers that the arrest was unjustified, illegal and the arrested person is still deprived of his or her liberty;⁶⁷ b) if the arrested person is not in custody, the court finds the arrest groundless, illegal or defective. Such finding is then notified to the authority superior to the one who made the arrest.⁶⁸

4. Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings

4.1. Restrictions on the right to access the case file

Access to the file is granted to the accused and his or her lawyer. It should be added that the fact that the accused is in detention on remand

⁶⁴ See more widely S Steinborn, 'Dostęp obrony do akt postępowania przygotowawczego w związku z procedurą habeas corpus – standard strasburski i jego realizacja w polskim procesie karnym' [Access of defense to file pre-trial proceedings in connection with the habeas corpus procedure – the Strasbourg standard and its implementation in the Polish criminal process] in A Błachnio-Parzych and others (eds), *Problemy wymiaru sprawiedliwości karnej. Księga jubileuszowa Profesora Jana Skupińskiego* [The problems of criminal justice. The jubilee book in honour of Professor Jan Skupiński] (Wolters Kluwer 2013) 540-542.

⁶⁵ See supra 3.2. *Arrest, habeas corpus and judicial review*.

⁶⁶ *Ibid.*

⁶⁷ Art. 246 § 3 in connection with Art. 247 §6 CCP.

⁶⁸ Art. 246 § 4 in conjunction with Art. 247 §6 CCP.

or deprived of liberty does not exclude the possibility of acquaintance of such person with the case files. It can be ordered at the request of such a person to send the case files to a prison or detention center, where he may familiarize himself with the materials in a designated room under the supervision of the Prison Service. The case law emphasizes the importance of the possibility for the accused under detention to defend himself in person where he claims the need to read the case file. The files should be sent to the accused in the first instance, whenever possible, regardless of whether he or she is using the help of defence lawyer⁶⁹.

The law does not foresee any fees for accessing the case files. The provision of Article 156 § 2 CCP stipulates, however, that copies of documents from the case file are payable. However, no fee is charged for self-made copies, which in practice allows defendants and their defence lawyers to make photocopies themselves without paying for this. The fee is based on the provisions of the Regulation of the Minister of Justice of 25/09/2015.⁷⁰ A fee of 1 PLN is charged for each page of a copy, and a fee of 6 PLN is charged for each page for printing a certified copy of the file. In the case of a copy of electronic documents on the data carrier, a fee of PLN 6 is charged for each used data carrier.

The suspect acquires the right to access the file, in principle from the moment he or she receives the suspect's status as charged, ie when he or she is presented with charges. From that moment on, he or she is entitled to lodge a request for access to the file. During pre-trial proceedings, some limitations may apply due to the internal secrecy of the case file. These restrictions cease at the moment of the review of the suspect of the materials in the final stage of the pre-trial proceedings. This operation is carried out based on the prior request of the suspect or his defence lawyer if there are grounds for closing the investigation. In this case, the suspect and his or her defence lawyer are entitled to review the entire files and then familiarize themselves with the material collected by the investigator. In addition, a suspect's right to read the case file is absolute if the pre-trial proceedings have been discontinued. The provision of Article 306 § 1b CCP stipulates that persons entitled to submit an interlocutory appeal (and even the suspect may question the legal ground of discontinuation adopted in the order) are entitled to review the file.

⁶⁹ Supreme Court 20 November 2008, II KK 175/08, LEX no 468655.

⁷⁰ Journal of Laws, pos. 1566.

At the pre-trial stage of the criminal proceedings, the authority in charge of the investigation decides in practice whether the suspect must be denied access to the case file or on the scope of materials available to the suspect because of the need to secure the so-called 'internal secrecy of the case file'. The authority conducting the pre-trial proceedings may refuse access to the case file, taking into consideration the need to secure the proper conduct of the proceedings or the necessity to protect an important state interest. The refusal of the access to the file of the pre-trial proceedings may concern all of the related case files, their specific parts and specific documents.⁷¹ The Court emphasized that the limitation on the full disclosure of the pre-trial proceedings' case file is also in a functional relation to the constitutional value of public order. Keeping, at the pre-trial stage, specified categories of information to the authority conducting the proceedings only, can effectively prevent the suspect from taking measures to distort the evidence gathered. Thus, the lack of full access to the file of pre-trial proceedings makes it difficult for the suspect to find out how to undermine – even using unlawful actions - the value of evidence already collected. The purpose of the provisions contained in the Code of Criminal Procedure, and therefore also in Article 156 § 5 CCP, is to develop the criminal proceedings in a way which enables the detection of the criminal perpetrator and for him to be brought to criminal responsibility.⁷² The detection of the offender and the bringing of him or her to criminal responsibility may contribute to restoration of the public order, violated by the offence.

It is, however, pointed out in the literature that a fairly general view of the conditions for refusing access to the case file increase the danger of total arbitrariness in the decision. It should therefore be assumed that the circumstances justifying the refusal of access to the file should include, in particular, the risk of premature disclosure, distortion, loss, intimidation of witnesses or other suspects, the destruction of evidence, or the absconding of a suspect.⁷³ The refusal of access to the file cannot, however, relate to the documents referred to in Article 157 §3 CCP, ie the protocol of the activity in which the party

⁷¹ S Steinborn in L K Paprzycki (ed), *Kodeks postępowania karnego. Komentarz [Code of Criminal Proceedings. Commentary]* (Wolters Kluwer 2013, vol. 1) 536. The admissibility of the above mentioned limitations was the subject of a Constitutional Court's review in the judgment of 3 June 2008, K 42/07, OTK-A 2008 No. 5 pos. 77.

⁷² Art. 2 §1 point 1 CCP.

⁷³ P Wiliński, *Odmowa dostępu do akt sprawy w postępowaniu przygotowawczym [Refusal to access the case file in pre-trial proceedings]*, [2006] Prok. i Pr. No. 11, 81.

participated or was entitled to participate, as well as the document originating from it or drawn up with it.

In the pre-trial proceedings, the order of access to the case file shall be issued by the authority conducting the proceedings (eg the prosecutor or the police officer). Polish legislation provides the defendant with the possibility to challenge a decision to refuse access to certain materials. According to the provisions of Article 159 CCP, the parties are entitled to submit an interlocutory appeal on the refusal on their access to the file of pre-trial proceedings. If the order has been issued by a non-prosecuting authority in the pre-trial proceedings, the interlocutory appeal shall be examined by the prosecutor supervising the proceedings. If the order was issued by a public prosecutor, the suspect is entitled to appeal to the court competent to hear the case, which decides in a composition of a single judge.

Judicial review of the prosecutor's decision to refuse access was introduced by the law of 27/09/2013 amending the CCP, which was the result of several years of work on a comprehensive reform of the criminal procedure prepared by the Criminal Law Codification Commission. The change in the content of Article 159 CPP was, in turn, a response to the voices of the practitioners, who indicated that the earlier solution, which sought examination of an appeal by the direct supervising prosecutor, made the review of orders illusory.

4.2. Derogations on the right to access a lawyer

The governing principle here is the free, contact, in person and by correspondence, of the arrested defendant with his lawyer in both the pre-trial and the jurisdictional proceedings. The current rules do not provide the possibility of refusal of contact of the accused in detention on remand with his lawyer.⁷⁴ Only in pre-trial proceedings it is possible to introduce certain restrictions in this area, during the first 14 days of detention on remand.⁷⁵

Some additional problems are encountered in relation to the participation of the suspect's lawyer during the first hearing in the pre-trial stage. Article 301 CCP stipulates that, at the request of the suspect, he or she should be interviewed in presence of a briefed defence lawyer. Before the first hearing, the suspect is informed of

⁷⁴ J Grajewski, S Steinborn, in L K Paprzycki (n 71) 291-292.

⁷⁵ See *supra* 3.3. *Detention pending trial*.

the right to access a defence lawyer. However, as it follows, according to the standard set forth in the case of *Płonka v. Poland*,⁷⁶ national authorities should take proactive steps to inform the defendant with his right to a lawyer, also on the possibility that one could be appointed by the court, and that the effectiveness of the waiver of that right depends on whether it has taken place in a clear, irrevocable manner and accompanied by the provision of minimum guarantees appropriate to the severity of the waiver. Against this background, the Supreme Court, in a recent case, held that the lack of the defence lawyer during the first hearing of the suspect in the pre-trial proceedings did not prevent the use of the statements given at the hearing, if there was no objectively present vulnerability to the suspect.⁷⁷ In the literature, it is indicated that this provision applies only to 'briefed' defence lawyers. Therefore, the provision of Article 301 CCP should be amended to make possible the briefing of a defence lawyer before the first interrogation of the suspect. This is fundamental for the selection of the strategies and lines of defence in the course of further proceedings.⁷⁸ The doctrine rightly assumes that when a suspect makes a statement about his or her willingness to exercise the right to silence until the defence lawyer is consulted, the authority should allow him to contact the lawyer and stop the further hearing without the support of his or her lawyer.⁷⁹ It is underlined as well the fact that in view of the extension of the so-called *Salduz* doctrine in the ECHR's jurisdiction, the Supreme Court's position, as set out in the above cited order of 5/04/2013, is not sufficient and the authority should aim for an express waiver by the suspect of the right to defence lawyer.⁸⁰

There is no exception to the rule that a defence lawyer is entitled to take part in a suspect's hearing. Of course, the possibility of taking part

⁷⁶ *Płonka v Poland* App no. 20310/02 (ECtHR, 31 March 2009).

⁷⁷ Supreme Court 5 April 2013, III KK 327/12, OSNKW 2013 No. 7 pos. 60.

⁷⁸ See more: W Posnow, 'Udział obrońcy w przygotowawczym stadium procesu – aspekty realizacji niektórych uprawnień' [*Attendance of the defence lawyer in the pre-trial stage of the process – aspects of implementation of certain powers*], in J Skorupka (ed), *Rzetelny proces karny. Księga jubileuszowa Profesora Zofii Świdły* [*Fair Criminal Process. Jubilee Book in Honour of Professor Zofia Świdła*] (Wolters Kluwer 2009) 416.

⁷⁹ J Grajewski, S Steinborn in L K Paprzycki (n 71) 902; Z Brodzisz, in J Skorupka (n 49) 702.

⁸⁰ See: S Steinborn, in S Steinborn (ed), *Kodeks postępowania karnego. Komentarz do wybranych przepisów* [*Code of Criminal Proceedings. Commentary to the Selected Regulations*] (LEX/el. 2016) commentary to Art. 301.

in a legal proceeding depends upon the prior notification of the entitled person. As a rule, according to Article 117 § 1 CCP the defence lawyer should be notified about the time and place of the hearing. In this regard, the legislature, however, introduced in Article 249 § 3 CCP quite an important exception, as the defendant's notification of the date of the suspect's hearing before the application of a preventive measure is not obligatory unless the defendant requests it, and this does not hinder the conduct of the action.⁸¹

According to Article 301 CCP, the lawyer's absence does not stop the hearing of the accused. It dominates a view that it is irrelevant whether the defence lawyer justifies his failure to appear.⁸² If the defence lawyer takes part in the hearing, he or she is entitled to ask questions to the suspect, submit motions, statements and to report any objections to the content of the report.

Article 73 CCP provides, in this regard, for two types of restrictions. First, the prosecutor granting authorization for the lawyer to communicate with the suspect in detention on remand, may stipulate in particularly justified cases, taking under consideration the need to protect the best interest of the pre-trial proceedings, that the lawyer or a person authorized by him also participate in the meeting. Second, for the same reason, it is acceptable to check the correspondence of the suspect with the defence lawyer. However, it should be noted that according to Article 73 §4 CCP the above reservations cannot be maintained or made after 14 days of detention on remand. In literature it is emphasized that the particularly justified cases referred to in Article 73 §2 and 3 CCP should be considered as extremely rare situations and they should not become the rule. The cases should primarily concern a real possibility of obstruction during the case or the need to verify the suspect's alibi.⁸³ In addition, restrictions should be applied with regard to the principle of proportionality. They can only take place if it is possible to achieve, in this manner, the intended purpose and also only when it is necessary. It means that preventing the abuse of the contacts between the suspect and his lawyer in a manner not compliant with the law, is not possible in any other way, e.g. by personal control of a suspect

⁸¹ See supra Section 3.3.3. *Defence rights and effective judicial review.*

⁸² See for example A Sakowicz, in A Sakowicz (ed), *Kodeks postępowania karnego. Komentarz* [Code of Criminal Proceedings, Commentary] (CH Beck 2016) 661; critically about this solution: W Posnow (n 77) 420.

⁸³ K Eichstaedt, in D Świecki (n 49) 371.

before and after the meeting with his lawyer in order to prevent the transfer of certain items and information.⁸⁴ The prosecutor's decision in both cases is not subject to appeal.

The involvement of the suspect and his or her lawyer in the pre-trial proceedings is limited by procedural law, due to the significant limitation of the principle of *audi alteram partem* at this stage of the process and the putting forward (prioritizing) of the interests of the investigation. The basic formal condition for participation in these activities is the submission of a request for admission to participation in the various actions of the pre-trial proceedings by the suspect or his lawyer. If the request for admission to participate in procedural actions does not specify what action is to be taken, the public prosecutor shall ask the applicant to indicate in what pre-trial proceedings he or she wants to participate.

The suspect and his or her lawyer have the right to take part in the following actions. The first category are actions that will not be repeated at trial (eg examining a place, object or body, examining and opening a corpse, collecting blood and secretions of the body, searching, exhuming, procedural experiment, recognition, confrontation, witness testimony, who will probably not be heard in court).⁸⁵ However, according to Article 316 §1 and 2 CCP, there is a possibility of not allowing the party to take part in unique activities. A person who is deprived of liberty is also not allowed to participate if there is a risk of loss or distortion of the evidence. The second types of actions are activities that are carried out at the request of the suspect or his lawyer, if they demand participation in this action. However, a suspect who is deprived of liberty is not brought over if it would cause serious difficulties.⁸⁶ Thirdly, in the hearing of an expert, a suspect deprived of liberty is not brought over if this would cause serious difficulties.⁸⁷

For other activities, the rule is that a party (and therefore the suspect and his or her lawyer) should be allowed to participate upon request. However, the prosecutor may, in particularly justified cases, refuse to allow the parties to take part in the activity on the basis of an

⁸⁴ S Steinborn, in S Steinborn (n 80) commentary to Art. 73.

⁸⁵ See J Grajewski, *Przebieg procesu karnego [Course of Criminal Process]* (CH Beck 2012) 69.

⁸⁶ Art. 315 §2 CCP.

⁸⁷ Art. 318 CCP.

important interest of the investigation or if bringing the accused person, deprived of his liberty would cause serious difficulties.⁸⁸

As regards available remedies, it is not possible to challenge the prosecutor's decisions restricting the personal and correspondence contact of the suspect with the defence lawyer. Similarly, in the case of other violations of the right to contact the defence lawyer, violations that may occur can be subject to appeal proceedings in the course of appeals against the first instance judgment. It is necessary, however, to demonstrate that such a violation of procedural rules could have affected the content of the ruling.

The described rules are in force in Polish criminal proceedings, in principle, since 1998. Legislative work on the further implementation of Directive 2013/48/EU was carried out in 2014-2015 by the Criminal Law Codification Commission, but the draft was not addressed by the Ministry of Justice for further work. Finally the Polish CCP has not been amended in order to implement the Directive 2013/48/EU (except adding the sole implementation note stating that the CCP implements the Directive 2013/48/EU⁸⁹). The Ministry of Justice holds the position that the Directive 2013/48/EU has been fully implemented into the Polish law and there is no need of any further legislative steps. However, the Polish Ombudsman, the Polish Bar Council, NGO's and many experts are of the opinion that domestic regulations fail to reasonably comply with the EU standard.

4.3. Decisions finding that there is no need for interpretation

In accordance with Article 72§ 1 CCP, the suspect has the right to use the free help of an interpreter if he does not speak Polish sufficiently. An interpreter is appointed by the authority conducting the pre-trial proceedings for acts of the proceedings. In addition, at the request of the suspect or his lawyer, the interpreter should also be appointed for the suspect to communicate with suspect's lawyer in connection with acts, in which the accused is entitled to participate.

The case law indicates that the concept of lack of sufficient command of the Polish language justifies the need for the participation of an interpreter, and cannot be narrowed to a total

⁸⁸ Art. 317 §1 and 2 CCP.

⁸⁹ Law of 10 January 2018 on the amendment of CCP and some other laws (Journal of Laws pos. 201).

ignorance of the language by the questioned person. The condition justifying the need to appoint an interpreter is the statement that the person interviewed either does not understand sufficiently the questions asked, or against the background of poor knowledge of the Polish language may not formulate thoughts recreating the course of events, which are the subject of the hearing.⁹⁰ The defendant is therefore entitled to the assistance of an interpreter if he or she knows the Polish language to a certain extent, but such knowledge is not sufficient for self-defense.⁹¹

Article 72 does not specify the language in which translation is to be provided. It is obvious, however, that it must be the language in which the accused is able to understand the content of the procedural actions and can speak freely. It seems, however, that this does not have to be the mother tongue of the accused, which is of particular importance in cases of less popular foreign languages. Therefore, if the accused speaks another foreign language other than his or her mother tongue (eg English), it is possible to provide an interpreter of such language. Undoubtedly, however, the knowledge of this language should be similar to that of the mother tongue, so that there is no limit to the possibilities of defence. The position of the suspect in this matter is also important, although it cannot be considered as decisive.⁹²

As regards the abovementioned right of the suspect to have the assistance of an interpreter in connection with the activity in which the defendant is entitled to participate, the provision of Article 72 §2 CCP seems, however, to skip the need for the defendant to communicate with the lawyer in connection with the preparation of pleadings, especially appeals, which is subject to explicit regulation of Directive 2010/64/EU. Therefore, it is emphasized in the literature that the provision should be interpreted in a manner consistent with the directive, and that it also involves communication necessary to commence actions in which the accused may be involved. Such an interpretation leads to the conclusion that the accused is also entitled to the assistance of an interpreter in consultation with the lawyer in connection with an application, and in connection with the filing of another pleading, if required by the standard of fair trial.⁹³

Polish law does not provide any remedies in the event of refusal to

⁹⁰ Supreme Court 22 April 1970, III KR 45/70, OSNKW 1970 No. 11 pos. 150.

⁹¹ S Steinborn, in S Steinborn (n 80) commentary to Art. 72.

⁹² *Ibid.*

⁹³ *Ibid.*

grant interpretation assistance. Possible omissions in this case may be the subject of an appeal if the first instance judgment is challenged. In practice, there are also rulings in which the court of appeal also *ex officio* has taken into account defects observed in this regard, even if the party itself did not raise any objections as to the scope and quality of the translation.⁹⁴

4.4. Decisions finding that there is no need for translation

Article 72 §3 CCP requires that the defendant be provided with the decision of presentation, addition or amendment of the charges, the indictment and the judgment which is subject to appeal or termination along with its translations. In addition, the accused may submit a request for translation of other documents from the case file not mentioned in the aforementioned provision. The case law indicates, however, that there is no obligation to translate the entire case, but only to the extent which is necessary for the accused to understand the meaning of the main proceedings against him.⁹⁵ This position is endorsed in the literature as it is argued it does not seem necessary to translate for the suspect, for example, the summons, the proof of documents' service, official notes and documents not related to the charge.⁹⁶ Quite surprising it may seem, however, that it is not required to deliver the translated appeal. It is difficult to effectively defend in the appeal proceedings without knowledge of the content of this pleading. Therefore, in the case-law, it is assumed that the principle of procedural loyalty and the need to provide the accused with a fair trial obliges the court to serve the accused the translated remedy. Otherwise, it would violate the accused's right to material defense, which is expressed in the possibility to determine his own position in the matter, submitting personal pleadings in his or her defense, or of evidence on appeal.⁹⁷

In addition, the translator should be called upon to translate the official documents written in a foreign language.⁹⁸ The defendant is

⁹⁴ See Maciej Fingas, *Glosa do wyroku Sądu Apelacyjnego w Gdańsku z 30.11.2011 r., II AKa 349/11* [Commentary to the judgment of the Court of Appeal Gdańsk of 30 November 2011, II AKa 349/11], [2013] *Palestra* No. 1-2, 140.

⁹⁵ Supreme Court 4 April 2012, III KK 133/11, OSNKW 2012 No. 8 pos. 81.

⁹⁶ K Eichstaedt, in D Świecki (n 49) 368.

⁹⁷ Supreme Court 24 July 2008, V KK 28/08, LEX No. 438505.

⁹⁸ Art. 204 §2 CCP.

therefore entitled to make his own written pleadings, which must then be translated by the authority. This provision also requires calling for an interpreter to familiarize the party with the content of the evidence. This also means the possibility of active participation by a person who does not speak Polish in procedural activities on a general basis.

The decision concerning the need to translate the particular document is taken by the authority conducting the proceedings. This authority is also competent to settle the accused motion in this respect.

Polish national law does not provide any remedies in the case of refusal of an interpreter's assistance. This may be the subject of appeal in the case of appeal against a judgment of the court of first instance.

4.5. Violations of the right to information

The CCP does not provide any specific remedy in the absence of proper notification of the suspect's rights in the pre-trial proceedings. The procedural consequences of this type of misconduct vary depending on the nature of the defiance. Article 16 §1 CCP provides an information rule called 'procedural loyalty rule'. It provides that if the authority conducting the proceedings is obliged to instruct the participants about their obligations and their rights, the absence of such instruction or a misleading one shall not have negative procedural consequences for the participant or other person concerned. It is mandatory to instruct the suspect before his or her hearing regarding most of the procedural rights, including the right to information about the contents of the charges, the right to the assistance of a lawyer and the free assistance of an interpreter, and the possibility for the suspected person to gain the access to the proceedings' file. The suspect is instructed of these before the first hearing.⁹⁹ However, it is noted that Article 300 §1 CCP unjustifiably omits instruction relating to the rights to initiate and participate in activities of pre-trial proceedings provided for in Article 315-318 CCP.¹⁰⁰ The instruction of a suspect and a crime victim who do not speak Polish sufficiently should be done in a language that is understandable to them. Although the provision of Article 72 §3 CCP

⁹⁹ Art. 300 CCP.

¹⁰⁰ See S Steinborn, in S Steinborn (n 80) commentary to Art. 300 and quoted literature.

does not provide for the obligation to give the written instruction referred to in Article 300 §1, with the translation, but nevertheless it should be translated at least orally.¹⁰¹

Polish criminal procedure provides a rule whereby a statement of charges is given when existing information justifies the suspicion that the offense was committed by a particular person.¹⁰² This action initiates the stage of proceedings against the identified person, who formally becomes a suspect and acquires certain procedural rights. The institution of presenting the charges is guaranteed, since it allows the suspect to take an active defence. For these reasons, it is unacceptable to delay the moment of presenting the charges by the person conducting the proceedings. Even more serious misconduct is the hearing as a witness of a person against whom there are grounds for presenting the charges and for questioning him or her as a suspect. This requires, for example, the assistance of a lawyer and the privileges of *nemo se ipsum accusare tenetur*. The Supreme Court indeed acknowledged the need to guarantee the effectiveness of the defence while countering abusive practices. It thus held that a person who was heard as a witness does not bear penal liability for giving false testimony, because *inter alia* it would violate Article 313 §1 CCP which orders him or her to be considered as a suspect.¹⁰³

In light of the above, it can be said that Polish procedural law adopts a formal criterion for acquiring the status of suspect. It should be added that, in the event of an action against the accused, in particular an arrest, he or she also has the right to information. Namely, according to Article 244 §2 CCP, the arrested person must immediately be informed of the particular reasons for the arrest and of his or her rights, including the right to a lawyer, the use of free interpreter services, and to refuse giving any statements.

The defendant does not have the opportunity to appeal separately on errors resulting from incorrect instructions or lack of adequate information about the charges. He or she may, however, challenge it indirectly referring to Article 16 §1 CCP and appeal against procedural decisions issued in connection with such a breach of the right to information.

¹⁰¹ Ibid.

¹⁰² Art. 313 §1 CCP.

¹⁰³ Supreme Court of 26 April 2007, I KZP 4/07, OSNKW 2007 No. 10 pos. 71.

5. Sanctions against illegal or improperly obtained evidence

The exclusionary rules are crucial mechanisms in the Polish criminal procedure, which aim is to prevent the infringements of the most important evidentiary rules and eliminate evidence obtained in such way. Nullities are unknown in the Polish criminal procedure. The sources of these rules are both regulations of the code of criminal procedure and case-law. There is no general rule regarding the illegal or improperly obtained evidence, but specific rules apply to the different situations. The exclusionary rules provided by the law are for example, the inadmissibility of using the earlier testimony of the witness (eg close relative of accused), who refused to give evidence to the court¹⁰⁴ or the inadmissibility of using objects found during the search, when the search and seizure had been performed without the consent of the prosecutor or judge and have not been *ex post* authorized by one of them.¹⁰⁵ An example of this exclusionary rule that has been developed in the case law is the inadmissibility of using the statements of a suspected person, which had been given without proper information about the right to remain silent.¹⁰⁶

The general exclusionary rule regarding illegal evidence has existed in Polish law for only a very short time. In the period from 1 July 2015 to 15 April 2016, the use of evidence obtained by a crime for the purposes of criminal proceedings was prohibited. Recently, the general approach of the legislature regarding illegal evidence has changed. Currently, according to Article 168a CCP this evidence is not to be regarded as inadmissible solely on the grounds that it was obtained in breach of the rules of proceedings or by means of a crime (with few exceptions). Also the theory of the fruits of the poisonous tree is not widely accepted in Polish criminal procedure and especially in the case law.

In the situation of the lack of general and also specific exclusionary rule, the only way for the accused person and his or her defence lawyer to eliminate the illegal or improperly obtained evidence is to prove that there has been a breach of the rules of procedure which may affect or have affected the content of the judgment. The defence may try to convince the court of first instance, that using such an evidence may negatively affect the proceedings and, as a consequence, also the

¹⁰⁴ Art. 186 §1 CCP.

¹⁰⁵ Art. 230 §1 CCP.

¹⁰⁶ Supreme Court 28 June 2001, II KKN 412/98, LEX No. 51377.

judgment. The court may then undertake preventive actions (eg repetition of evidentiary activities) or just eliminate this evidence, with the aim of avoiding a failure. Violations of the rights of the defence can be raised as allegations in the appeal.¹⁰⁷ The defence may raise the issue in the appeal that specific evidence is inadmissible. This may result in the change or revocation of the contested judgment. The assessment of the possibility of an impact of the breach of procedure on the judgment's content is made *in concreto*.

5.1. Infringements of the right to access the case file

In the case law, the consequences of a denial of access to the case file are only considered in the context of the possible impact of such a failure on the content of the contested decision. One of the rulings indicated that the refuse to access to the case file may be treated as an infringement of the right to defence, as it may be exercised by using procedural rights, including access to the case files.¹⁰⁸ This means that if a particular document from the case files was not made available for the defence (eg the evidential record, which could not be taken into account by the defence in further evidential proceedings), this can be considered *in concreto* as a failure that could affect the content of the decision and result in the decision being quashed and the case reconsidered. In principle, this will not result in the elimination of a particular evidentiary activity, but only in re-conducting it. If the court of first instance determines that the defence has not been given the opportunity to review the files, in order to avoid the above mentioned consequences, the hearing should be postponed in order to give the defence adequate time to review the files.

Similarly, if the right of defendant and his lawyer to access the materials essential to challenging the detention on remand is violated, this may result - if the defence lawyer raises an allegation in the interlocutory appeal against the decision regarding detention on remand - in the quashing of the decision and re-hearing of the issue of ordering detention on remand.

If the defence lawyer has not been given the access to the case files for the full period of time which is scheduled to draw up and lodge an appeal, then it may be considered to be serious misconduct resulting in

¹⁰⁷ Art. 438 point 2 CCP.

¹⁰⁸ Court of Appeal Katowice 6 May 2009, II AKa 394/08, LEX No. 519646.

quashing the decision and referring the case back to the court of first instance, especially when the defence lawyer objectively was not able at the time to read the file, make the necessary copies or photocopies and develop an appeal and submit it within a set time to the competent court.¹⁰⁹

5.2. Statements obtained in breach of the right to access a lawyer

The case law indicates that the absence of the defence lawyer at the first hearing of the suspect in the pre-trial proceedings¹¹⁰ does not in itself constitute an obstacle to the use at trial of the statements submitted under such conditions – because of the content of Article 6 Section 1 in conjunction with Article 6 paragraph 3 point c) ECHR – unless the suspect is objectively vulnerable to harm.¹¹¹ On this basis, it can be held that if there is a violation of the right of the accused to a lawyer and he or she would be questioned without the assistance of a lawyer, or if any evidentiary activity would be in violation of the right to a lawyer, the use of such statements or evidence in court would be unacceptable.

Practitioners, especially defence lawyers, indicate that an explicit exclusionary rule in the CCP, which would eliminate hearings in violation of the right of access to a lawyer, is necessary. Instruction on the right to refuse to give statements and the correlated standard set forth in Article 16 CCP are not a sufficient safeguard mechanism for the lack of proper instructions on the right of access to a lawyer.

5.3. Breaches of the right to translation and interpretation

There are no exclusionary rules regarding breaches of the right to translation and interpretation. In practice, if the evidentiary proceedings were carried out (eg witness testimony), and the suspect (accused) was not assisted by an interpreter, the court is obliged to repeat the action with the interpreter in order to give the accused an

¹⁰⁹ Supreme Court 4 December 2013, II KK 230/13, LEX No. 1400584.

¹¹⁰ Art. 300 and 301 CCP.

¹¹¹ Supreme Court 5 April 2013, III KK 327/12, OSNKW 2013 No. 7 pos. 60; similarly Court of Appeal Gdansk 22 January 2014, II AKa 447/13, LEX No. 1430707; Court of Appeal Wroclaw 19 September 2013, II AKa 292/13, LEX No. 1375926.

opportunity to ask questions and refer to its results (eg witness statements). This will not, however, result in the inadmissibility of the results of the previous activity.

5.4. Failure to provide information about rights and about accusation

From Article 16 §1 CCP, a rule may be derived that, if the authority conducting the proceedings is obliged to instruct the accused of his or her obligations and rights, the lack of such instruction or a misleading instruction must not adversely affect the suspect (accused). The same applies to the situation where the law does not explicitly provide the obligation to instruct, but in the light of the circumstances, such instruction should be deemed necessary.

Under Article 175 §1 CCP, which provides the right of the accused to provide explanations and the right to remain silent, it is clear that the accused must be instructed that he or she may do so. In the literature, however, there is no common view on what are the procedural consequences for a violation of this rule. Some of the literature tends to the view according to which, if the accused is not instructed as to his right to refuse to give explanations, plead guilty or give information about the circumstances unfavourable to his or her procedural interests, then the statements cannot be used as evidence.¹¹² A different view presupposes that due to the evidentiary rules, the statements submitted in a situation of lack of instructions on the right to remain silent are not in themselves deprived from the evidentiary force, because the legislature intended to eliminate the evidence at trial due to certain infringements, such as these.¹¹³

The lack of information regarding the charges during the pre-trial proceedings does not directly affect the admissibility of the evidence gathered during this stage of criminal proceedings. The case law and literature point out that the authority conducting the investigation should not postpone the presentation of the charges if it has sufficient

¹¹² In particular L K Paprzycki, in L K Paprzycki (n 71) 595; M Jeż-Ludwichowska, 'Wyjaśnienia oskarżonego a prawo do informacji' [*Explanations of the accused and the right to information*], [2003] *Palestra* No. 3-4, 50; R Kmieciak, in R Kmieciak (ed), *Prawo dowodowe. Zarys wykładu* [*The law of evidence. Basic principles*] (Wolters Kluwer 2008) 95.

¹¹³ See T Grzegorzczak, *Kodeks postępowania karnego. Komentarz* [*Code of Criminal Proceedings, Commentary*] (Wolters Kluwer 2008) 637; K Boratyńska, in Sakowicz (n 82) 464; M Kurowski (n 49) 673.

evidence justifying the suspicion that the offence was committed by the specific person. On the other hand, there is no direct consequence of the violation of the right to information about the charges to the evidence gathered. When a specific charge was not presented to the suspect in a formal way and the accusation was brought to the court, it could lead to the return of the case to the pre-trial proceedings.¹¹⁴ The main aim of this is to enable the suspect to defend himself, but it does not directly affect the evidence. Specific evidence can be eliminated only when the court of first or second instance finds that this failure may affect (or has affected) the content of the judgment.

6. Appeals against conviction and sentence

According to the provisions of Article 444 CCP the judgment of the court of first instance may be challenged in an appeal by the parties, inter alia by the accused. The law does not provide for any exceptions to the right of the parties to challenge a judgment delivered by a court of first instance. The deadline for appeals is 14 days that counts and runs for each eligible person separately from the date of service of the judgment together with the justification. It should be noted, however, that the justification of the judgment of the court of first instance is drawn up at the request of a party, filed within 7 days from the issuance of the judgment.

The Polish model of appeal proceedings is of mixed character. With the recent reforms of the CCP from 2013 to 2016, second instance proceedings got more a character of the ‘appeal-model’ (in contrast to the previous ‘revision-model’), as the elements of the typical revision were weakened.¹¹⁵ The appellate court carries out the substantive and legal review of the contested judgment within the appeal and raised objections. The applicant can therefore challenge both the facts underlying the contested judgment and raise objections relating to infringements of substantive and procedural law. As a rule, the content of the appeal determines the extent of the review of the case conducted by the second instance court.

There are, however, several exceptions to this rule, which allow the

¹¹⁴ Art. 344a CCP.

¹¹⁵ See more: M Fingas *Orzekanie reformatoryjne w instancji odwoławczej w polskim procesie karnym* [*Reformatory Adjudication in Appellate Proceedings in Polish Criminal Process*] (Wolters Kluwer 2016) 59-60.

Court of Appeal to rule regardless of the appeal's boundaries and objections raised. The first exception is the so-called benefit of another remedy.¹¹⁶ The court of second instance may quash or change the ruling in favour of the co-defendants, even if they did not bring an appeal, in the situation when considerations supporting quashing or changing the rule in favour of them are similar to all defendants in question. Second, absolute reasons for appeal¹¹⁷ consist in the most serious procedural defects which, if they arise, result in the quashing or sending for the re-examination by the court of first instance, irrespective of the defects on the content of the contested decision. Third, the serious injustice of a judgment¹¹⁸ allows the appellate court to modify a judgment in favor of the accused (and in cases enumerated in the CCP, set aside the judgment) when maintenance of the contested decision would be grossly unfair.

The appellate court is also entitled to conduct evidentiary proceedings, apart from the situation in which it would be necessary to retry the trial as a whole.¹¹⁹ As a rule, the appellate proceedings do not entail, therefore, the re-taking of evidence. The extent of the evidence proceedings in the hearing before the second instance court stems primarily from the grounds of appeal and evidence submitted by the parties. The legislation, in this respect, provides restrictions according to which the appellant may only indicate new facts or evidence if he or she could not refer them to the court of first instance.¹²⁰ However, this rule is weakened by the appellate court's obligation to examine, *ex officio*, all available evidence, important for the resolution of the case.¹²¹ It should be noted, however, that in appeal proceedings it is of relevance for the judgment only the evidence which are related to the objections indicated in appeal and are examined by a Court of Appeal, or which deal with matters that are subject to the issues of Court's own motion.¹²² Consequently, nothing stops the Court of Appeal from making new findings and to

¹¹⁶ Art. 435 CCP.

¹¹⁷ Art. 439 §1 CCP.

¹¹⁸ Art. 440 CCP.

¹¹⁹ Art. 452 §2 CCP.

¹²⁰ Art. 427 §3 CCP.

¹²¹ *Ibid* 182.

¹²² S Steinborn, *Postępowanie dowodowe w instancji apelacyjnej w świetle nowelizacji kodeksu postępowania* [*Evidence Proceedings in the Appellate Instance in the Light of the Amendment to the Code of Criminal Proceedings*], [2015] *Pr. i Pr. No.* 1-2, 154.

rule differently on the substance of the case, except the three exemptions described in Article 437 §2 CCP.

The disputes resolved in the appeal are governed by Article 437 CCP. The Court of Appeal may uphold the challenged judgment, change the contested decision, ruling differently on the merits, quash the challenged judgment and discontinue the procedure, quash the challenged judgment and refer the case back to the first instance. This last scenario arises in the following situations:

- The Court of Appeal finds that an absolute cause of appeal listed in Article 439 §1 CCP (eg improper court composition, *res iudicata* process obstacle) has been established;
- The occurrence of one of the *ne peius* rules;¹²³
- The Court of Appeal cannot convict the accused, who was acquitted at first in-stance or for whom at first instance the proceedings were discontinued or conditionally discontinued;
- The Court of Appeal cannot aggravate the punishment by imposing a life imprisonment sentence. If, therefore, the court of appeal find the grounds for issuing such a decision, it is obliged to give a ruling of a cassation nature;
- The need arises to re-try the case. However, this is permissible only in the situation where all of the activities of the first instance court proceedings require a retrial due to the nature of the infringement of established law (eg proceeded without the participation of the party who was not duly notified of the hearing).

In the Polish penal process there is a direct and indirect ban of *reformatio in peius*. Direct prohibition on *reformatio in peius* is addressed to the appellate court. According to Article 434 §1 CCP, the court of appeal may rule against the accused only if the following conditions are met: when the appeal was brought against the accused; within the limits of an appeal, unless the law requires judgment regardless of the limits of the appeal; in the event of objections indicated in the appeal, unless the appeal comes not from the public prosecutor or attorney and has not raised any objections (allegations), or the law requires the judgment, regardless of objections indicated in the appeal.

The key issue in practice is to determine what the term ‘decision against the accused’ means and what the scope of this ban is. In the case law, it is assumed that in the absence of an appeal against the

¹²³ Art. 454 CCP.

accused, his situation in the appeal procedure cannot deteriorate at any point. This imposes on the court of appeal the obligation to refrain from taking actions- including in the sphere of factual findings - causing, or even possibly having, a negative effect on the legal position of the accused.¹²⁴ Therefore, this prohibition refers broadly to the issue of criminal responsibility of the accused for his alleged offense, in particular its legal qualification, factual findings on the subject matter, the sentence terms, the penalties and other judgments.

The Code of Criminal Procedure currently provides only one exception. This applies to the use of the so-called ‘small’ crown witness institution, which involves an extraordinary reduction of the sentence against the accused, who has opted to cooperate with the law enforcement authorities in which he or she discloses to them information about persons involved in the offense and the relevant circumstances of this offense.¹²⁵ The prohibition of *reformatio in peius* is excluded if, after the judgment has been delivered, the accused appeals and at the same time cancels or substantially changes his explanations or testimony. In such a case, the appellate court may rule against him or her despite the fact that the only appeal which was brought was in favour of the accused. However, this does not apply if the accused does not ‘withdraw from the agreement’ with the prosecutor, but rightly pleads on an infringement of substantive law. The exception does not occur also when the court of appeal establishes one or more absolute grounds for appeal set out in Article 439 §1 CCP.

The indirect prohibition of *reformationis in peius* is addressed to the court of first instance, which has been referred the case for re-examination. Pursuant to Article 443 CCP, in further proceedings it may be given a more severe judgment than the quashed one, only if the judgment has been challenged against the accused or there were grounds of the *reformatio in peius* exclusion. It is important to note that in a re-trial, the court of first instance is not constrained in any way with regard to rule against the defendant regarding preventive measures (eg placement in a psychiatric hospital), if it is found necessary and justified.

¹²⁴ See inter alia: Supreme Court 2 April 1996, V KKN 4/96, OSN Prok. i Pr. 1996 No. 10 pos. 14; Supreme Court 4 February 2000, V KKN 137/99, OSNKW 2000 No. 3-4 pos. 31; Supreme Court 5 August 2009, II KK 36/09, OSNKW 2009 No. 9 pos. 80.

¹²⁵ Art. 60 § 3 Penal Code.

7. Judicial review by Courts of Higher instance

As already mentioned, Polish criminal procedure consists of two instances. The judgment given by the Court of Appeal is therefore final and enforceable. The quashing or changing of the final judgment is possible within the framework of the system of extraordinary remedies, which include: cassation, complaint against the quashing judgment of the Court of Appeal and reopening of proceedings.

Complaint against the judgment of the Court of Appeal is an extraordinary remedy, and in fact, unlike in the known systems of procedural penal law, it was introduced by the amended law of 11/03/2016. The complaint serves only one purpose: to stop courts of appeal from quashing the judgments hastily and sending the cases back for reconsideration.¹²⁶ As it has already been pointed out, currently Article 437 §2 CPP provides a closed catalogue of prerequisites for issuing a cassation judgment. Where the Court of Appeal cancels the judgment of the court of first instance and hands it back for reconsideration in breach of the above-mentioned provision, ie for reasons not provided for therein, or where the cassation decision of the appeals court is affected by an absolute ground for appeal under Article 439 §1 CPP, then a party has the possibility of lodging a complaint to the Supreme Court within 7 days. If the complaint is upheld, the contested judgment is annulled and the case forwarded to the appropriate court of appeal for re-examination.

Cassation is available to the parties against final judgments of the appeal court closing the proceedings and a lawful decision of the court of appeal to discontinue the proceedings and to apply a protective measure. It must be emphasized, however, that a party who has not challenged the judgment of a court of first instance can only file for cassation if the decision of the court of first instance has been altered to their detriment. Additionally, there is an absolute cause for appeal contained in Article 439 § 1 CPP. The Code in Article 523, however, provides limits to the type of cases which can be subject to appeal under cassation proceedings. On the one hand, cassation in

¹²⁶ See: S Steinborn, 'Skarga na wyrok kasacyjny sądu odwoławczego na tle systemu środków zaskarżenia w polskim procesie karnym' [Complaint against the Cassation Judgment of the Appellate Court in the Perspective of the System of appeals in the Polish criminal process], in T Grzegorzczak, R Olszewski (eds), *Verba volant, scripta manent. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej* [Verba volant, scripta manent. The Jubilee Book in Honour of Professor Monika Zbrojewska] (Wolters Kluwer 2017) 415-416.

favour of a convicted person can be made only if the defendant is convicted for a crime or a fiscal offense, facing imprisonment without conditional suspension of the sentence. On the other, cassation to the disadvantage of the accused can only be made if the accused is acquitted or the proceedings are discontinued.

The above limitations do not apply if the judgment is affected by an absolute grounds for appeal under Article 439 §1 CPP. The literature indicates pragmatic reasons for restricting the access of parties to cassation proceedings, ie the need to reduce the influx of cassations to the Supreme Court¹²⁷.

The deadline for the cassation appeal for parties is 30 days from the date of delivering the ruling with justification. A request for delivering a ruling with justification should be lodged to the court that issued the judgment, within 7 days from the date of the judgment's publication, and if the law provides the service of the judgment, from the date of the service.

A special type of cassation is the extraordinary cassation which is reserved for the Minister of Justice - the General Attorney, the Ombudsman and the Ombudsman for Children's Rights if the judgment violates the rights of a child. The above-mentioned authorities are entitled to lodge a cassation appeal against each lawful judgment of the court terminating the proceedings, and therefore there are no limitations on the scope of the subject matter subject to appeal proceedings. Furthermore, these authorities are not bound by any deadlines to file a cassation, with a stipulation that in accordance with Article 524 §3 CPP it is impermissible to file a cassation appeal against a defendant which is brought one year after the date of the judgment becoming final.

The third of the remedies is the reopening of judicial proceedings concluded by final legal binding judicial decision. This institution is based on the principle that in particularly offensive situations, the legitimacy and stability of a judicial decision cannot be seen as proper and just¹²⁸.

The CPP lists in Articles 540 CPP, Article 540a CPP and Article 540b the following conditions for the resumption of court proceedings. First, the so-called *propter crimen* arises where there has been a crime connected with the proceedings and there is a justified

¹²⁷ See Grajewski (n 85) 364.

¹²⁸ K Marszał, in K Marszał (ed), *Proces karny. Przebieg postępowania* [Criminal Process. The Course of Proceedings] (Volumen 2012) 281.

reason to believe that this may affect the content of the judgment. Second, the so-called *propter nova* applies where new facts or evidence is revealed after the ruling has been delivered indicating that: a convicted person did not commit the offense or the offense was not a criminal offense or it is not punishable; a person was convicted of an offense punishable by a more severe punishment, or did not take into account circumstances requiring extraordinary mitigation of the penalty, or misrepresentation of circumstances affecting the extraordinary aggravation of the penalty; or the court has discontinued or conditionally discontinued criminal proceedings and mistakenly found that the accused committed the offence although he should be acquitted. As a third condition, a ruling of the Constitutional Tribunal has declared the law on the basis of which a judgment has been issued incompatible with the Constitution, ratified international agreements or a legal provision and, as a result, resumption may not adversely affect the accused. A fourth condition lies in the decision of an international authority (in particular the ECHR), from which it is necessary to reopen the proceedings in favour of the accused (e.g. the judgment of the European Court of Human Rights). Resumption of court proceedings may also result where the so-called ‘small’ crown witness did not confirm the information disclosed in criminal proceedings, there is a need to resume proceedings for an action covered by the so-called absorption cancellation, or the case was considered and conducted in the absence of the accused.

The higher instance court is competent to hear the request for the resumption of proceedings, but in the case of proceedings leading to a judgment by the Court of Appeal or the Supreme Court, the latter is competent to hear the application. It should be noted that it is not permissible to reopen the proceedings to the detriment of the defendant after one year from the date of validation of the decision.¹²⁹

As regards the scope of review, a complaint against a judgment of the Appeal Court initiates a review only of the legal side of the judgment. The Supreme Court examines the complaint within the limits of the objections raised, as previously stated, to show only that the Court of Appeal has inadequately dismissed the contested decision and forwarded it for reconsideration, or that the judgment of the Court of Appeal is affected by the absolute reason for appeal.

¹²⁹ Art. 542 §5 CCP.

Cassation has autonomous cassation reasons formulated in Article 523 § 1 CCP, in line with the model of this appeal as a purely legal review. Namely, cassation may be brought only because of the absolute reason for appeal under Article 439 §1 CCP or other serious violation of the law, if it could have a significant impact on the content of the judgment. It is unacceptable to base the cassation solely on the allegation of disproportionate punishment, but this restriction does not apply to the Minister of Justice - General Attorney in cases of crimes (acts punishable by at least 3 years of imprisonment). In cassation proceedings, as a rule, factual findings underpinning the contested judgment are not examined. It is not permissible to raise an allegation of erroneous facts, unless they are the result of a gross violation of procedural law.¹³⁰ However, the complainant may raise objections to the judgment of the court of first instance, but they must be related to the objections against the ruling of the Court of Appeal. It is not a function of the Supreme Court to 'duplicate' the appellate control.¹³¹

According to Article 536 CCP the Supreme Court examines the cassation within the limits of the appeal and objections raised, and to a greater extent only if there is a need for the institution of the beneficiary of the appeal,¹³² the occurrence of absolute reason for appeal¹³³ and the need to correct the legal qualification of the offence.¹³⁴ In practice, there are situations in which the Supreme Court goes beyond the normative framework of examining a case in cassation proceedings, mainly for reasons of justice. The admissibility of such an action by the Supreme Court was in particular referred to in the judgment, which stated that a ruling in favour of the defendant was also permitted when in the course of cassation proceedings blatant breaches of law causing the contested judgment to be openly contrary to the principles of a lawful and fair criminal procedure are found unraised in the cassation and not mentioned in Article 439 § 1 CCP.¹³⁵ In addition, the analysis of the case law makes it clear that the Supreme Court also occasionally interferes in factual arrangements to benefit from the provisions of Article 537 § 2 CCP allowing the

¹³⁰ J Grajewski, Steinborn, in L K Paprzycki (n 71) vol. 2, 318.

¹³¹ J Grajewski (n 85) 358.

¹³² Art. 435 CCP.

¹³³ Art. 439 CCP.

¹³⁴ Art. 455 CCP.

¹³⁵ Supreme Court 21 May 1995, III KKN 2/96, OSNKW 1996 No. 9-10 pos. 52.

exceptional right to acquit the defendant whose conviction was clearly wrong.¹³⁶

In the cassation proceedings, the evidence may be examined only to confirm or exclude the objection raised in the cassation of alleged egregious infringement of law, rather than supplementing the evidence procedure aimed at examining the validity of the assessment of the evidence and the accuracy of factual findings.¹³⁷

The court hearing the request for the reopening of proceedings must rule within the limits of the application, and will exceed those limits only if there is an absolute reason for appeal under Article 439 § 1 CCP and if there is the need to use the institution of the beneficiary of the appeal.¹³⁸ In proceedings initiated by filing a request for resumption of the proceedings, there is no evidence processing in principle. Article 546 CCP provides, however, for the opportunity to review the circumstances relevant to the decision on the application, eg verifying whether the evidence offered in the application for a renewal exists. The parties have the right to take part in such activities.

Once a complaint against the judgment of the Court of Appeal has been examined, the Supreme Court dismisses the complaint if it is unfounded, or considers it necessary to quash the contested judgment and refer the case to the competent Court of Appeal. After the cassation review, the Supreme Court is entitled to issue the following resolutions: dismiss the cassation if it is unfounded or, if the cassation is upheld, the contested judgment is quashed and the case is referred to the competent court for reconsideration or the proceedings are discontinued. Exceptionally, if the conviction is manifestly groundless, the Supreme Court would acquit the accused.

As a result of consideration of the application for resumption of proceedings, the following resolutions may in principle be settled. On the one hand, unfounded requests are dismissed. On the other, where the application is considered, the court quashes the challenged decision and refers the matter to the competent court for reconsideration. Exceptionally, by quashing the challenged judgment

¹³⁶ See, for example, M Fingas, 'Kilka uwag o orzekaniu reformatoryjnym w postępowaniu kasacyjnym' [*Several Comments on Reformatory Adjudication in Cassation Proceedings*], in S Steinborn (ed), *Postępowanie odwoławcze w procesie karnym – u progu nowych wyzwań* [*Appeal proceedings in criminal process – on the threshold of new challenges*] (Wolters Kluwer 2016) 370.

¹³⁷ Supreme Court 3 April 1997, III KKN 170/96, OSNKW 1997 No. 7-8 pos. 69.

¹³⁸ J Grajewski, S Steinborn, in L K Paprzycki (n 71) vol. 2, 401.

the court may acquit the accused if new facts or evidence indicate that the judgment is manifestly groundless or the proceedings are discontinued. However, this applies only to situations in which the assessment of all evidence gathered in the case, taking into account the new circumstances set out in the request, leads to the undoubted finding that an innocent person was convicted.¹³⁹

8. Access to the Constitutional Court

The Polish legal system provides for a specific legal measure in the form of a constitutional complaint. According to Article 79 of the Constitution, anyone whose constitutional freedoms or rights have been infringed has the right, in accordance with the provisions of the law, to file a complaint with the Constitutional Tribunal on the conformity with the Constitution or other normative act on the basis of which the court or a public administration's authority has finally ruled on their freedoms or their rights and obligations defined in the Constitution. A constitutional complaint can only be lodged by an individual complainant after a final, fully valid closing of criminal proceedings, because a constitutional review of the legal provisions commenced by the constitutional complaint may concern the legal act (law) being the basis of the final judgment given in the complainant's case. There must therefore be a link between the provision indicated as the subject of the review and the basis of the final judgment.¹⁴⁰ The deadline for filing the complaint is 3 months after the final judgment, final decision or other final resolution has been served on the applicant.¹⁴¹ A party may, however, challenge in the complaint only the laws, on the basis of which the case was adjudicated, as incompatible with the Constitution. On the other hand, it is not permissible to question how the law was applied in the issuing of a judgment. As already mentioned earlier, the Constitutional Tribunal's judgment may also serve as a basis for resuming judicial proceedings in favour of the accused.

¹³⁹ Supreme Court 10 October 1995, II KO 76/94, OSNKW 1996 No. 1-2 pos. 9.

¹⁴⁰ Constitutional Court 18 October 2011, SK 39/09, OTK-A 2011 No. 8 pos. 84.

¹⁴¹ Art. 46 section 1 of the Constitutional Tribunal Act.

9. Judicial review and the EAW

9.1. Competent judicial authorities

Both the issue of the EAW and the execution of the EAW belong primarily to the jurisdiction of the district court (*sąd okręgowy*), which is a mid-level court of the judiciary in Poland.¹⁴² This is in line with the traditionally accepted principle of the Polish law that, in the area of international judicial cooperation in criminal matters, instruments involving deprivation of liberty belong to the jurisdiction of district courts. A decision on the execution of the EAW may be appealed to the Court of Appeal.

9.2. Defence rights in the execution of a EAW

In the proceedings concerning the execution of the EAW, defence rights such as right to an interpreter and translation, right to information and right to access to the defence lawyer are guaranteed.

There is no separate regulation on the right of the requested person to an interpreter. In this regard, the rules concerning the right of the accused (suspect) are accordingly applied to the requested person.¹⁴³ This means that if the requested person does not have sufficient command of the Polish language, he or she has the right to use the free-of-charge interpreter service.¹⁴⁴ According to Article 607i § 1a CCP, the court delivers to the requested person information about the date of the court sitting, along with the EAW accompanied by a translation into the language that this person commands. This provision also allows the giving of information to the requested person, if it does not impede the exercise of their rights, regarding the content of the EAW, including the right to consent to be surrendered and to renounce to the entitlement to the speciality rule. Polish legislation does not provide any separate measure by which the requested person could challenge the court's decision not to translate the EAW and other documents and to question the quality of the translation. This person can only raise this issue in the course of the

¹⁴² Judiciary in Poland consists of county courts (*sądy rejonowe*), district courts (*sądy okręgowe*) and courts of appeal (*sądy apelacyjne*).

¹⁴³ See *supra* Section 4. *Specific remedies for alleged breach of defence rights in the pre-trial stage of criminal proceedings.*

¹⁴⁴ Art. 72 §1 CCP.

proceedings in the form of motions for translating specific documents or requesting a change of interpreter, and also as an argument in an appeal against a court's decision to execute the EAW and surrender him or her to another Member State.

The person who is in detention in connection with the EAW issued in another Member State is given a written notice. A model of this instruction is set out in the regulation of the Minister of Justice of 11 June 2015.¹⁴⁵ The notice includes information on the following rights of the requested person:

- to obtain the cause of arrest,
- to give explanations, the right to remain silent or refuse to answer questions,
- to the assistance of a lawyer, including a court-appointed defence lawyer,
- to the assistance of a free interpreter,
- to review the file as to the grounds of arrest,
- to notify their closest person and consular services of their country,
- to lodge an interlocutory appeal against the arrest,
- to immediate release if, within 48 hours of arrest, there is no transfer of that person to the court for the purpose of detention on remand, or if there is no detention order issued by the court within 24 hours after the transfer,
- to information on the content of the EAW and to receive a copy of it with translation,
- to lodge an interlocutory appeal against the decision on the execution of the EAW,
- to consent to be surrendered and to renounce to the entitlement to the speciality rule,
- to access to medical aid.

There is no explicit information about the right to be heard by a judicial authority, but only the general information about the right to be heard and to the refusal to submit any explanation (right to remain silent).

The person arrested in order to execute the EAW has access to a defence lawyer on the same conditions as a detained suspect in criminal proceedings. The Polish CCP does not provide any separate

¹⁴⁵ Ordinance of Ministry of Justice of 11 June 2015 on specifying a model of instruction about the powers of person arrested upon the European Arrest Warrant (Journal of Laws pos. 874).

regulation in this area. This means that the detained person in connection with the EAW should be able to contact the lawyer, while in justified cases, a prosecutor or a police officer may be present during the meeting. The requested person also has the right to be heard with a defence lawyer if he or she has already appointed him, but the absence of the lawyer does not prevent the hearing. However, Article 73 §2 and 3 CCP allow limitations of contact with the defence lawyer by introducing for a period of 14 days from the date of the detention on remand, as well as the control of correspondence, and the above-mentioned presence of an indicated person at a direct meeting between the suspect and the defence lawyer. These restrictions, however, can only be used in preparatory proceedings, not during the proceedings regarding execution of the EAW.

It is not possible for a requested person to immediately challenge decisions restricting their right of access to a lawyer. Allegations of such restrictions can only be raised in an appeal against a decision on the execution of the EAW and on the surrender of the requested person.

The most serious difficulty with regards to the right to defence of the person, against whom the EAW was issued, is caused by the Polish legislation implementing Framework Decision 2002/584, limiting effective access of this person to a defence lawyer. Among other difficulties, there is a lack of an absolute obligation to bring a requested person to a court hearing during which the execution of the EAW is considered, even if the person is in custody and expresses the will to attend the hearing. The decision to bring in the requested person is made by the court. The provisions also do not provide the obligation to inform that person that they have the right to request to attend the court proceedings.

9.3. Judicial review and grounds for refusal

Polish law foresees grounds for refusal of the execution of a EAW closely linked to the defence rights of the requested person. According to Article 607r §3 CCP the execution of the EAW issued for the purpose of executing a custodial sentence may be refused if it has been rendered in the absence of a requested person. The indicated grounds for refusal to execute the EAW do not occur in the following cases:

- the requested person was summoned to participate in the proceedings or otherwise notified of the date and place of the hearing, informing him/her that the failure to appear does not constitute

a hindrance to the issuance of a decision, or if this person had a lawyer present at the hearing;

- after delivering to the requested person a copy of the decision along with the notice of their rights, the term and manner of submitting a request for new court proceedings in the same case in the country issuing the EAW, the requested person failed to submit such a request within the statutory deadline or stated that he or she does not challenge the decision,
- the issuing authority ensures that after the surrender of the requested person to the country issuing the EAW, he or she will receive a copy of the judgment together with a notice of his or her right, the term and manner of submitting for new judicial proceedings in the same case.

The Polish legislation concerning this ground for refusal to execute the EAW is therefore almost an exact reproduction of the content of Article 4a Section 1 b) of Framework Decision 2002/584. The differences concern specific issues. For example, in point (a), contrary to the Framework Decision 2002/584, it is not explicitly reserved that the defence lawyer's participation in the hearing excludes the grounds for refusal only when the requested person was aware of the hearing. In turn, point (b) does not distinguish clearly, unlike in art. 4a Section 1 c) of the Framework Decision 2002/584, the right to reconsider a case and the right to appeal. In Article 607r § 3 CCP only the right to apply for new court proceedings is mentioned. However, a broad understanding of this term is proposed, consistent with the wording of Article 4a Section 1 of the Framework Decision 2002/584.

Polish law requires that the requested person shall receive a copy of the judgment before being surrendered, when this person was not personally served with the decision rendered in absentia in the issuing Member State, as required in Article 4a Section 2 of the Framework Decision 2002/584. According to Article 607u CCP, if the EAW has been issued for the purpose of executing a custodial sentence imposed under the conditions set out in Article 607r §3 point c) CCP, the requested person must be informed about the right to demand a copy of the judgment. The information on filing a claim for a copy of a judgment is forwarded to the country issuing the EAW without delay, and upon receipt of the judgment it is delivered to the requested person. Submission of the request does not suspend the execution of the EAW.

The ground for non-execution of EAW issued for purpose of enforcing decisions rendered in absentia, as defined in Article 607r § 3 CCP, does not cause difficulties in practice and it is rather rarely discussed. One of the rulings stated that this ground for refusal to

execute the EAW occurs if the requested person was not present at the hearing, unless one of the conditions provided for in the further part of Article 607r § 3 CCP occurs.¹⁴⁶

According to Article 607p §1 point 5 CCP it is an obligatory ground for non-execution of EAW, if execution would violate the freedoms and rights of individual. This is a consequence of Article 55 Section 4 of the Polish Constitution banning extradition if it would violate the freedoms and rights of individual.

This ground is quite general, which makes it possible to cover different situations. It encompasses freedom and rights guaranteed in the Polish Constitution and in acts of international law, especially in the ECHR. With regards to the content of Article 607p §1 point 5 CCP, it appears that this is a violation of fundamental rights as a result of execution of the EAW, and not only in the national proceedings on the implementation of the EAW. The risk of violation of the freedom and rights of an individual through the execution of the EAW may be due to an infringement of the right to defence in the country issuing the EAW (eg in criminal proceedings in connection with which the EAW was issued).

The Constitutional Court has held that Article 607p §1 point 5 CCP is compliant with Article 45 Section 1 and Article 42 Section 2 connected with Article 55 Section 4 of the Polish Constitution which allows refusing to execute the EAW issued against a Polish citizen for the purpose of conducting criminal proceedings in cases where it is obvious for the court adjudicating on its execution that the requested person has not committed the offence in respect of which the EAW has been issued and where the description of the offence in the EAW prevents its legal qualification.¹⁴⁷ The Court ruled that the possibility of refusing to execute the EAW should be allowed where it is apparent to the court adjudicating on its implementation that the requested person is not guilty of the offence in respect of which the EAW was issued and where the description of the offence the EAW refers to is imprecise to the extent that it is impossible to decide on the admissibility of the surrender, ie to the extent that it is impossible to determine whether there are grounds for mandatory or optional refusal to execute the EAW. The inclusion of these circumstances is, in the Court's view, possible in the context of the condition for refusal set out in Article 607p §1 point 5 CCP. This provision, interpreted in

¹⁴⁶ Court of Appeal Katowice 4 January 2013, II AKZ 776/12, KZS 2013 No. 5 pos. 87.

¹⁴⁷ Constitutional Court 5 October 2010, SK 26/08, OTK-A 2010 No. 8 pos. 73.

this way, conforms to the constitutional standards of the right of defence and the right to a fair trial.

Polish regulations do not explicitly provide for the possibility of examining the proportionality of the EAW during the procedure of executing the EAW. However, this can be considered admissible in the context of the verification as to whether there is no ground for refusal to execute the EAW as defined in Article 607r §1 point 5 CCP, so that the execution of the EAW would violate the freedoms and rights of the individual. Within this basis, the court could assume that the execution of the EAW would result in a disproportionate limitation of the requested person's freedom.

The Supreme Court has examined whether examining the reasons for issuing the EAW is permissible in the course of proceedings. It accepted that the judicial authority of the executing state may refuse to surrender the requested person only if it finds that the EAW was issued contrary to the admissibility of its issuing. A review of these conditions must precede the assessment of whether there are grounds for non-execution of EAW (both mandatory and optional). The admissibility of the negative verification of the conditions of the EAW in the executing country is limited to completely exceptional cases, as it is enshrined in the principle of mutual trust, which is the cornerstone of judicial cooperation between EU Member States. It is, therefore, not permissible to verify the validity of a decision of an issuing judicial authority in regard to the conditions which are of an evaluative nature. The competence of a specific authority issuing the EAW and the purpose for which the EAW has been issued are subject to review by the executing judicial authority. There is no doubt that the EAW cannot be issued to prosecute a person for any other conduct than the one object of the criminal proceedings. In such situations, the refusal to surrender a requested person is not due to the grounds for non-execution of the EAW, but because the EAW was issued despite the fact that it did not meet the conditions of its issue in the country requesting the surrender of the requested person (and hence the finding that the decision given to the executing judicial authority in essence is not a EAW). The assessment of the fulfilment or non-fulfilment of the prerequisites for the issue of a EAW must, in any event, be made in the context of the national law of the country in which the EAW was issued, but always taking into account the content of the EAW Framework Decision.¹⁴⁸

¹⁴⁸ Supreme Court 20 July 2006, I KZP 21/06, OSNKW 2006 No. 9 pos. 77.

CHAPTER VI

SPAIN

Teresa Armenta, Susanna Oromí, Silvia Pereira, Fernando Alday

TABLE OF CONTENTS: 1. Constitutional guarantees. – 2. Investigative measures subject to prior judicial authorization. – 2.1. Competent judicial authorities. – 2.2. Scope of review. – 2.3. Exceptions for urgent cases. – 2.4. Remedies available to the defendant. – 3. Deprivation of liberty: arrest and pre-trial custodial measures. – 3.1. Information about rights and reasons for arrest. – 3.2. Arrest, *habeas corpus* and judicial review. – 3.3. Detention pending trial. – 3.4. Arrest and detention order for questioning. – 4. Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings. – 4.1. Restrictions on the right to access the case file. – 4.2. Derogations on the right to access a lawyer. – 4.3. Decisions finding that there is no need for interpretation. – 4.4. Decisions finding that there is no need for translation. – 4.5. Violations of the right to information. 5. Sanctions against illegal or improperly obtained evidence. – 6. Appeals before second instance courts. – 7. Appeals limited on errors of law. – 8. Access to the Constitutional Court. – 9. Judicial review and the EAW. – 9.1. Competent judicial authorities. – 9.2. Defence rights in the execution of a EAW. – 9.3. Judicial review and grounds for refusal.

1. Constitutional guarantees

The Spanish Constitution guarantees the right of access to court, granted through effective judicial action whenever there is a legitimate claim in the exercise of a right or interest. In this way, the Spanish Constitution pays special attention to the respect and enforcement of fundamental rights provided by constitutional provisions. This preferential treatment is reflected upon the specific content of Article 24, which contains provisions guaranteeing what has been referred to in the national doctrine as ‘procedural fundamental rights’. If a breach of fundamental rights occurs during criminal proceedings, the right of the accused to access a

court is guaranteed by the said article,¹ whose wording reflects Article 13 ECHR. By referring to the establishment of an impartial tribunal, right of legal assistance, presumption of innocence and due process, Article 24 of the Spanish Constitution further enhances the guarantee of effective judicial protection and incorporates the content of Article 6 ECHR in the constitutional text. In this regard, it is worth recalling that Article 10 (2) of the Spanish Constitution requires national courts to construe fundamental rights and liberties recognised by the Constitution in conformity with the Universal Declaration of Human Rights and international treaties ratified by Spain, including the ECHR.

Further rights and guarantees provided by the Constitution apply at different stages of criminal proceedings. For instance, the right to appeal is provided in line with Article 2 Protocol 7 ECHR.² Even if it is not explicitly stated in the Constitution, the Spanish Constitutional Court (*Tribunal Constitucional*) has acknowledged its existence within the formula of the ‘fair trial principle’ under Article 24 of the Constitution. The right to appeal is further developed by the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*, hereinafter CCP),³ which sets forth the procedural rules and limits on the exercise of this right. Also the constitutional remedy of *amparo* provides ample opportunities to seek judicial review over the actions taken by the authorities in connection to criminal trials, from arrest and detention to sentencing, whenever there is a claim for the violation of a fundamental right.⁴

By contrast, the Spanish Constitution does not expressly provide the right to review the lawfulness of detention. However, it guarantees the right to be informed of the rights and grounds for arrest,⁵ as well as the requirement of a *habeas corpus* procedure provided by law to ensure the immediate release of an illegally arrested individual.⁶

¹ Art. 24 (1) Spanish Constitution reads ‘All persons have the right to obtain effective protection from the judges and the courts when exercising their Rights and legitimate interests, and in no case may there be a lack of defence’.

² Ratified by the Spanish government on October 15, 2009.

³ Art. 220 – 224 CCP.

⁴ Art. 53 (2) Spanish Constitution.

⁵ Art. 17 (3) and (4) Spanish Constitution.

⁶ Art. 17 (4) Spanish Constitution, as well as Ley Orgánica no 6/1984 reguladora del procedimiento de Habeas Corpus, BOE 26 May 1984.

2. Investigative measures subject to prior judicial authorization

2.1. Competent judicial authorities

In Spain, criminal investigations are assigned to the investigating judge (Juez de Instrucción). Thus, the investigative measures taken during the pre-trial stage of criminal proceedings are mostly carried out under judicial authorization. There are some intrusive measures which can be carried out by the police, such as following suspects, recording them in public places or asking telephone companies to identify who owns a telephone number. However, when these measures may somehow affect fundamental rights judicial authorisation is necessary. In this sense, the Spanish Supreme Court (Tribunal Supremo) recently held that evidence resulting from house surveillance by police officers with binoculars without prior judicial authorization is null and may not be taken into account.⁷

2.2. Scope of review

The review focuses on the compliance of the judicial decision authorizing an investigative measure with the principle of proportionality.⁸ The latter covers three aspects: suitability, necessity and proportionality *stricto sensu*, requirements that apply to all measures restricting fundamental rights. Suitability refers objectively and subjectively to the causality of the measures in relation to their purposes, both qualitatively (eg entering and searching to obtain evidence) and quantitatively (eg duration of telephone tapping). The necessity requirement, also referred to as a ‘less burdensome alternative’, compares the restrictive measure intended to be used with other possible measures and these should be the least harmful to the rights of citizens (ie provisional release, provisional custody, home surveillance, and the order to not leave the country). To sum up, proportionality in its strictest sense, is applied after examining the concurrence of the two precedents and assesses the weight of the competing interests according to the circumstances of each concrete case, determining whether the sacrifice of individual rights that such restriction entails maintains a proportional relation to the extent of the State interest that it seeks to safeguard (eg right to honour *versus*

⁷ Spanish Supreme Court, 20 April 2016, no 329/2016.

⁸ Art. 220 and 766 CCP.

freedom of expression, right to information *versus* interest in criminal prosecution).

Against this background, further observations should be made with regard to new ways of using technology for investigative purposes.⁹ Judicial authorization shall be adopted in line with the principle of speciality and proportionality. According to the former, the measure must be related to the investigation of a specific crime, thus precluding the use of technological means aimed at preventing and discovering crimes or removing suspicions without an objective basis. Proportionality implies, on the other hand, that the judicial authorization takes into account all the circumstances of the case, so that the encroachment on the individual rights and interests involved does not exceed the benefits that the authorized measure would bring for the public interest and third parties. This balancing test shall take into consideration: a) the seriousness of the event; b) its social importance or the technological field of production; c) the intensity of the existing evidence, and d) the relevance of the results sought with the restriction of the right. Further requirements of suitability, exceptionality and necessity are manifestations of the exceptional character of these investigative measures, which can only be carried out for serious or specific crimes, or over a limited time period even in exceptional cases. This last aspect has raised a number of issues with regard to the compatibility of the measure and its successive extensions.¹⁰

2.3. *Exceptions for urgent cases*

Exceptions to the above-mentioned procedural rules may apply in the event of terrorism and of *in flagrante* offences. Furthermore, in cases of urgent need, certain measures may be carried out without prior judicial authorisation, but in these circumstances they must be immediately notified to the judge who may decide to confirm or revoke the measure. An illustration thereof is the tapping and monitoring of communications, which in some cases may be authorized by the Minister of Interior or the State's Security Secretary

⁹ For instance, tapping phones and electronic messages, tapping and recording conversations with the use of electronic devices and the use of technical devices to capture images, following and locating, remote searches on computer devices and searching large storage data devices.

¹⁰ Art. 588 *bis* CCP.

provided that such investigative act is notified to the judge within 24 hours. Likewise, the police may use tracking devices without prior judicial authorization when it is absolutely necessary and urgent. In this case, the judge must also be notified within a maximum period of 24 hours.

2.4. Remedies available to the defendant

As mentioned above, in Spain criminal investigations are not assigned to the public prosecutors but to the investigating judge, a judge who is responsible for authorizing any investigative measure, including those which affect the fundamental rights of the defendant. As a consequence, although Spanish law establishes as a general rule the possibility of reviewing a decision, the first reviewing authority is usually the judge who has adopted the measure.¹¹

The defendant has indeed the possibility to challenge resolutions taken by the investigating judge before the same judge (*recurso de reforma*).¹² However, such possibility encounters limitations. In particular, where the investigations are declared confidential, all parties, except the public prosecutor, are unaware of any information gathered in the proceedings. Therefore, the defendant cannot challenge the act until the judicial declaration of confidentiality is lifted. This limitation is regarded as fully justified in view of the needs of investigation, even though it is intended to last for the shortest possible time.

Under certain circumstances, the defendant has also the possibility to further appeal against acts taken by the investigating judge with the Court of Appeal (*Audiencia Provincial*),¹³ which is composed of three judges. Appeals (*recurso de apelación*) are of particular importance where they are directed against evidentiary sources that could later be declared illegally obtained. Again, the possibility to appeal against warrants authorising investigative measures is restricted when it has been declared the confidentiality of all or part of the proceedings— in case, for instance, of interception and monitoring of communications—, because the defendant will have no notice of the investigative measures before the confidentiality is lifted. Appeals in

¹¹ For this reason, it is uncommon that the decision is overruled.

¹² Art. 216 CCP.

¹³ Art. 220 and 766 CCP.

the investigation phase are not subject to any payment or fee, but to relatively short terms (five days), that are sufficient in the opinion of judges and prosecutors, not so much in the view of defence lawyers because of the limitation that such short term may entail for the exercise of the right of defence. Lawyers also value negatively the limitation on the grounds of appeal enacted following the legal reform of 5 October 2015.¹⁴

3. Deprivation of liberty: Arrest and pre-trial custodial measures

3.1. Information about rights and reasons for arrest

Article 520 CCP implements into Spanish law the content of Article 4, paragraph 3 Directive 2012/13/EU. Detailed information on the reasons for arrest must be provided in written form as soon as the person is deprived of his liberty. This information also encompasses a list of rights, which correspond to those mentioned in Article 3 Directive 2012/13/EU. If the person does not understand the language in which the information is given to him, an interpreter shall be provided.¹⁵

3.2. Arrest, habeas corpus and judicial review

In the pre-trial stage of criminal proceedings, arrest and detention warrants are issued by the Investigating Judge. The maximum length of detention is 72 hours,¹⁶ after which the arrested person must be set free or presented before a judge in order to determine his legal standing and to be informed of all the rights granted to him in case of detention.¹⁷ Police officers and members of other enforcement agencies have competence to execute an arrest. Under exceptional circumstances, in cases of extreme urgency and *in flagrante delicto*, private citizens are also authorized to arrest a suspect without prior judicial authorization.¹⁸

The lawfulness of the arrest may be examined through the *habeas*

¹⁴ See below.

¹⁵ Art. 520 (2) CCP.

¹⁶ Art. 17.2 Spanish Constitution.

¹⁷ Art. 17.3 Spanish Constitution.

¹⁸ Art. 490 – 492 CCP.

corpus procedure at any time, where there are reasons to suspect a breach of defence rights related to the arrest or detention.¹⁹ The *habeas corpus* procedure enables the defendant to exercise his right to be brought in front of a judge who determines the lawfulness of detention. The review thus undertaken leads to the release of the individual who has been either taken into custody in an illegal manner or is retained in an unlawful way. Detention is declared in any event illegal when the detainee was put into custody in breach of the formalities and requirements set forth by law. More specifically, persons considered to be illegally detained are: those detained by a member of the public or non-judicial authority without a legal basis or without observing the formalities and requirements demanded in that respect by the law; those detained for a longer period than allowed by law if, after this period, they are not released or are not handed over to the Judge closest to the place of detention.

After the arrest and during detention, Spanish Constitution and procedural law grants to the individual a comprehensive set of safeguards, designed to sustain the ability of the accused to actively participate in the pre-trial phase, to assert his innocence and exercise his defence. Such guarantees encompass different safeguards contained in EU Directives, such as, among others, the right to legal assistance,²⁰ the right to be informed of the contents of the accusation,²¹ the right to access the materials of the case file.²² In particular, after the entry into force of the new CCP, Articles 118 and 520 referring to the participation of the lawyer in criminal proceedings strengthened the rights of suspects and accused persons. In particular, Spanish law guarantees the right of the accused persons and their lawyers to be informed in writing, immediately and in a language they understand of the reasons and facts related to the detention. They must also be informed of the maximum length of detention. The accused person has the right to appoint a lawyer of his choosing, with whom he can communicate in private - even via telephone or videoconference in the event they are distant from the place of detention – before the police questioning.²³ In order to be able to examine and discuss the legality of the detention, the defence

¹⁹ Organic Law no 6/1984 of May 24.

²⁰ Art. 527 CCP in accordance with Art. 6 ECHR.

²¹ Art. 24.2 Spanish Constitution in accordance with Art. 6 Directive 2012/13/EU.

²² Art. XXX CCP in accordance with Art. 7 Directive 2012/13/EU.

²³ Art. 527 CCP.

lawyer has access to the police statements before the questioning of the accused person. Furthermore, he has the rights to obtain a copy and verify, after the conclusion of the questioning, the accuracy of the transcription of statements made by the accused in the report he is given to sign. The accused person may renounce to the mandatory assistance of a lawyer if he has been detained for facts that can be classified exclusively as road safety offences. The accused has the right to communicate in private with his lawyer at the end of the procedure in which they have participated.

3.3. *Detention pending trial*

Detention on remand can only be ordered by a judicial decision.²⁴ In the pre-trial stage of criminal proceedings, the power to order detention falls within the competence of the investigating judge. He has competence to order pre-trial detention in case of serious crimes,²⁵ some less serious offences²⁶ and, irrespective of the penalty, whenever the special circumstances of the case justify the need to protect the victims. Furthermore, remand for custody must fulfil one of the following legitimate aims: prevent a danger of absconding; avoid, where necessary, disappearance of evidence; prevent the risk of re-offending; prevent serious risks that the accused will act against the victim.²⁷ Detention pending trial may only be used in cases when it is objectively necessary and whenever no other less intrusive means restricting the right to liberty could be taken. The warrant²⁸ ordering pre-trial detention or its continuation must be reasoned, providing indication of the grounds justifying detention and its legal basis.²⁹

As mentioned above, the person deprived of his liberty must be brought in front of a judicial authority within 72 hours.³⁰ The judicial authority will then determine, having regard to the offence, whether to order provisional release (without bail) or, hold a hearing

²⁴ Art. 502 CCP.

²⁵ Crimes punished of at least 3 years of imprisonment.

²⁶ Criminal offences punished of at least 2 years, but less than 3 years of imprisonment.

²⁷ Art. 503 CCP.

²⁸ *Auto* in Spanish.

²⁹ Art. 506 CCP.

³⁰ Art. 17 Spanish Constitution.

to order provisional detention pending trial.³¹ The hearing must take place as soon as possible, within 72 hours of the detainee being presented to the judge. In order to be able to participate in this hearing, the defendant has the right to legal assistance. Defence must be granted full access to the case file as far as it contains materials that are essential to challenge the pre-trial detention order.³²

Judicial review *ex-officio* and upon request. The review of the lawfulness of continued detention may be carried out by a judicial authority at reasonable intervals or at any time the judge considers it necessary to take into account information on the situation of the detainee.³³ It may also be carried out whenever a *habeas corpus* procedure is requested. In addition, the person placed under detention on remand can appeal against the decision ordering detention pending trial to the Court of Appeal (*Audiencia Provincial*).³⁴ Continued detention may be justified only in cases where there are indications justifying the need to protect a public interest, which outweighs the presumption of innocence and thereby justifies a restriction to the individual liberty. In such cases, a person may be released whenever the reasons for his retention no longer exist.

Defence rights and effective judicial review. In any event, the scope of judicial review over detention orders encompasses both the merits and the compliance with the procedural safeguards. In this regard, it is worth mentioning that the rights recognized in Directive 2012/13/EU have all been implemented into the CCP. This includes the right to legal assistance,³⁵ the right to be informed of the reasons of the detention³⁶ and the right to access documents essential to challenge the lawfulness of arrest and detention,³⁷ the right to be heard in person³⁸ and the right to translation and interpretation.³⁹

³¹ Art. 505 CCP.

³² Art. 505 CCP.

³³ Art. 520 bis (2) CCP.

³⁴ Art. 507 CCP.

³⁵ Art. 118 and 520 CCP.

³⁶ Art. 302 CCP.

³⁷ Art. 505 (3) CCP.

³⁸ Art. 24 Spanish Constitution and Art. 775 CCP.

³⁹ Art. 123 CCP, in the light of Art. 6 (3) c ECHR and Directive 2010/64/EU.

3.4. *Arrest and detention order for questioning*

Spanish law allows arrest and detention for the purpose of questioning when a person fails to present himself voluntarily after having been summoned to appear before the Investigating Judge.⁴⁰ The lawfulness of such measure is assessed by the Investigating Judge or by the Court of Appeal upon request of the parties at any time.

The order of arrest for questioning can be challenged through a request for reconsideration (*reforma*)⁴¹ addressed to the same judge that issued the order. The defence can challenge the lack of reasoning of the order, or the failure to recur to other means to force the defendant to appear before the judge. The time limit to request reconsideration is 3 days from the order being issued. Whenever this request for reconsideration is rejected, the defence can challenge the order in a subsidiary manner through appeal.⁴²

Even though procedural safeguards enacted by the EU Directives are set forth in order to ensure the legality of the questioning, national legislation still holds room for improvement in matters concerning the participation of the defence to such questioning. Procedural legislation foresees that the intervention of the defence attorney must occur after the questioning of the accused, thus contradicting Directive 2013/48/EU that requires the lawyer not only to be present, but also be able to ‘participate effectively’ during the questioning.⁴³

4. **Specific remedies for alleged breaches of defence rights in the pre-trial stage of criminal proceedings**

4.1. *Restrictions on the right to access the case file*

Directive 2012/13/EU on the right to information in criminal proceedings has been transposed in Spain by the Organic Law no 5/2015 of April 27⁴⁴ amending the CCP and the Organic Law on the Spanish Judicial Body. The said organic law amends several provisions of the Spanish Code of Criminal Procedure (CCP), among others Articles 302 and 505.3 CCP that govern the right to

⁴⁰ Art. 487 CCP.

⁴¹ Arts. 217 and 384 CCP.

⁴² Arts. 217, 219 and 766 CCP.

⁴³ Art. 3 (3) Directive 2013/48/EU

⁴⁴ BOE 28 April 2015.

information in criminal proceedings. The former establishes that ‘the parties are informed about the proceedings and intervene in all stages of the proceedings’.⁴⁵ Moreover, ‘the counsel of the investigated or prosecuted party shall, in any case, have access to the elements of the proceedings that are essential to challenge the deprivation of liberty of the investigated or prosecuted party’.⁴⁶

The authority competent for granting or refusing access to the case file is the judge responsible for investigating the case. No fees are charged for accessing the case file. Pursuant to Article 118 of the Spanish CCP, any person who is accused of a criminal offence may exercise the right of defence and intervene in the proceedings from the moment the existence of such punishable act is reported, if he has been detained or faces any other preventive measure, or when prosecution has been started against him.

The right to access materials of the case file has raised specific questions with regard to right of the lawyer to access documents that are essential to challenge the deprivation of liberty.⁴⁷ In this respect, it is worth noting that Article 527 CCP establishes that in cases of solitary confinement, the detainee may be deprived of the following rights: a) appoint a lawyer of his trust; b) communicate with all or any of the persons with whom he is entitled to do so, except with the judicial authority, the Public Prosecutor and the Medical Examiner; c) private interviews with his lawyer, and d) access for him or his lawyer to proceedings, except for the essential elements necessary to challenge the legality of detention. The conclusion to be drawn from the above rules (reformed in 2015) is that in no case may the detainee or his lawyer be deprived of the information necessary to challenge the legality of detention or deprivation of liberty. One of the problems that arises from this issue is that is it not predetermined what are the documents that may be considered essential to challenge the legality of arrest or deprivation of liberty,⁴⁸ such as for instance the police statement. The Resolution no 2 issued by the Investigating of Pamplona, dated November 9, 2016, provides a clear answer to this problem:

‘Of course, the essential supposition necessary for any detention to

⁴⁵ Art. 302 CCP.

⁴⁶ Art. 505.3 CCP.

⁴⁷ Art. 520 CCP.

⁴⁸ As noted by one of the practitioners interviewed.

be lawful is that there is reasonable evidence that the detainee has committed or participated in an act constituting an offence. Therefore, the first thing to which the detainee and his lawyer must have access is to the facts that constitute the offense by which that person is detained and to those signs that allow an indication of the existence of an offence. It is therefore necessary that regarding the part of the report to which the detainee and his lawyer are to have access, in writing, be told what specific charges are attributed to the detainee (...). Regarding the proof (...), it is necessary to reflect a minimum summary of what has allowed the police to attribute the commission of such a crime to the detainee in the proceedings so that the lawyer can verify that the police action was not due to pure whim or the will of the police officer practising detention (...). It will also be necessary to provide, for the detainee and his lawyer to have access to these reports, where the reasons that led to, in each specific case, deprivation of liberty of the detainee (...). And, finally, it will be necessary for the detainee and his lawyer to have access to the items of the proceedings in which all the specific circumstances of the detention are documented (place, date and time in which this was done; and effective enforcement by the police of these rights (...)).⁴⁹

Recently, the judgment of the Spanish Constitutional Court of January 30, 2017 granted protection to a citizen whose lawyer was denied access to the police file opened after his arrest by the Civil Guard, whose situation was not subsequently corrected by the Investigating Judge who dismissed the *habeas corpus* petition.⁵⁰ The application for constitutional protection alleges that access to the police file is a claimable right under Directive 2012/13/EU, although it had not yet been incorporated into Spanish law at the time of the events. The Directive set the deadline for transposition in June 2014 and Spain failed to comply with this obligation until 2015. The Constitutional Court ruled that EU Directives are binding before transposition when the State fails to meet the deadline set for such and considers that the rights to individual liberty and legal assistance during the detention have been violated.

⁴⁹ Regarding the digitization of materials, the national legislator strongly supports the use of new technologies in the administration of Justice.

⁵⁰ TC (Spanish Constitutional Court) no 13/2017.

Besides the above-mentioned restrictions on defence rights in case of solitary confinement,⁵¹ further restrictions of the right of access to the case file are provided under Article 302 and 505 CCP in case of ‘confidential proceedings’, when an individual is held in pre-trial detention. The wording of these provisions is far from clear. Article 302 establishes that if the offence is public, the Investigating Judge may, at the request of the Public Prosecutor, of the parties or *ex officio* declare the proceedings, by order, totally or partially confidential to all parties involved, for a period not exceeding one month when it is necessary so as to: a) avoid a serious risk to the life, liberty or physical integrity of another person; or b) prevent a situation that could seriously compromise the outcome of the investigation or trial. Confidentiality must necessarily be lifted at least ten days prior to indictment. Article 302 CCP merely refers to the fact that such confidentiality must nevertheless be compliant with Article 505 paragraph 3 CCP, guaranteeing the right of the defence counsel to access items of the case file that are essential to challenge the detention.

Spanish law does not provide specific remedies available to the defendant against breaches of the right of access to the case file. Nonetheless, he may use the general remedies of consideration, appeal and complaint against the decisions of the Investigating Judge. In particular, remedies for consideration are available against all decisions of the investigating judge, whilst appeals may be lodged only in those cases defined by law. The complaint may also be filed against all non-appealable decisions of the Judge, and against decisions that deny the acceptance of an appeal. The remedies of consideration and appellate procedure must be filed before the same Judge who issued the order. The complaint remedy will be made before the competent High Court.

4.2. *Derogations on the right to access a lawyer*

Among the range of rights granted to suspects and accused persons, the right to access a lawyer is of particular importance since the lack of legal assistance risks to hamper the effective exercise of other procedural safeguards. In this regard, Spanish legislation clearly guarantees the right to access a lawyer in line with the requirements

⁵¹ Art. 527 CCP.

stemming from the ECHR and the EU Charter of Fundamental Rights.⁵² The Organic Law 13/2015⁵³ amending the Spanish CCP to strengthen procedural safeguards and regulate technological investigative measures transposed Directive 2013/48/EU on the right to legal assistance in criminal proceedings into national law.

The resulting reforms implementing the Directive may be summarized as follows. First, any person accused of a crime may exercise the right of defence by intervening in the proceedings from the moment he is charged, irrespective of whether he has been arrested or not, he is the subject of other preventive measures or has agreed to be tried.⁵⁴ The right to defend oneself is clearly and precisely recognized.⁵⁵ Indeed, Spanish law provides that the suspect may exercise his right of defence without any restrictions other than those provided for in the law, from the moment he is accused of the investigated offence until the termination of the proceedings.

Second, the right of defence includes the right to appoint a legal counsel or, failing that, to a court-appointed lawyer. The suspect has the right to communicate and meet in private with his lawyer at any time after being accused of a criminal offence. Moreover, the presence of the lawyer is guaranteed during the questioning of the suspect or accused person, all identity parades and reconstructions of the crime scene. In case of detention, the right to appoint a counsel arises from the time of arrest or provisional detention.

Third, communications between the suspect and his lawyer are confidential unless there is objective evidence of the lawyer's participation in the investigated crime or his involvement in committing another criminal offence with the defendant. In the same vein, it is important to emphasize that if these conversations or communications have been tapped or recorded, the judge orders the destruction of the recordings and hands over to the recipient any secret correspondence intercepted.

Where the suspect or accused person is deprived of his liberty, the right to access a lawyer under Spanish law is in line with the requirements set forth by the EU Directive. This includes the

⁵² C Arangüena Fanego, 'El derecho a la asistencia letrada en la Directiva 2013/48/UE' (2014) 32 *Revista General de Derecho Europeo*.

⁵³ Organic Law 13/2015 of October 5

⁵⁴ Art. 118 CCP.

⁵⁵ It should be noted that legal assistance is not mandatory for minor offences.

detainee's right to appoint a lawyer with whom he can meet privately,⁵⁶ even before being questioned by the police, the prosecutor or the competent judicial authority.⁵⁷ However, detainees may waive the right to the mandatory presence of a lawyer when arrested for acts that might be exclusively characterized as crimes against traffic safety, as long as they have been given clear and adequate information in a simple and comprehensible language on the content of that right and the consequences of the waiver. The lawyer takes part in the detainee's interrogations and in the reconstruction of the facts in which the detainee is involved. He can request, where appropriate, that the detainee is informed of the rights included in Article 520 CCP and, if necessary, undergoes a medical examination. Furthermore, the lawyer must inform the detainee of the consequences of providing or refusing to provide consent to certain acts, such as for instance DNA samples.

Grounds for temporary derogations apply in case of solitary confinement or isolation for serious offences only in the pre-trial stage.⁵⁸ This complies with Article 3(6) Directive 2013/48/EU, which refers to the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or to prevent substantial

⁵⁶ Technological means such as video made be used to ensure immediate access to a lawyer.

⁵⁷ According to the Resolution issued on 9 November 2016 by the Investigating Judge of Pamplona, 'the lawyer appointed for the legal defence of a detainee may not delay his appearance in the police station where the detainee is held beyond three hours provided in Article 520.5, last paragraph of the Spanish CCP and that regardless of whether or not the detainee is going to make a declaration within the said period, since legal assistance for the detainee goes much further than the mere presence of the lawyer in his Declaration, as indicated in article 520.6 of the Spanish Criminal Procedure Law (...) The guiding role of the detainee's lawyer has been reiterated in numerous judgments of the Constitutional Court and the European Court of Human Rights, and first of all verifies the physical and legal situation of a person deprived of liberty, Which is the principal function of the detainee's lawyer, which may only be carried out in the presence of the lawyer in police stations in order to check the physical condition of the detainee and that all legal provisions are respected regarding that person. Specifically the rights provided for in Article 520 of the Spanish Criminal Procedure Law'.

⁵⁸ In case of solitary confinement, a person may be deprived of the following rights if it is justified in the light of the specific circumstances of the case: a) right to appoint a lawyer of his choosing; b) right to communicate with all or some of the people he is entitled to, except with the judiciary, the prosecution and the coroner; c) right to meet his lawyer in private; d) access by his lawyer to the case file, exception made for those documents essential to challenge the lawfulness of detention.

jeopardy to criminal proceedings.⁵⁹ In particular, according to Article 527 CCP, the detainee or prisoner may be deprived of the possibility to appoint a lawyer of his choosing, although a lawyer may be appointed *ex officio*. It should be pointed out that this is not a ‘derogation’ of the right, but a restriction on exercising the right of defence in the broad sense since it limits free designation.

Spanish law provides the defendant with the possibility to challenge a decision applying derogations to the right of access to a lawyer during the pre-trial stage of proceedings. Available remedies are appeals against interlocutory resolutions⁶⁰ and applications for ‘*amparo*’ with the Spanish Constitutional Court for violation of fundamental rights.

With regards to the appeals against interlocutory resolutions, these are lodged with the Court of Appeal that has far-reaching powers of review. Once the Court ascertains a violation of a defence right, it declares the impugned procedural act null and void in the following cases: 1) when the challenged act was adopted by a court with no jurisdiction or lack of objective or functional jurisdiction; 2) when the act is carried out under violence or intimidation; (3) when essential procedural rules are disregarded, provided that such irregularity hinders the right of defence; 4) when the acts are performed without the intervention of a lawyer, in cases in which the law provides his mandatory presence; 5) when hearings are held without the mandatory intervention of the court-appointed lawyer; 6) in other cases in which the procedural law provides for a ground for nullity.⁶¹

4.3. Decisions finding that there is no need for interpretation

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings has been implemented in Spain by the Organic Law no 5/2015, of April 27, which amended the CCP and the Organic Law on Judicial Power.⁶² The resulting amendments enhance the

⁵⁹ J Obach, ‘El derecho de defensa en la detención y prisión incomunicada tras la reforma de la LO 13/2015 de la Ley de Enjuiciamiento Criminal’, in J Alonso-Cuevillas Sayrol (ed), *El nuevo proceso penal tras las reformas de 2015* (España, Atelier, 2016) 153 ff.

⁶⁰ See *supra*.

⁶¹ Art. 238 Judiciary Organic Act.

⁶² C Arangüena, ‘El derecho a la interpretación y a la traducción en los procesos penales’ (2011), *Revista General de derecho Europeo*, 24; C Fernández Carrón, *Dercheo a interpretación y a traducción en los procesos penales* (Valencia, Tirant lo Blanch, 2017).

application of the right to interpretation, thus strengthening the right of defendants and the guarantee of a fair trial.

A new article has been introduced to guarantee a set of rights for suspects or accused who do not speak Spanish or the official language in which the investigation and the proceeding takes place, i.e. the official languages of certain regions such as Catalan or Basque.⁶³ Article 123 CCP provides the following guarantees. First, the right to be assisted by an interpreter extends to all procedural steps in which the presence of the suspect or accused is required, including questioning by the police or the prosecutor, and in all court hearings. The provision also guarantees the right to be assisted by an interpreter in conversations held with one's lawyer to prepare the defence, covering any action directly related to any questioning or hearing during the proceedings, or when lodging an appeal or other procedural actions. The defendant has the right to interpretation in the trial stage of the criminal proceedings, which in principle must be simultaneous. However, if such a service is not available, consecutive interpretation is allowed provided that it ensures sufficiently the defence of the accused.

Furthermore, as a direct result of Article 4 Directive 2010/64/EU, the administration is expected to bear the costs of interpretation, regardless of the outcome of the trial. Spanish law allows the possibility of providing assistance by videoconference or any other means of telecommunication, unless the Judge or Prosecutor, *ex officio* or at the request of the interested parties or the defence, considers that the physical presence of the interpreter is necessary to safeguard the right of defence. This is certainly a change, since so far it has been common in Spain to have an interpreter assisting the accused or defendant in person.⁶⁴ Regarding oral interpretations or by sign language, these may be documented with an audio-visual recording of the original statement and interpretation, unless recording equipment is not available, or if the translation or interpretation is not deemed appropriate or necessary.

As for the role of interpreters and translators, it is important to note that they are not obliged to testify,⁶⁵ thus ensuring the confidentiality of interpretations and translations as required by the Directive. Moreover,

⁶³ Art. 123 CCP.

⁶⁴ Art. 123.5 CCP.

⁶⁵ Art. 416.3 CCP.

interpreters and translators must respect the confidentiality of the service provided.⁶⁶

Court interpreters or translators are appointed from the lists drawn up by the administration. According to the Organic Law no 5/2015, the Government shall present, within a maximum period of one year from the publication of this Law, a draft law establishing an official register of translators and court interpreters for the registration of all professionals who have the proper licensing and qualification. This measure is aimed to enhance the quality of the linguistic assistance provided. In case of urgency, however, other persons familiar with the language may be appointed as temporary interpreters or translators if deemed qualified for this task.⁶⁷ The entire system is strengthened by enabling the judge or prosecutor to conduct any necessary checks in cases where they consider that the translation or interpretation has not provided sufficient guarantees and, if necessary, they may appoint a new translator or interpreter.

Finally, it is possible to waive the right to interpretation and/or translation provided that this is done expressly and freely. The waiver is valid only if it occurs after the accused or defendant has received adequate legal advice that allows him to be aware of the consequences of such waiver. Lastly, the right to be assisted by an interpreter in court hearings and proceedings before the trial court is inalienable.⁶⁸

In the pre-trial stage of criminal proceedings, the defendant has the possibility to challenge the decision finding that there is no need for interpretation.⁶⁹ The remedy provided under Article 125 (2) CCP refers to decisions of the Judge or Court both in the pre-trial or trial stage of the proceedings. Such a decision denying the assistance of an interpreter must be recorded in writing. In the pre-trial stage, if the impugned judicial decision is a ruling, an appeal may be filed with the same investigating judge, who will have jurisdiction to review the challenged act.⁷⁰ Although the law does not provide any specific remedy against the decisions of the investigating judge on such appeal, the issue may nevertheless be raised in the appeal against the final judgment with the competent higher court.⁷¹ In case of arrest or

⁶⁶ Art. 124.2 CCP.

⁶⁷ Art. 124 CCP.

⁶⁸ Art. 126 CCP.

⁶⁹ Art. 125.2 CCP.

⁷⁰ Art. 216, 217, 219 and 220 CCP.

⁷¹ Art. 218, 219, 221, 233-236 CCP.

detention, the violation of the right to interpretation may be raised during the *habeas corpus* procedure provided by the Law no 6/1984.⁷²

Likewise, when the Court, the Judge or Public Prosecutor, *ex officio* or at the request of a party, finds that interpretation does not offer sufficient guarantees of accuracy, they may order the necessary checks and, if necessary, the appointment of a new interpreter. In a similar way, persons with hearing or speech impediments contending that the interpretation provided does not offer sufficient guarantees of accuracy, may request the appointment of a new interpreter.⁷³

It is worth mentioning that the existing remedies are in line with Directive 2010/64/EU since they enable the defendant to challenge both unfounded denials as well as the quality of the interpretation provided, in so far as these procedural defects impair the effective exercise of defence. In such cases, the violation of the right to interpretation entails the nullity of the impugned decision.

A breach of the right to interpretation may also be raised as a preliminary objection at the beginning of the court hearing.⁷⁴ If the failure to provide adequate interpretation persists, the defence lawyer shall raise a formal objection that must be recorded, thus allowing him to raise the alleged violation of the right in the appeal against the final judgement.⁷⁵ If the alleged violations of the right to interpretation are dismissed on appeal, the defendant may lodge an appeal for breach of procedural requirements before the Criminal Chamber of the Supreme Court, alleging a violation of Article 24 (2) of the Spanish Constitution, which guarantees the right to a fair trial.⁷⁶ According to the case law, the defendant shall demonstrate that the violation of the right to interpretation deprived him of the possibility to defend himself.⁷⁷ Lastly, the '*recurso de amparo*' in

⁷² See among other TC (Constitutional Court) 95/2012, of 7 of May.

⁷³ Art. 124.3 and Art.846 bis c) CCP.

⁷⁴ Article 666 CCP or Art. 36.1 b) of the Organic Law of the Court of Jury.

⁷⁵ Art. 125.2 CCP.

⁷⁶ According to Art. 852 CCP.

⁷⁷ Supreme Court judgment of 26 January 2016 (STS 213/2016 - ES: TS: 2016: 213): 'The appellant highlights what he considers to be translation defects, but does not specifically mention any that has caused material loss to the appellant on the grounds that he has misled the sentencing court. The purpose of this plea cannot be for the Court of Cassation to analyse in detail all the answers given by the appellant and the technical correction of each of the translations carried out by the official interpreter, but to indicate some specific translation error that may have affected the appellant's defence. And the truth is that having examined the set of questions,

front of the Constitutional Court is also available to the defendant after exhaustion of all ordinary remedies.

4.4. *Decisions finding that there is no need for translation*

The Organic Law no 5/2015 implementing Directive 2010/64/EU has also introduced legislative modifications as regards the right to translation in criminal proceedings. The suspects or defendants who do not speak Spanish or the official language in which the investigation and the process takes place, have first the right to a written translation of documents that are essential to guarantee the right to defence.⁷⁸ Decisions ordering detention, the indictment and sentencing of the defendants must be translated *ex officio*, as required under Article 3 (2) Directive 2010/64/EU. Among the essential documents needed to guarantee the exercise of the right of defence are also certain parts of the police report recording actions that may have evidentiary value in the oral trial. The accused can always submit a reasoned request for the translation of other documents that he considers essential.

Furthermore, as a direct result of Article 4 Directive 2010/64/EU, the administration is expected to bear the costs of translation, regardless of the outcome of the trial. The translation must be provided in a reasonable time and, upon agreement of the Court or Prosecutor, all procedural deadlines are suspended for that period.⁷⁹

Spanish law provides, however, for the possibility not to translate certain parts of essential documents that are not deemed necessary for the accused or defendant to understand the facts against him. The judge, court or other competent official enjoy discretion in determining whether passages of documents and materials are essential. Moreover, in exceptional circumstances, such written translations may be replaced by an oral summary of their content in a language that the suspect or accused person understands, provided that the right of defence is sufficiently guaranteed.⁸⁰

The remedies against decisions finding that there is no need for translation are the same as those applied to decisions finding that

answers and translations related by the appellant we fail to appreciate that there are any that may have caused some impairment to the appellant's defence'.

⁷⁸ Art. 123 CCP.

⁷⁹ Art. 123.4 CCP.

⁸⁰ Art. 123.3 CCP.

there is no need for interpretation.⁸¹ Indeed, Article 125 (2) CCP provides that ‘the decision of the Judge or Court which denies the right to the interpretation or translation of any document or passage thereof that the defence considers essential, or which rejects the defence’s complaints regarding the lack of quality of the interpretation or the translation provided, will be documented in writing (...) Against these judicial decisions an appeal may be lodged’.

4.5. *Violations of the right to information*

Directive 2012/13/EU on the right to information in criminal proceedings has been implemented in Spain by the Organic Law no 5/2015, of April 27, which amended the CCP and the Organic Law on Judicial Power. The need for an adequate guarantee of the right to information in criminal proceedings has also led to a subsequent amendment of the CCP by the Organic Law no 13/2015, of October 5, to strengthen procedural guarantees and regulate measures of technological investigations. The above-mentioned implementing statutes amended the rules guaranteeing the right to information in criminal proceedings by providing detailed legal requirements that ensure the effective exercise of defence rights guaranteed in Article 24 of the Spanish Constitution.

Under Spanish law, any person accused of a crime must be informed of the charges against him, as well as of any relevant change leading to a new characterization of the investigated offence. He has the right to access materials of the case file in timely manner as to safeguard the right of defence, the right to appoint a lawyer of his choosing, the right to seek legal aid, the conditions to do so and the procedures to obtain it, the right to free interpretation and translation, the right to remain silent and not give evidence if one does not want to and the right not to testify against oneself or confess his guilt.⁸² The suspect or accused must be informed about all these rights in a language he understands, adapted to the age, level of maturity, disability or any other personal circumstances of the defendant or detained. In addition, in cases of detainees or prisoners, information of rights must always be provided in writing, and this is the main novelty introduced in the Spanish system.

⁸¹ See *supra*.

⁸² Art. 118 CCP.

With respect to the right to information of detainees or prisoners, it was necessary to complete the list of rights referred to in Directive 2012/13/EU, among others, with the right of access to the materials of the proceedings that are essential to challenge the legality of detention or deprivation of liberty. Also worthy of mention is the right to information regarding the maximum period of detention before being brought in front of the competent judicial authority and the procedure for challenging the lawfulness of detention. All this information must be provided in writing.⁸³ Moreover, Spanish law provides that the assistance of a counsel for detainees or prisoners includes the possibility to request, if not done previously, that the detainee or prisoner is informed of their rights and undergoes a medical examination⁸⁴.

In case of relevant changes in the subject of the investigation and the charges, defendants must be informed ‘promptly’, as required under Article 6 Directive 2012/13/EU. On the other hand, this information can be succinct, provided that it allows first the exercise of the right of defence, and secondly, is communicated in writing to the defence lawyer.⁸⁵ Also, time requirements further strengthen the right to information. Thus, the defendant must receive such information without undue delay and, in the cases of detainees or prisoners, it must be provided immediately.

In case of arrest or detention, the person deprived of his liberty can claim a breach of the right to be informed about his rights guaranteed under Articles 118 and 520 CCP by requesting an *Habeas Corpus* procedure, which aims to ensure the immediate handing over to the judicial authority of the detainee.⁸⁶ The request is submitted before the competent Court having jurisdiction to hear the request according to the Organic Law no 6/1984.⁸⁷ The governmental authority, agent or other public official, shall be obliged to immediately notify the competent judge of the *Habeas Corpus* request made by the person deprived of freedom in their custody.

The implementation of the abovementioned rules does not raise significant problems in the judicial practice. When the investigation is declared confidential, restrictions on the right to access information

⁸³ Art. 520 CCP.

⁸⁴ Art. 520.6 a) CCP.

⁸⁵ Art. 775 CCP.

⁸⁶ TC (Constitutional Court) 95/2012, of May 7.

⁸⁷ Art. 2 Organic Law 6/1984, of May 24.

apply vis-à-vis suspects and accused person. This is however without prejudice to their right to be informed about the facts and charges on which they are accused.

5. Sanctions against illegal or improperly obtained evidence

As a general rule, evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall not be effective.⁸⁸ Claims alleging violations of a fundamental right against any illegal or improperly collected evidence may be raised as preliminary issues before trial courts at the beginning of the oral hearing.⁸⁹ Faced with this claim, the judge may consider that such evidence should be withdrawn or declared void. If no remedy against the alleged irregularity is provided during trial, the defence lawyer must lodge an objection in order to be able to raise the plea in the appeal against the final judgement.⁹⁰ In such circumstances, the ground for appeal consists in the breach of procedural guarantees that undermined the right of the accused to defend himself.⁹¹

According to the abundant jurisprudence of the Spanish Constitutional Court, Spanish law prevents the use of unlawful evidence obtained directly in violation of fundamental rights and freedoms. Only such violations entail the indirect or reflexive ‘non-usability’ of evidence derived from the one that was illegally obtained (so-called ‘fruit of the poisonous tree’ doctrine).

Breaches of other rules amount to a procedural irregularity, which is sanctioned with nullity according to Article 238 and following of the Organic Law of the Spanish Judicial Body. More specifically, procedural acts will be deemed null and void in the following cases: 1) when they are adopted by a court lacking jurisdiction or objective functional jurisdiction; 2) when they are carried out under violence or intimidation; 3) when essential procedural rules are disregarded, provided that this undermined the right of defence; 4) when these are performed without the intervention of a lawyer, in cases in which the law requires his mandatory presence; 5) when hearings are held without the mandatory intervention of the Court-appointed lawyer; 6)

⁸⁸ Article 11.1 Judiciary Organic Act.

⁸⁹ Article 666 CCP or Art. 36.1 b) of the Organic Law of the Court of Jury.

⁹⁰ Art. 125.2 CCP.

⁹¹ Art. 846 *bis* CCP.

in other cases in which the procedural law establishes a ground for nullity.⁹²

Examples of the above-mentioned rules can be found in the prolific case law of the Spanish Constitutional Court. An illustration thereof is the exclusion of statements obtained in breach of the right to access a lawyer. According to the Spanish Constitution, all detained persons must be immediately and comprehensively informed of their rights and the reasons for their detention, and they may not be forced to testify. The assistance of a lawyer is guaranteed to the detainee in police and judicial proceedings, according to the requirements established by law.⁹³ Furthermore, the defendant has the right to use evidence appropriate to his defence, to not make self-incriminating statements and to not declare guilty.⁹⁴ Having regards to these guarantees, the Constitutional Court held that the failure to appoint a legal counsel or public defender constitutes a violation of the right to effective judicial protection.⁹⁵

Conversely, in the judgment of the Spanish Constitutional Court number 229/1999, of December 13, the Court found that the right to legal assistance was not infringed in the case where the accused, who was not detained, during the first questioning before the judge without the presence of a lawyer, waived to his right to be assisted by a lawyer, after having been informed of such right by the judge.

As regards the right to interpretation and translation, the constitutional case law consistently held that to prevent the use of evidence collected in violation of such rights the defendant has to prove that the lack of linguistic assistance hampered the exercise of the right of defence.⁹⁶

More recently, in a judgement of 30 January 2017, the Court held that breaches of defence rights may result under certain circumstances from violations of the ABC Directives. The citizen was granted constitutional protection (*amparo*) after his lawyer was denied access to the police file opened after his arrest by the Civil Guard, a situation that was not subsequently corrected by the Investigating Judge who dismissed the habeas corpus petition. The application for

⁹² Art. 238 Judiciary Organic Act.

⁹³ Art. 17.3 Spanish Constitution.

⁹⁴ Art. 24.2 Spanish Constitution.

⁹⁵ TC (Spanish Constitutional Court) no 217/1997, of 4 December.

⁹⁶ TC (Constitutional Court) 338/2004, of 13 September. TS (Supreme Court) of January 26, 2016 (STS 213/2016 - ES:TS:2016:213).

'*amparo*' claimed that access to the police file is an enforceable right granted by Directive 2012/13/EU, although the latter had not then been implemented into Spanish law at the time of the events. Yet, Spain did not comply with the time-limit of June 2014 for transposing the EU Directive. The Constitutional Court gave direct effect to the EU legal provisions, ruling that EU directives are binding before formal implementation into national law when the State fails to meet the deadline for transposing it. As a result, the Court found a violation of the right to individual liberty and to legal assistance.

6. Appeals before second instance courts

In order to comply with Article 2 Protocol 7 ECHR, Spain has recently adopted a reform aimed at generalizing courts of second instance in criminal proceedings.⁹⁷ The Appeals Chambers have been created within the National High Court and the Supreme Courts of Justice of the Autonomous Communities are now entrusted with jurisdiction to hear appeals against the decisions handed down at first instance by the Provincial Courts. Appeals are the ordinary remedy '*par excellence*'. Judgments delivered by trial courts at first instance may be subject to review on the merits before second instance courts.⁹⁸

Indeed, Spanish law grants to the defendant the right to appeal against judgments and writs that put an end to the process. Decisions amenable to review by second instance courts are the following: first instance judgments delivered by the Provincial Court and by the Criminal Chamber of the National Court; judgments issued in the fast-track proceedings by the Judge of Criminal Cases and those handed down by the Judge on Duty; judgments handed down for minor offences by the Investigating Judges, as well as other decision putting an end to specific type of criminal proceedings, such as the proceedings before the Court with a Jury or the Juvenile Procedure; judgments issued by the Provincial Courts of Appeal or the Criminal Chamber of the National Court at first instance that may be appealed,

⁹⁷ Law 41/2015, of October 5 modifying the CCP for the improvement of criminal justice and strengthening of procedural guarantees: generalization of the second instance; extension of the appeal and incorporation of the judgements rendered by European Court of Human Rights against Spain.

⁹⁸ In this regard, one should distinguish appeals against interlocutory ruling that are delivered in the course of the proceedings and appeals against convictions and sentences. The present section will focus on the latter.

respectively, before the Civil and Criminal Chamber of the Superior Courts of Justice in each Autonomous Community and before the Appeals Chamber of the '*Audiencia Nacional*'; decisions that puts an end to the criminal proceedings on grounds of lack of jurisdiction or dismissal.

Specific procedural rules govern the access to second instance courts depending on the decision that is subject to appeal. As regards appeals against first instance judgments rendered by the Criminal Chamber of the '*Audiencia Nacional*', the Provincial Court, the Criminal Judge or the Central Criminal Court, the time limit for filing the appeal is ten days following the notification of the impugned judgment.⁹⁹ In principle, criminal appeals lead to a written procedure. However, the competent court may order the holding of a hearing where a request to produce evidence has been submitted and granted or if the court deems the hearing necessary.

As mentioned above, appeals are also available against trial judgments concerning minor offences and those rendered by the Criminal Judge in the field of fast-track prosecution. The first case includes judgments handed down in trials for minor offences by the Investigating or Criminal Law Judge. As regards the decision issued by the Criminal Judge in the context of fast-track criminal proceedings, the time-limit for lodging an appeal are reduced from ten to five days.¹⁰⁰

The scope of review of the above-mentioned appeals are limited. Appellate Courts do not hold a new trial, but simply review the judgement rendered at first instance. The grounds of appeal are the following: 1) breach of procedural rules and guarantees that undermined the effective exercise of defence; 2) error in assessing the evidence, because for instance of insufficiency or lack of rationality in the factual reasons, a clear departure from the rules of common knowledge, or lack of reasoning on one or any of the admissible evidence or on evidence that was unlawfully declared inadmissible; 3) infringement of constitutional or legal principles. As mentioned above, review by appellate courts over fresh evidence is limited; the Court normally only examines old evidence.¹⁰¹

⁹⁹ Art. 790 CCP.

¹⁰⁰ T Armenta Deu, *Lecciones de Derecho Procesal Penal* (España, Marcial Pons, 2016) 328-333. See also A M Lara López, *El recurso de apelación y la segunda instancia penal* (España, Aranzadi, 2014).

¹⁰¹ Art. 790 CCP.

The appeal may lead to the annulment of the acquittal or conviction, and, in such case, the case will be referred back to the body that issued the appealed decision. The judgment on appeal will specify whether the nullity should be extended to the oral proceedings and whether the principle of impartiality requires a new composition of the body of first instance in order to stage a re-trial.

When the judgment appealed against is annulled due to a breach of some essential procedural forms, the court grants, without entering into the substance, restoration of the *status quo ante*, notwithstanding actions whose content would be identical irrespective of the said violation. Where the appeal alleges an error in the assessment of the evidence, the competent Appellate Court has jurisdiction to review and correct the deliberation carried out by the first instance court.

As mentioned above, the Court of appeal has the power to review new or fresh evidence only in a limited number of cases. This applies to evidence that the appellant could not submit at first instance; to evidence presented at first instance that was not admitted without legal justification, provided that the appropriate objection was raised at that moment; to evidence admitted at first instance which could not be submitted for reasons not attributable to the appellant.

In addition, where only the convicted person lodges an appeal against the first instance judgement, the powers of review of Appellate Court are limited by the principle of *reformatio in pejus*. In this case, the second instance court cannot convict the accused who was acquitted at first instance, nor aggravate the sentence that had been imposed at first instance.¹⁰²

7. Appeals limited on errors of law

Judgments rendered by appellate courts can be subject to a review limited on points of law through appeals in cassation (*recurso de casación*) before the Supreme Court (*Tribunal Supremo*) or the High Court of Justice (*Tribunal Superior de Justicia*). In particular, the defendant has the possibility to lodge appeals for errors of law or violation of procedural requirements against the following acts: 1) judgments handed down in single instance or on appeal by the Civil

¹⁰² Art. 792 CCP. See E Guixé Nogués, ‘Consideraciones sobre el principio de non reformatio in peius y el actual sistema de recursos en el ámbito penal’ (2016) 2 *Justicia: revista de derecho procesal*, 215-254.

and Criminal Chamber of the Superior Courts of Justice; 2) judgments issued by the Appeals Chamber of the National Court and those handed down by the Provincial Courts in single instance. The following decisions are subject to appeal for breach of law: 1) judgments handed down on appeal by the Provincial Hearings and the Criminal Chamber of the National Court (except those that are limited to declaring the nullity of first instance judgments); 2) the documents for which the law expressly authorizes such appeals and the final orders issued at first instance and on appeal by the Provincial Courts or by the Criminal Chamber of the National Court, when they put an end to the proceedings due to a lack of jurisdiction or under certain circumstances decisions not to prosecute.¹⁰³

As regards procedural requirements, it is worth noting that the party must express his intention to appeal in cassation, indicating whether on grounds of substantive or procedural errors, within 5 days after the sentence was handed down.

The recent reform on criminal appeals mentioned above did not only strengthen the right to access second instance courts, it also expanded the number of criminal offences for which subsequent appeals in cassation are available. The unifying role of such remedy is aimed to enhance the consistency of criminal case law. Although it is still premature to assess the impact of the recent reform on cassation appeals in Spain, the extended scope of such remedy may lead to a significant increase in the number of cases brought before the Supreme Court, which might require the judicial practice to adapt. Nonetheless, appeals in cassation must be seen as extraordinary remedies based on limited grounds for appeal.

Appeals in cassation imply a review of the trial records in order to ascertain the alleged errors of law. As previously mentioned, appeals in cassation may be filed for breach of law and breach of form. On the one hand, violation of law arise: 1) when, given the facts that are proven in the resolutions subject to appeal, a substantive criminal law or other legal rule of the same character that must be complied with has been breached and 2) when there has been an error in the assessment of evidence, based on documents in the file which prove the error of the judge without being contradicted by other evidence.

On the other hand, violations of procedural requirements encompass violations of forms related to both the hearing and the

¹⁰³ Art. 847 and 848 CCP.

judgement. The following shall be understood as violations of form in the hearing: 1) when some evidence, which is presented in a timely manner by the parties, has not been admitted and is afterwards considered relevant; 2) when there is a lack of the summons of the accused, of the party who has subsidiary civil liability, of the claimants or of the civil plaintiff for their appearance at the hearing, unless the parties have appeared within the given period, after being summoned; 3) when the President of the Tribunal refuses to have a witness answer the question or questions that are addressed to him, when these are relevant and clearly influence the case; 4) when any question is dismissed for being suggestive or impertinent, when it is in fact not so, as long as it is of real importance for the outcome of the trial, and 4) when the Court has decided not to suspend the trial when the accused failed to attend, whenever there is a justified cause, and refuses to hear him, regardless of this fact and when there has not been any lack of declaration for failing to appear in court.

The reasons for the alleged breach of form in the judgment encompass the following cases: 1) when the judgment fails to express clearly and conclusively the facts considered proven, when there is a clear contradiction between such facts or it considers as proven facts concepts that, due to their legal nature should be predetermined; 2) when the judgment only states that the charges have not been proven, without expressly mentioning what facts are proven; 3) when it fails to decide on all the points that have been object of the accusation and defence; 4) when it punishes for a crime which is more serious than the one that was the object of the accusation, if the Court has not previously proceeded as determined by Article 733;¹⁰⁴ 5) when the judgment has been issued by less judges than required by law or lacking the contribution of votes required by the same, and 6) when a judge, that has been objected in due course, has taken part in rendering the judgment.¹⁰⁵

The higher courts have the power to quash the impugned decision. They can remand the case or, only when the court decides in favour the accused, reverse the decision. In particular, if the appeal in cassation claimed a violation of form, the result will be the annulment of the decision subject to appeal. The case is then referred back to the sentencing court. Likewise, if the appeal was filed due to an error of

¹⁰⁴ Art. 851 CCP.

¹⁰⁵ Art. 851 CCP.

law, the impugned decision may be annulled, whilst in case of errors in the assessment of evidence, the Court reviews the case on the merit.

8. Access to the Constitutional Court

Article 53 (2) of the Spanish Constitution provides the defendant with the possibility to submit an application seeking constitutional protection (*recurso de amparo*) against infringements of rights and public freedoms. This remedy is available only after all remedies and ordinary appeals have been exhausted. The deadline for filing an action seeking constitutional protection against judicial decisions is 30 days from the notification of the decision that ends the previous judicial proceedings. This appeal is initiated by a writ of claim before the Constitutional Court. In order for the action to be admissible, the application must justify the need for a review on the merits by the Constitutional Court. The judgment grants or denies the constitutional protection requested and, in the event that this protection is granted, it contains mention of the public right or freedom violated.

In practice, however, the Constitutional Court reviews only a limited number of *recurso de amparo*. The number of actions filed with the Constitutional Court that are declared admissible is very low. For instance, in 2011, only 80 ‘*amparo*’ remedies were admitted.¹⁰⁶ In 2015, the Chambers and Sections admitted 84 proceedings for ‘*amparo*’ and issued 7880 resolutions of inadmissibility¹⁰⁷. The main cause of inadmissibility is insurmountable defects of the claim.

9. Judicial review and the EAW

9.1. Competent judicial authorities

The Framework Decision 2002/584/JHA was implemented in Spain under the Law no 23/2014 regulating the European Arrest Warrant (EAW).¹⁰⁸ The law designates the authorities competent in Spain to issue and execute a EAW. On the one hand, the judicial authorities

¹⁰⁶ Statistical data are published in the Constitutional Court reports. See <<http://www.tribunalconstitucional.es/es/memorias/Documents/Memoria%202011.pdf>> Last accessed 19 July 2017.

¹⁰⁷ <http://www.tribunalconstitucional.es/es/jurisprudencia/InformacionRelevante/MEMORIA-2015.pdf>> Last accessed 19 July 2017.

¹⁰⁸ Law no 23/2014 of 20 November implementing the EAW.

having competence to issue a EAW are the judge or the court hearing the case in which such orders are issued. On the other hand, the competent executing authority is the Central investigation Court within the National Court. When the warrant concerns a minor, the decision falls within the competence of the Juvenile Central Court within the same National Court.¹⁰⁹

9.2. Defence rights in the execution of a EAW

Although Spanish law does not provide specific remedies against breaches of defence rights in proceeding for the execution of a EAW, pursuant to Article 3 of Law no 23/2014 the defence rights of the surrender person must be respected.¹¹⁰ In particular, Article 21 (1) of the said law states that ‘the execution of the order or resolution that has been transmitted by another Member State will be governed by Spanish law and will be carried out in the same way as if it had been issued by a Spanish judicial authority’. Therefore, procedural requirements and guarantees granted by the Spanish CCP to suspects and accused persons deprived of their liberty in the course of national criminal proceedings also apply in proceedings for the execution of a EAW. Thus, the general rules analysed in the previous sections are relevant.

Within a maximum period of seventy-two hours after arrest, the detained person shall be placed at the disposal of the Central Investigating Judge within the National Court. The issuing authority is informed about the arrest. The person brought before the judicial authority is informed about the existence and content of the EAW, the possibility to consent to surrender during the hearing before a judge, as well as of further rights he enjoys.¹¹¹

The hearing takes place in the presence of the Public Prosecutor, the

¹⁰⁹ Art. 35 of the 2014 Law implementing the EAW.

¹¹⁰ L Bachmaier ‘Quo vadis – el TJUE y su papel en materia de cooperación penal al hilo de la reciente jurisprudencia sobre la orden de detención y entrega’ (2016) 38 *Revista General de Derecho Europeo*. J Burgos (et al) *La cooperación judicial entre España y Italia. La orden de detención y entrega en la ejecución de sentencias penales* (San Sebastián, Instituto Vasco de Derecho Procesal, 2017). M Jimeno Bulnes, ‘Orden de detención europea’ in *La cooperación judicial civil y penal en el ámbito de la Unión Europea : instrumentos procesales*’ (Barcelona, Bosch, 2007) 299-348. VM Moreno Catena, ‘La orden europea de detención en España’ (2005) 78 *Revista del Poder Judicial*, 11-38.

¹¹¹ Art. 50 of the 2014 Law implementing the EAW.

defence lawyer and, if needed, the interpreter as provided in the CCP. Likewise, the right to legal assistance is guaranteed and, when the legal requirements are met, access to legal aid.¹¹² Indeed, the person detained on the basis of a EAW is entitled to access a lawyer under the same conditions as those provided under the CCP. It thus follows that the person subject to a EAW has at his disposal the same rights and remedies available to arrested and detained persons described in the previous sections.¹¹³ Hence, defence rights of the person subject to a EAW do not raise specific problems, as these rights are duly guaranteed in the Spanish system.

9.3. Judicial review and grounds for refusal

Spanish law does not provide for additional grounds for refusal based on breaches of the rights of defence other than those set forth in Articles 3 and 4 Framework Decision 2002/584. The national executing authorities check whether any of the grounds for refusal provided for in Law 23/2014 apply and, if not, whether other formal requirements set forth by law are met.¹¹⁴ In case of no procedural obstacles to the execution of the EAW, the judicial authority carries out a proportionality review.

Even if the executing judicial authority is aware of potential violations of fundamental rights of the person to be surrendered in the issuing State, this does not automatically lead to a refusal to surrender. In such situation, the issuing authority may be required to provide further guarantees. To this end, the executing judicial authority must request urgent information from the issuing Member State regarding detention conditions to which the person to be surrendered will be subject.¹¹⁵ The issuing judicial authority may thus offer guarantees to the executing State indicating, for instance, that the person will benefit from alternative measures to imprisonment or

¹¹² Art. 51 of the 2014 Law implementing the EAW.

¹¹³ According to Art. 24 of Law implementing the EAW ‘Against the decisions issued by the Spanish judicial authority deciding on the European instruments of mutual recognition, appeals may be lodged in accordance with the general rules provided for in the CCP. The appeal may suspend the execution of the order or resolution when it might create irreversible situations or cause damages impossible or difficult to remedy, adopting in any case precautionary measures to ensure the effectiveness of the resolution’.

¹¹⁴ Art. 47 of the 2014 Law implementing the EAW.

¹¹⁵ Art. 30 of the 2014 Law implementing the EAW.

that he will serve the sentence in a penitentiary centre where detention conditions respect international standards. Once the information has been received, the executing judge can rule out the existence of alleged risks of inhuman and degrading treatment.¹¹⁶ If such risks are ascertained, the judicial authority shall grant the release. If, on the other hand, the additional information submitted indicates that the risk persists, the executing judicial authority must defer surrender for a reasonable period of time in accordance with Article 17(4) Framework Decision.¹¹⁷

Within this period of time, the executing judicial authority determines whether provisional detention is excessive and consequently grants provisional release. Nonetheless, it must take all necessary measures to prevent the person to be surrendered from escaping and thereby ensure his possible future surrender.¹¹⁸ This requires the executing judicial authority to act in accordance with the principle of proportionality and to take into account the presumption of innocence of the person to be surrendered. But, even if the existence of the risk persists after a reasonable period of time or, in other words, the guarantees given by the issuing judicial authority are insufficient, the Spanish executing authority will have to decide whether to end the surrender procedure. There is no doubt that refusal is a measure of last resort, precisely because it is an exceptional check on the part of the executing judicial authority as to whether fundamental rights are respected in the issuing Member State.

The Spanish Constitutional Court confirmed that such a refusal is possible, although not expressly provided for by the Law 23/2014. Nonetheless, it is for the defendant to provide reliable and specific evidence supporting his claim, which corroborate alleged risks of inhuman and degrading treatment in the issuing State. General allusions or allegations denouncing detention conditions in the foreign country are insufficient.¹¹⁹

As regards EAW that seek to enforce judgements rendered *in*

¹¹⁶ The decision taken by the Spanish executing authority is without prejudice to the possibility for the requested person to use legal remedies available in the issuing Member State that enable him to question the detention conditions.

¹¹⁷ Art. 23 of the 2014 Law implementing the EAW. The said period of a maximum of 30 days. EUROJUST shall be informed of the reasons for the delay.

¹¹⁸ Art. 53.3 of the 2014 Law implementing the EAW.

¹¹⁹ See TC (Spanish Constitutional Court) : 30 March 2000, no 91/2000 ; 13 February 2003, no 32/2003 ; 13 September 2004, no 148/2004 ; 4 June 2007, no 140/2007 ; 28 September 2009, no 199/2009.

absentia, Spanish law implements Article 4a (1) of the Framework Decision 2002/584. In this case, the executing authority proceeds to the surrender provided that the person benefits in the issuing State of the right to a new trial or to appeal against the judgment rendered *in absentia*.¹²⁰ In such circumstances, if the person did not receive official notification of the decision rendered *in absentia*, he may request a copy of the sentence at the time when he is informed of the content of the EAW. The issuing authority, through the Spanish judicial authority, shall provide the interested party with a copy of the judgment immediately. In any event, the request of the copy does not delay the surrender procedure nor the decision to execute the EAW.¹²¹

EAW issued for the purpose of executing a sentence rendered *in absentia* may raise problems, notably where the request for surrender does not specify whether the conviction in the issuing State has been rendered in the absence of the accused or without due notice to the convicted person. The defence rights of the person subject to a EAW because of convictions for particularly serious crimes rendered *in absentia* are at the heart of several judgements rendered by the Spanish Constitutional Court.¹²² For instance, the ruling of 7 April 2014 dealt with a EAW issued without the requesting authorities guaranteeing a possible review of the judgments rendered *in absentia*. In the case in question, however, the Constitutional Court noted that the applicant was in fact aware of the criminal proceedings and voluntarily failed to appear at trial although duly summoned. In such circumstances and according to the constitutional case law, the defendant did not suffer from a breach of his right to a fair trial.¹²³ The situation would have been different if the person subject to the EAW would not have been even aware of that criminal proceedings against him in the issuing State. Despite this, the Constitutional Tribunal held that the Spanish executing authority failed to provide sufficient reasons for its decision to surrender, since it was not clear whether the person subject to the EAW had the right appeal or apply for retrial in the issuing State.

¹²⁰ Art. 49.1 and .2, and 33.1 (c) of the 2014 Law implementing the EAW.

¹²¹ Art. 49.2 of the 2014 Law implementing the EAW.

¹²² In the same case, TC (Spanish Constitutional Court): 30 March 2000, no 91/2000; 27 June 2006, no 177/2009; or, 28 September 2009, no 199/2009.

¹²³ TC (Spanish Constitutional Court) 23 February 2014, no 26/2014.

PART IV

**FROM RIGHTS TO REMEDIES:
A COMPARATIVE OVERVIEW**

CHAPTER I

NATIONAL REMEDIES AGAINST BREACHES
OF THE RIGHT TO TRANSLATION
AND INTERPRETATION

Christian Schmitt

TABLE OF CONTENTS: 1. Introductory remarks. – 2. Right to interpretation. – 2.1. The reference to ‘procedures in national law’. – 2.2. Judicial review in the pre-trial or trial stage of criminal proceedings. – 2.3. Reasons for divergences. – 3. Right to translation.

1. Introductory remarks

The effective exercise of defence rights guaranteed by the ABC Directives also relies on the existence of effective remedies against breaches of those rights under national law. Based on this hypothesis, the present contribution intends to provide a comparative overview of the national remedies that suspects and accused persons may use in order to challenge violations of their right to interpretation and translation.

To this end, special attention will be paid to the existing and newly adopted national measures that implement the remedial obligations under Directive 2010/64/EU into domestic law.¹ The following observations are based on the analysis of six Member States’ criminal justice systems presented in the present volume.²

¹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

² See *supra* Part III.

2. Right to interpretation

2.1. *The reference to 'procedures in national law'*

The right to interpretation is regulated in Directive 2010/64/EU. The obligation to provide a remedy against breaches of the right to interpretation is enshrined in Article 2(5) of this Directive. The provision requires that Member States ensure, in accordance with procedures in national law, that suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, where interpretation has been provided, the possibility to lodge a complaint that the quality of the interpretation was not sufficient to safeguard the fairness of the proceedings.³

It should first be noted that the implementation can be carried out in accordance with procedures in national law. This gives the Member States significant room for manoeuvre in implementation. As a result, the examined Member States have implemented Article 2(5) Directive 2010/64/EU in very different ways. For instance, in Belgium, Germany, Poland and Spain, the legal provision had no or little impact on the national system of remedies available to suspects and accused persons. Minor reforms adopted in France and Luxembourg improved, although in an indirect way, the legal protection provided under national law. France, for example, introduced the possibility for a suspect to make observations recorded in the report of the questioning for the purpose of challenging the lack or quality of the interpretation provided.⁴ The Luxembourg law implementing the ABC Directives extended the number of acts that are the subject of existing remedies available to the defendant. The latter can directly challenge the decision finding that there is no need for interpretation.⁵

2.2. *Judicial review in the pre-trial or trial stage of criminal proceedings*

Moreover, the remedial obligation does not specify at which stage of the criminal proceeding the review shall intervene.⁶ The opportunity to challenge breaches of the right to interpretation

³ Art. 2(5) Directive 2010/64/EU.

⁴ Art. D594-2 French CPP.

⁵ See *supra* Part III, Chap. IV, Section 4.3.

⁶ This also results from the very wording of Art. 2 (5) Directive 2010/64/EU,

provides different level of judicial protection depending on the stage of the criminal proceedings in which judicial scrutiny is undertaken.⁷ Whilst remedies available in the pre-trial stage ensure a prompt judicial review of decisions finding that there is no need for interpretation, in some Member States the review focuses itself in the main proceedings before trial courts.⁸

In the examined Member States, there are indeed very different remedies against the decision finding that there is no need for interpretation. These differences can be roughly broken down into two groups.

First: The group of Member States with direct judicial review during or at the end of the investigation procedure includes Belgium, France, Luxembourg and Spain. National law may, however, restrict the possibility of challenging decisions finding that there is no need for interpretation in the pre-trial stage of the criminal proceedings depending on the authority taking that decision.⁹

Second: The Member States that, in principle, do not have direct judicial review during the investigation procedure. This group includes Germany¹⁰ and Poland. In these countries, judicial review of decisions finding that there is no need for interpretation intervenes only at the trial stage of proceedings, even when the lack of linguistic assistance may have affected the questioning of the suspect or accused person during the investigation. Although national law provides for specific remedies during the pre-trial stage of proceedings, these do not apply with respect to alleged breaches of the right to interpretation. In Germany for instance, the accused has the right to a lodge a complaint against judicial decisions.¹¹ This right does not encompass, however, decisions that have been taken by the public prosecutor. The appeal provided for by Section 98 (2) CCP¹² does not apply either, because the decision finding that there is no need for interpretation is not covered by the relevant legal provision.

according to which the implementation should be carried out in accordance with procedures in national law.

⁷ See *supra* Part II, Chap I, Section 3.

⁸ For example, this is the case in Germany and Poland.

⁹ For instance, only decisions taken by the Investigating Judge can be subject to judicial review in the course of judicial investigations under French law. See *supra* Part III, Chap III.

¹⁰ This, however, only if the decision is enforced by the public prosecutor's office alone. An appeal against the court decision is admissible.

¹¹ Section 304 CCP; Oberlandesgericht Hamburg (Higher regional court, OLG), Beck online Rechtsprechung (BeckRS) 2014, p. 586.

¹² German CCP.

Another possibility would be a remedy pursuant to Section 23 of the Introductory Law of the Courts Constitution Act (ILCCA).¹³ This remedy provides the possibility of reviewing a judicial administrative act of the prosecutor.¹⁴ However, the exact definition of a judicial administrative act is not entirely clear.¹⁵ Some have argued that the decision denying the assistance of an interpreter is not an act covered by this provision. Therefore, only an appeal on fact and law, and an appeal limited to errors of law remain open to the accused at the trial stage of criminal proceedings.

2.3. *Reasons for divergences*

These differences in approach have their roots in the very structure of the different criminal justice systems. For example, German law adopts the principles of immediacy¹⁶ and orality.¹⁷ The principle of orality requires that live evidence be given at the trial stage and prohibits the substitution of live testimony by the reading of any documents from the pre-trial stage. It prioritizes the consideration of evidence through interrogation of witnesses over the consideration of evidence by inspections of documents.¹⁸ The principle of immediacy states that the court should form its own direct and immediate opinion of the facts to be assessed. This requires that the judges called upon to take the decision ground their judgment only on evidence which they have heard during the trial.¹⁹ This also concerns the testimony of witnesses.²⁰

The consequence of the principle of immediacy is that statements made by the accused during the investigation phase without the

¹³ T Wickern, in *Löwe-Rosenberg StPO* (2010, De Gruyter, Berlin), § 176, n. 47.

¹⁴ H Mayer, in *Karlsruher Kommentar zur Strafprozessordnung* (KK-StPO), (7th edn, 2013, C.H. Beck), EGGVG § 23 n. 31.

¹⁵ *Ibid.*

¹⁶ Section 250 CCP; Kudlich, in *Münchener Kommentar StPO* (1st edn, 2014, Munich, C.H. Beck), introduction n. 177-179.

¹⁷ H Kudlich, in *Milko StPO*, n. 185-187.

¹⁸ Bundesgerichtshof (Federal Court, BGH), in *Neue Juristische Wochenschrift* (NJW) 1954, 1415; BGH NJW 1961, 327.

¹⁹ A Ganter, in *Beck'scher Online-Kommentar Strafprozessordnung* (28th edn, 2018, BeckOK StPO), § 250, Rn. 9.

²⁰ There are exceptions to the principle of immediacy, which arise from Section 252 CCP and permit the replacement of a testimony of a witness, of an expert witness or of a co-suspect.

assistance of an interpreter cannot be directly used as evidence in court.²¹ On the contrary, the statements made during the pre-trial stage must be repeated before the trial court.²² Therefore, the statements gathered during the investigation have little effect on the main proceedings, since it is still possible to revoke or change those statements made in the pre-trial stage. It is true that the trial court can hear the interrogator as a so-called 'indirect witness'. In this way, it is possible to consider statements made during the investigation.²³ However, according to the case-law, these statements have limited probative value.²⁴ Judgments should not be based solely on the testimony of the indirect witness.²⁵ Therefore, judicial review during the investigation procedure is not as important in these Member States as in Member States which allow the direct use of questioning reports and the statement recorded therein in the main procedure.

The argument that there is no need for a remedy during the pre-trial stage also results from pragmatic considerations. Besides the principle of immediacy explained above, the lack of judicial remedies would avoid delaying tactics by the defence. The principle seems to be: rather too much than too little. Sometimes this leads to an abusive use of control mechanisms in order to waste time. Generally, the right to interpretation leads to the prolongation of proceedings, very much to the displeasure of all participants.

As a result, under German law, the breach of the right to interpretation can be brought in the appeal on fact and law. In most cases, only the failure to provide interpretation during the trial will support such an appeal. The judgment must be based on the violation of the right to interpretation regarding to statements made during the investigation procedure. If this is the case, there is the possibility for an appeal on fact and law against decisions finding that there is no need for interpretation during the pre-trial proceedings.

In Poland, the legal situation is similar to that in Germany. Like German law, Polish criminal procedure adopts the principle of immediacy.²⁶ Accordingly, the accused person has to repeat his

²¹ U Eisenberg, in *Beweisrecht der StPO* (10th edn 2017, C.H. Beck, Munich) n. 66.

²² *Ibid* n. 65.

²³ A Geipel, *Handbuch der Beweiswürdigung* (3th edn, 2017, LexisNexis Deutschland GmbH - ZAP Verlag), n. 259-261.

²⁴ K Detter, 'Der Zeuge vom Hörensagen - eine Bestandsaufnahme' (2003) *Neue Zeitschrift für Strafrecht (NSTZ)* 1.

²⁵ A Ganter, in *BeckOK StPO*, § 250 Rn. 11-12.

²⁶ S Waltos, in T Weigend, G Küpper, *Festschrift für Hans Joachim Hirsch, Die*

statements before the trial court in order to gain probative value. Exceptions to this principle, similar to that provided in the German system, also exist.

By contrast, criminal justice systems rooted in the inquisitorial tradition – such as in France, Belgium and Luxembourg - do not adopt any principle of immediacy.²⁷ In those systems and most particularly with regard to investigations conducted under the lead of an Investigating Judge, judicial review over the admissibility of evidence has a focus on the pre-trial stage of criminal proceedings. The competent court controls only the legality of investigative acts and may sanction procedural defects in the evidence gathering. In doing so, the judge does not check, however, the probative value of the evidence collected.²⁸

There exists, nonetheless, the principle of orality in the French system.²⁹ This means that the Court must hear the defendant and witnesses when their testimony is necessary to establish the truth. Thus, pieces of evidences are at least partially repeated in the main hearing, just as in Germany or Poland. There is, however, a difference, in that the judge can take into consideration statements made by the accused during police questioning and check, for instance, whether he maintains the same version of the facts in order to assess the evidentiary value of his statements. As a result, statements made by the accused without the assistance of an interpreter in the pre-trial stage of the criminal proceedings in these Member States may have a greater impact on the trial than, for example, in Germany or Poland.

The differences in the national measures implementing Article 2(5) Directive 2010/64/EU have their origin in the very structure and principles governing criminal justice systems. These differences illustrate the difficulties of harmonizing the existing judicial remedies in Member States. The implementation of the EU Directive did not reduce such divergences, nor did it lead to the adoption of new judicial remedies or specific complaint procedures.

neue polnische Strafprozessordnung im Vergleich mit dem deutschen Strafprozessrecht (2011, Berlin, de Gruyter) 1000 ff.

²⁷ J Leblois-Happe, 'Das Unmittelbarkeitsprinzip im französischen Strafverfahrensrecht' (2014) 1 *Zeitschrift für die gesamte Strafrechtswissenschaft* 185 ff.

²⁸ *Ibid.*

²⁹ H-H Kühne, in H-H Kühne, *Strafprozessrecht Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts* (9th edn, 2015, C.H. Beck, Munich)709.

3. Right to translation

Regarding the right to translation, Article 3 Directive 2010/54/EU requires the Member States to ensure that suspected or accused persons who do not understand the language of the criminal proceedings are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defense and to safeguard the fairness of the proceedings.³⁰ In the examined Member States, there were very different forms of implementing the possibility to institute an action against a decision finding that there is no need for translation. One may distinguish three main groups of countries.

First: In Germany, as well as in Luxembourg and France, where the impugned decision is taken by the Investigating Judge, the suspect or accused person has immediate access to court or an independent judicial authority during the pre-trial proceedings.³¹ Those countries thus provide for the possibility to challenge the decision finding that there is need for translation before the trial court will rule on the merits of the case.

Second: Other Member States provide the suspect or accused with the possibility to lodge a complaint or an appeal in front of the same authority that takes the challenged act during the pre-trial stage of proceedings. This is, for instance, the case in Spain with regard to a decision taken by an Investigating Judge finding that there is no need for translation.³²

Third: In some countries, such as for instance Poland and France, where the author of the impugned act is the Public Prosecutor, the judicial review of decisions finding that there is no need for translation is carried out at the trial stage of criminal proceedings.³³

As for the right to interpretation, the Member States implement the remedial obligation set forth in Article 3(5) Directive 2010/64/EU in very different ways. This complexity is not solely reflected in the comparative analysis of national criminal procedures. Within the same Member State, judicial remedies against decisions finding that there is no need for translation may vary depending on the authority that takes the impugned decision or whether that decision is taken *ex-officio* or

³⁰ Art. 3 (5) Directive 2010/64/EU.

³¹ See *supra* Part III, Chap. II, III, IV.

³² See *supra* Part III, Chap. VI.

³³ See *supra* Part III, Chap. II, V.

upon request of the parties.³⁴ Again, divergences among the national system of judicial review are rooted in the very structure of national criminal justice.

³⁴ This is for instance the case in Luxembourg, see *supra* Part III, Chap IV.

CHAPTER II

RIGHT TO INFORMATION AND REMEDIAL OBLIGATIONS: A COMPARATIVE ANALYSIS OF NATIONAL REMEDIES

Slawomir Steinborn

TABLE OF CONTENTS: 1. Introductory remarks. – 2. Remedies against breaches of the right to access the case file. – 2.1. Variety of remedies under national laws. – 2.2. The timing of review, a key issue. – 3. Remedies against violations of the right to information about rights and accusation. 4. Conclusions.

1. Introductory remarks

In order to provide the defendant with the possibility to effectively use of a particular procedural right, it is not enough to foresee in a specific legal act an adequate provision granting such right to this person. The ability of effective exercise of procedural rights largely depends on the creation of appropriate mechanisms to guarantee these powers.¹ This means that a defendant should be given procedural ‘tools’, which he could use to effectively benefit from his procedural right. This is of fundamental importance especially in a situation when an authority conducting criminal proceedings violates this right of the defendant, violations that are not completely unusual in practice. Such mechanisms guaranteeing the possibility to exercise the procedural right could consist in the right of the defendant to file a motion for a particular procedural act; the possibility to appeal against a negative decision of the authority; or, the possibility to ask for a subsequent review of the decision during the trial stage of criminal

¹ See *supra* Part II, Chap. I.

proceedings – by the court of first or second instance or imposing the obligation on an authority to make some activities *ex officio*.

Regarding the effectiveness of some particular procedural remedies, it is also necessary to take into account the consequences of the breach of a specific right of the defendant. If the law does not foresee such negative consequences or they are too ‘lenient’, this may encourage the authorities not to feel themselves obliged to respect the particular right of the accused. This might be a problem especially during pre-trial proceedings.

This paper will analyse the such remedies or ‘tools’ with regards to the right to information provided for in Directive 2012/13 on the right to information in criminal proceedings.² There are three separate rights provided for in this directive: (1) right of the suspect or accused person, and of an arrested or detained person to information about rights, (2) right to information about the accusation, (3) right of access to the materials of the case.³

Article 8 (2) Directive 2012/13 states, that ‘Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive’. Recital 36 of Directive 2012/13/EU also includes that the ‘right to challenge does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged’. This means that Member States are free to provide the defendant with the possibility to appeal against a refusal decision during the pre-trial stage of the proceedings, or simply grant the accused the opportunity to challenge such a decision in front of the trial court of first or second instance, especially when the court examines the correctness of the procedural steps performed during pre-trial proceedings.

Due to the differences between these three rights, the comparative analysis of national legislations in Belgium, France, Germany, Luxembourg, Poland and Spain, will be conducted with regard to these rights separately.

² [2012] OJ L142/1.

³ See more S Cras, L de Matteis, *The Directive on the Right to Information. Genesis and Short Description*, (2013) 1 Eucrium 22.

2. Remedies against breaches of the right to access to case file

2.1. *Variety of remedies under national laws*

Besides the obligation resulting from Article 8 (2) Directive 2012/13 to provide a right to challenge decisions refusing access to the case file,⁴ Article 7 (4) Directive 2012/13 also sets forth an important rule on how national law remedies should be construed. Pursuant to this Article, ‘Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review’.⁵ This means that, regardless of the stage of proceedings in which it takes place, the review of the decision refusing access should be carried out by the court if the decision subject to review has been issued by a non-judicial authority.⁶ This is undoubtedly of particular importance in order to ensure adequate judicial review of the refusal decision taken in the course of pre-trial proceedings. The refusal decision should be understood to mean not just a refusal to grant access to the case file in general, but also only to a specific part of it.

Most of the analysed countries provide to the defendant a right to appeal against a decision refusing access to the case file. In all cases, it is an interlocutory appeal or a similar remedy, which means that it affords the defendant the possibility to start a separate appellate procedure against the decision.

In Luxembourg the defendant can lodge an appeal against the decision whereby the investigating judge exceptionally restricts access to the case file after indictment, rejects the defendant’s request to revoke such a restriction, or denies the communication of materials of the case file requested by the parties. The decision taken by the investigating judge is notified within twenty-four hours to the accused, who can lodge an appeal with the pre-trial chamber of the Court of Appeal within five days from the date of the notification.⁷ The scope of review is quite broad, because the competent court must verify whether the contested decision is sufficiently reasoned and

⁴ Directive 2012/13 uses the term ‘materials of the case’ instead of ‘case files’. About the reasons of this difference see Cras, de Matteis (n 3) 30. In this paper the indicated terms are used indifferently.

⁵ Art. 7 (4) Directive 2012/13/EU.

⁶ On this aspect, see also Part II, Chap I.

⁷ Art. 133 Luxembourg CCP.

whether one of the grounds set forth under Article 85 of Luxembourg CCP justifies the denial to access the case file in the light of the specific circumstances of the case.

In France, if the investigating judge refuses to provide the copies of the documents requested, the defendant and his lawyer have, within two days of its notification, the possibility to refer the decision of the investigating judge to the President of the Investigating Chamber, who shall rule within five working days and take a written and reasoned decision, not subject to appeal.⁸ The same procedure is used when the investigating judge fails to rule upon a request to access the case file within the given deadline.

Likewise, in Belgium an appeal may be lodged with the Chamber of Accusation against a decision whereby the investigating judge refuses to grant access to the case file or when it fails to rule upon a request of access within the given deadline.⁹

In Spain the remedy of ‘consideration’ may be submitted against the decision of the investigating judge refusing access to case files. This application is examined by the same judge.¹⁰

Polish law provides the defendant and his defence lawyer the possibility to challenge a decision refusing access to certain materials of pre-trial proceedings. An interlocutory appeal may be submitted within 7 days from the date of the notification of the refusal decision. There is, however, a difference with regards to the reviewing authority. If the refusal decision has been issued by a public prosecutor, the appeal is examined by a single judge of the court competent to hear the case. When the decision has been issued by another non-judicial authority (eg police officer), the interlocutory appeal shall be examined by the prosecutor supervising the proceedings.¹¹

A similar, but not identical solution has been adopted in Germany. Namely, the decisions taken by the public prosecution office refusing access to the files of investigation are subject to the review of the judge, but only after the closing of the investigation. A suspect can only apply against a decision taken by the judge. The impossibility to challenge the prosecution office’s decision is considered to be inconsequential as the accused has the possibility to repeat his

⁸ Art. 114 (9) French CCP.

⁹ See Part III, Chap. I.

¹⁰ See Part III, Chap. VI.

¹¹ See *supra* Part III, Chap. V.

demand of access to the materials of the file to the court after the indictment has been submitted. It is assumed that this is sufficient to be able to claim legal protection in a timely manner.¹²

Some conclusions can be drawn from this brief overview. Certain national legislations afford the defendant the right to challenge decisions refusing or restricting access to case file also when this decision is taken by the judicial authority *stricto sensu* (France, Belgium, Luxembourg and Spain). Paradoxically, some countries do not provide specific remedies enabling the suspect or accused person to challenge such decisions when taken by the prosecutor in the pre-trial stage of criminal proceedings (Spain, France) or even by a police officer, as in Poland, where the law grants the possibility to challenge his refusal only in front of the public prosecutor. This regulation triggers a very important question as to whether the public prosecutor is a judicial authority as provided in Article 7 (4) Directive 2012/13, or even more generally in the perspective of procedural rights in criminal proceedings in the EU.¹³

Taking into consideration the rule set forth in Recital 36 of Directive 2012/13, it is clear that the lack of immediate access to the court is not, however, necessarily inconsistent with Article 7 (4) Directive 2012/13. Judicial review can still be undertaken only at the trial stage of proceedings (as in Germany) – both by the first instance court and appellate court. The defendant and his lawyer can raise this question, especially during the hearing in regard to particular evidence, which was in their opinion obtained in flagrant breach of the right to access to the case file. The defence can also raise their allegations in the appeal against the judgment.

2.2. *The timing of review, a key issue*

With regards to the time of the review of the refusal decision, a certain contradiction may be observed in Article 7 (3) Directive 2012/13. It states that access to the case file shall be granted in due time to allow the effective exercise of the rights of the defence. However, in order to foresee a precise guarantee, the Directive also adds a certain time limit prior to which access must be granted in all cases: ‘at the latest upon submission of the merits of the accusation to the judgment

¹² See *supra* Part III, Chap. III.

¹³ On this issue see Part II, Chap I.

of a court'.¹⁴ It may be interpreted to the effect that the Member States are free to choose not to grant any access to the case file during the whole pre-trial stage of criminal proceedings.¹⁵ There is no need for such decision of national legislature to have an additional justification in the circumstances indicated in Article 7 (4) Directive 2012/13, because that provision regulates other separate restrictions on the right to access to the case file. Surprisingly, it may thus be understood that according to Directive 2012/13 the exercise of the right of access to the case file in the pre-trial proceedings is not relevant for an effective defence. It appears, however, that due to the fact that in the course of pre-trial proceedings many acts (especially evidentiary) of key importance to the outcome of the trial or irreversible acts are likely to be carried out, it should be possible for the defence to obtain prior access to the case file in order to prepare for this activity, rather than only after the submission of the accusation to the court.

The question of the moment when the suspect and his defence lawyer not only get access to the case file but also have the possibility to challenge the decision denying such access, is of great importance for the perspectives and chances of effective defence. Therefore, the question arises as to the advantages and disadvantages of both alternative options, especially in view of their effectiveness. There is no doubt that the possibility to challenge the refusal decision enables the suspect to cause an immediate court review of this decision and, as a result, obtain access to the case file. The disadvantage, however, is that the lodging of an interlocutory appeal, complaint or similar application results in the initiation of a separate proceedings, which in turn may result in the extension of the main proceedings. The right to request access to a case file and then the possibility to challenge every refusal decision may also be used in very obstructive manner, blocking the possibility to conduct the main proceedings.

In turn, greater efficiency and effectiveness of the pre-trial proceedings may be ensured when the timing of the judicial review of the refusal decision is postponed to the stage of the proceedings

¹⁴ Art. 7 (3) Directive 2012/13/EU.

¹⁵ S Allegrezza, V Covolo, 'The Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status quo or step forward?' in Z Durdevic, E Ivcevic Karas (eds), *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges* (Zagreb 2016) 47- 48.

before the first or even second instance court. It seems, however, that this solution is less desirable from the perspective of the defence. Indeed, it should be noted that in such case the court is called upon to examine whether the refusal to make the case file available to the suspect in the pre-trial proceedings has affected negatively his situation, and particularly the possibility to prepare and exercise an effective defence.

For this purpose, the defendant and his lawyer should prove – at least its plausibility – that the specific procedural or evidentiary action might have had a different effect, if they had been given access to the case file at a specific point in time during pre-trial proceedings (eg if the suspect had known about specific evidence, he would not have given explanations of the specific content). It is extremely difficult, however, to prove that, if at a specific point in time the defence had had specific knowledge of the specific materials in the case file, it would have taken other procedural steps than it actually did. It all comes down to whether the court, which would assess *ex post* the effects of the unjustified refusal to provide access to the case file, would find that argument convincing. It is more a matter of faith than of facts. For these reasons, it is also difficult to verify not only the question of the causal link between the lack of access to the case file and the content and effects of the specific procedural action during the pre-trial stage of criminal proceedings, but also the judge's assessment of this relation itself. For this reason, there is a danger of great discretion in these assessments.

The question of what consequences may an unjustified refusal to give the suspect and his defence lawyer access to the case file have, can also be asked. For example, if a defence lawyer has not been given access to certain materials before the court's hearing on the detention on remand, what should be the consequence of finding that this refusal unduly infringed the defence rights. Should this result in the quashing of the detention order, in the granting of compensation for the time of the detention, or merely in the examination of the grounds for detention, of course after having made the case file accessible for the defence lawyer and having given him enough time to read it and prepare to the hearing?

There is no doubt that from the perspective of defence, the mechanism of exclusionary rules (but also nullities) provides the highest level of protection. It shall be inadmissible to use, – as a factual basis of judgment – the results of the evidentiary activity undertaken during pre-trial stage of criminal proceedings, when the defence lawyer requested access to the case file or specific materials

in connection with a specific action (eg the questioning of a suspect) and it has been refused in the absence of any justification provided by the law. There would therefore be a mechanism based on the presumption that the breach of the defence right has an impact on the content of a given activity. Such a rigid mechanism also has a negative side. It could sometimes lead to the elimination of substantive evidence only because of a formal failure to provide to the defendant and his lawyer access to the case file. In addition, since pre-trial proceedings usually take a certain period of time, the question arises on how to assess the negative consequences of the refusal of access to the case file, and its impact on further steps, especially with regard to evidence gathered during this stage of criminal proceedings.

From this perspective it seems better to establish a different safeguard mechanism, namely to give to the suspect and his defence lawyer the right to lodge a complaint or interlocutory appeal against the negative decision whereby the authority conducting the pre-trial proceedings (eg prosecutor, investigating judge) refuses access to the case file. Such review can be carried out quite quickly and prevents the permanently and sometimes difficult to reverse, negative consequences for the defence. Such review also allows the avoidance of the negative impact on the efficiency of the proceedings, if additional strict deadlines and other safeguards against obstructive uses of the right to access to the case file are introduced to prevent extending the proceedings.

It may seem that these considerations were the main reasons taken into account by the analysed countries, since the possibility of lodging appeal or a similar remedy against a negative decision was introduced besides the mechanism of the exclusionary rule or nullity.

3. Remedies against violations of the right to information about rights and accusation

The first problematic issue encountered when reading Article 8 (2) Directive 2012/13 in regard to the information about the accusation and the rights of the defendant, is how to challenge the failure of the competent authority to provide this information at all. The complaint against a lack of such information would require the defendant's knowledge that a specific situation takes place when the information should be provided. Unless the authors of the Directive assumed that it was still possible in the EU a situation like in the famous novel by Franz Kafka, when the suspect has been denied any information about the reasons justifying the criminal proceedings against him. For these

reasons, national legislation should, first of all, include the positive responsibility of the competent authorities to provide *ex officio*, relevant information about the accusation¹⁶ and rights of the defendant.¹⁷ The possibility to challenge the failure or refusal to provide sufficient information about the accusation and the rights should also be provided especially in the appeal procedure before the court of second instance (so-called ‘subsequent review’). Thereby, a comprehensive assessment of the consequences of the infringement of the right to information for the defence rights, in particular the impact of this infringement on the content of the judgment, would be possible only in the course of the appeal review of the entire judgment.

The effective safeguard mechanism should consist of two linked elements: (1) clear obligations imposed on the authorities conducting criminal proceedings to inform in specified situations about the charges (accusation) and defendant’s rights and (2) the elimination of evidence obtained when a flagrant breach of this right to information has occurred. This elimination of evidence could be based on the mechanism of the exclusionary rule as well as on a system of nullities. Generally speaking, in some of the analyzed national legislation the breach of information already leads to the elimination of the evidence.¹⁸

Failure to provide relevant information could also include situations where the notification took place, but was ineffective due to improper form or language or due to other aspects, such as timing or content.¹⁹ The best remedy against the situation when the information is not transparent or complete is, on the one hand, the imposition of specific obligations on the authorities conducting the criminal proceedings (eg tape the moment of giving instructions to the suspect; written confirmation of the suspect, that he has been given the information) and granting to the suspect (accused) the possibility to ask for information at any time during the further proceedings. It is also possible to impose a presumption that the absence of disclosure implies that the obligation to inform about the rights has been not

¹⁶ Art. 6 Directive 2012/13/EU.

¹⁷ Art. 3 and 4 Directive 2012/13/EU.

¹⁸ This is for instance the case in Germany, France and Poland.

¹⁹ A Tsagkalidis, ‘Directive 2012/13/EU on the Right to Information in Criminal Proceedings’ (2017) 13 Online, <www.era-comm.eu/procedural_safeguards/kiosk/pdf/2017/Article_Right_to_Information.pdf> accessed on 29 October 2017.

fulfilled, unless it is proven otherwise.²⁰ When the information is delayed there is only a matter of consequences of such failure.

Going further, one should address the possible consequences of an infringement of the right to information during pre-trial proceedings. Due to the preparatory function of pre-trial proceedings, it would be difficult to justify the inadmissibility of the indictment in the event that the suspect's right to information about the accusation was infringed during the investigation. In Poland, in practice, there have been situations when after the indictment has been brought to the court, it turned out that in the course of the previous investigation no information was given to the suspect (in form of a written decision presenting the charge to him/her) about one of the several charges brought by the indictment. This situation is a clear violation of the right to information about the accusation and, consequently, the right of defence. However, since the charge was then contained in the subsequent indictment, so that the accused actually received information about it, it is difficult to determine what consequence this should have, such as, for example, the withdrawal of the case from the court and its being sent back to the prosecutor. While admittedly late, the accused has received the information about the accusation and charges. It seems therefore that the rational remedy in this situation may only be granting adequate time to the defendant and his defence lawyer before the hearing to prepare the defence in regard to the 'new found' offence and the taking of the infringement into account by the court in its assessment of evidence in the whole case.

Another problem occurs when, due to the lack of knowledge about the charges or suspicions, a particular person (the suspect) gives testimony of particular content as a witness. In some national legislation or case-law special rules that concern this issue can be found. In Luxembourg, it is prohibited by the law to question a person as a witness where serious and consistent evidence against him justify the pressing of charges.²¹ In such circumstances, the contested act is declared null and void where the delayed indictment deprived the accused of the possibility to exercise defence rights.²² A similar rule has been developed in case-law of the Polish courts.²³ This is

²⁰ S Allegrezza, V Covolo (n 15) 48-49.

²¹ Art. 73 Luxembourg CCP.

²² See *supra* Part III, Chap. IV.

²³ See *supra* Part III, Chap. V.

more a matter concerning the right to remain silent than right to be informed about the accusation.

4. Conclusions

Considering the provision of effective remedies regarding the defendant's right to information, one should have in mind that this right consist of three different guarantees. The nature of every right is a bit different and this has its consequences on the appropriate remedy chosen. The effective judicial remedy, on the one side, should be an effective procedural safeguard of the defendant's right, on the other hand, it should also take into account the need to accomplish the goals of the criminal proceedings. Generally speaking, subject to the nature of the specific right, it is sometimes more important to prevent infringements by imposing positive obligations on the authorities conducting the criminal proceedings than granting the defence a possibility to challenge the negative decisions. Discussing the issue of the effective remedy it is also important to remember how crucial is the timing (moment of criminal proceedings) when this remedy may be sought by the defendant and his defence lawyer.

CHAPTER III

JUDICIAL PROTECTION OF THE RIGHT TO ACCESS A LAWYER IN THE MEMBER STATES

Valentina Covolo

TABLE OF CONTENTS: 1. Remedial obligations under Directive 2013/48/EU. – 2. Decisions authorizing temporary derogations on the right to access a lawyer. – 2.1. Judicial authorization or *ex-post* judicial review. – 2.2. Grounds for derogation. – 3. Incriminating statements obtained in breach of the right to legal assistance. – 3.1. Nullities and exclusionary rules. – 3.2. A wide spectrum of sanctions.

1. Remedial obligations under Directive 2013/48/EU

How do Member States ensure respect of the right to access a lawyer guaranteed under Directive 2013/48/EU? More particularly, what control mechanisms prevent and sanction breaches of this right in criminal proceedings? Based on the rich analysis of six Member States displayed above, the present contribution seeks to identify commonalities and divergences among national measures implementing the remedial obligations set forth under Directive 2013/48/EU.

With this aim in mind, two provisions are of particular interest. On the one hand, the EU Directive authorizes, under exceptional circumstances and only at the pre-trial stage of criminal proceedings, temporary derogations on the right to access a lawyer.¹ Two sets of grounds may allow such restriction. The first is of a pragmatic nature, since it justifies delayed access to legal assistance where the

¹ Art. 3 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 [2013] OJ L 294/1.

‘geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty’.² The second set of grounds for temporary derogations consists in ‘compelling reasons’, namely an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.³ Thus defined, the compelling reasons leave room for extensive interpretation. Hence, considering that delayed access to a lawyer is likely to seriously undermine the right of the suspect or accused to defend himself, the European Parliament strongly advocated for the introduction of strict conditions that must be fulfilled in the case of temporary derogations.⁴ Delayed access to a lawyer shall be proportionate and strictly limited in time.⁵ Moreover, pursuant to Article 8 Directive 2013/48/EU, temporary derogations must be authorized by a duly reasoned decision, taken on a case-by-case basis by a judicial authority or by another competent authority on condition that the decision can be submitted to judicial review.⁶

On the other hand, Article 12 is the first provision of the ABC Directives addressing the question of the use of evidence gathered in breach of defence rights. Whilst the first paragraph requires the Member States to provide effective remedies against violations of the rights guaranteed under Directive 2012/13/EU,⁷ the second states that the assessment of statements made by the suspect or accused person in breach of the right to access a lawyer, or made where a derogation to that right was authorized, shall ensure that the rights of the defence and the fairness of the proceedings are respected.⁸ It is worth recalling that the EU legislature thereby declined to introduce in the final text of the Directive a clear exclusionary rule, emphasizing, on the contrary, that Article 12 is without prejudice to national rules and systems on the admissibility of evidence.⁹ The stipulation reflects the

² Art. 3 (5) Directive 2013/48/EU.

³ Art. 3 (6) Directive 2013/48/EU.

⁴ S Cras, ‘The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in the European Arrest Warrant Proceedings’ (2014) 1 *Eucri* 32, 41.

⁵ Art. 8 (1) 2013/48 EU.

⁶ Art. 8 (2) and (3) Directive 2013/48 EU.

⁷ Art. 12 (1) Directive 2013/48/EU.

⁸ Art. 12 (2) Directive 2013/48/EU.

⁹ *Ibid.*

harsh opposition from a group of Member States against the Commission proposal,¹⁰ which intended to prohibit the use against suspects of incriminating statements obtained in breach of the right to access a lawyer ‘unless the use of such evidence would not prejudice the rights of the defence’.¹¹ Similarly, during the negotiations of Directive 2016/343/EU, the Council opposed the adoption of a fully-fledged exclusionary rule applying to statements gathered in violation of the right to remain silent or the right not to incriminate oneself.¹²

This first insight into both provisions already demonstrates that Directive 2013/48/EU gives the Member States significant latitude in implementation. Hence, one may expect that requirements governing temporary derogations and the use of evidence obtained in breach of the right to access a lawyer has had little impact and harmonizing effect on national criminal procedures. The following sections will test this hypothesis with regards to the implementing measures adopted in Belgium, France, Germany, Luxembourg, Poland and Spain.

2. Decisions authorizing temporary derogations on the right to access a lawyer

2.1. Judicial authorization or ex-post judicial review

As mentioned above, Article 8 Directive 2012/48/EU sets forth guarantees of judicial review governing decisions that delay, under exceptional circumstances, the right to access a lawyer in the pre-trial stage of criminal proceedings. Such decisions must be issued by a judicial authority or, alternatively, be subject to subsequent judicial control.¹³ It thus follows that the Member States may either make temporary derogations conditional upon judicial authorization or, where the authority having competence to delay legal assistance is not a judicial body, adopt a system of *ex-post* judicial review.

The lenient requirements laid down in the provision has not reduced the significant divergences among national criminal procedures. Indeed,

¹⁰ S Cras (n 4) 40.

¹¹ Art. 13 (3) Proposal for a Directive of the European Parliament of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326 final.

¹² S Cras, A Erbežnik, ‘The Directive on the Presumption of Innocence and the Right to Be Present at Trial’ (2016) 1 *EuCrim* 25, 34.

¹³ Art. 8 (2) and (3) Directive 2013/4/EU.

the authority empowered to authorize temporary derogations varies from one country to another. In the majority of the Member States examined below, national laws designate that this power shall lie with the authority leading the investigation or conducting the questioning. Thus, depending on the type and structure of preliminary enquiries, the power to derogate from the right to legal assistance falls within the competence of the investigating judge, the public prosecutor or police officers, upon approval of prosecutorial authorities. However, given the exceptional nature of such derogations, some national legislation requires the intervention of fully independent and impartial judicial bodies, separate to those conducting the investigation. This, for instance, is the case in Germany, where restrictions on the right to legal assistance shall be ordered by a court.¹⁴ In a similar way, French law requires under certain circumstances that delayed access to a lawyer must be authorized by the Judge of Freedom and Detention, upon the request of police officers.¹⁵

In this respect, it is worth recalling that Article 8 Directive 2013/48/EU requires decisions derogating from the right to legal assistance to be duly reasoned on a case-by-case basis and recorded in accordance with national rules of procedure.¹⁶ Yet, national laws of some of the Member States under analysis expressly impose on the competent authority the duty to state reasons for the decision authorizing temporary derogations. For instance, written and reasoned decisions are required under both French¹⁷ and Luxembourg law.¹⁸

Moreover, the remedial obligation enshrined in Article 8 Directive 2013/48/EU has no harmonizing effect on the remedies available to the suspect against temporary derogations of the right to access a lawyer. First, the provision does not specify at which stage of the proceeding the subsequent judicial scrutiny of decisions taken by a non-judicial authority shall occur. Accordingly, the analysis conducted in the selected countries shows that the judicial control on the derogation may take place either in the pre-trial or the trial stage of criminal proceedings. The availability of remedies at an early stage does not necessarily enhance the effectiveness of the right to legal assistance. The significant time delays associated with judicial actions might

¹⁴ Section 148 German CCP.

¹⁵ Art. 63-4-2 French CCP.

¹⁶ Art. 8 (2) and (3) Directive 2013/48/EU.

¹⁷ Art. 63-4-2 French CCP.

¹⁸ Art. 3 – 6 (6) Luxembourg CCP.

discourage the suspect or accused person from availing himself of the remedies provided under national law. However, the delaying tactics of defense counsel may also explain the low number of judicial actions introduced.

Depending on the country and the type of investigation concerned, judicial protection afforded by national law sometimes goes beyond the standards set forth under the Directive. For example, this is the case in Germany, Spain, France and Luxembourg, where the decision whereby a judicial authority derogates from the right to access a lawyer can be challenged in front of a court during the pre-trial stage of criminal proceedings. Subsequent avenues of appeal are also provided.¹⁹

In sum, Article 8 Directive 2013/48/EU had very little impact on the system of judicial review in the selected Member States. The remedial obligations against restrictions on the right to legal assistance did not lead to the introduction of new judicial remedies under national law. Nonetheless, the implementation of the EU Directive had an indirect impact on existing control mechanisms. On the one hand, where implementing measures strengthened the substance of the procedural guarantee or clarify grounds for restriction, they respectively extended the scope or specified the grounds for review.²⁰ On the other hand, national implementing measures introduced the possibility to challenge directly the decision authorizing temporary derogations.²¹ This is without prejudice to the possibility of incidentally challenging acts authorizing such derogations in the pre-trial stage of criminal proceedings. For instance, under Luxembourg law, requests for annulment may still be directed against the report of the questioning conducted by the investigating judge without the presence of a lawyer and, therefore, entail the review of the decision delaying entitlement of the procedural safeguard.²²

2.2. Grounds for derogation

The judicial control undertaken by the national competent authorities primarily aims at assessing, in the light of the specific circumstances of the case, whether compelling reasons justify denials

¹⁹ This is notably the case in Spain where a judicial action can be instituted in front of the Constitutional Court.

²⁰ Luxembourg, Spain.

²¹ Luxembourg.

²² Art. 126 Luxembourg CCP.

of access to a lawyer. Hence, the scope of review will also depend on the way Member States have implemented Article 3(6) Directive 2013/48/EU. In this regard, it is worth noting that Belgium²³ and Luxembourg²⁴ operated a literal implementation of the compelling reasons defined by the said provision. Only German law allows temporary derogations of the right to communicate in private with a lawyer where the accused is strongly suspected of terrorism organization.²⁵ This raises concerns about the compliance of German law with the European instrument, since Article 8 Directive 2013/48/EU prohibits temporary derogations exclusively based on the type or the seriousness of the alleged offence.²⁶

Divergences among national legislation also lie in the components of the right to legal assistance that are subject to such derogations. For instance, German criminal procedure only allows the competent authorities to ban communication or the possibility for the accused held in custody to communicate in private with a lawyer.²⁷ Other countries authorize derogations of all guarantees defined under Article 3(3) Directive 2013/48/EU. An illustration can be found in the Luxembourg Code of Criminal Procedures (CCP), which empowers the competent authorities to derogate from the right to meet and communicate in private with a lawyer, the right to have a lawyer present at investigative or evidence-gathering acts, as well as the right to effective legal assistance during any questioning.²⁸

Finally, Article 8 Directive 2013/48/EU further requires temporary derogations to be necessary, proportionate and strictly limited in time. Depending on the country, such requirements find explicit expression in legal provisions. A telling example are the maximum time-limits governing the possibility to delay access to a lawyer during questioning under French law²⁹ or those delimiting the possibility to derogate from the right of the person under detention on remand to communicate in private with a counsel laid down in the Polish

²³ Art. 2bis and 24bis Belgian Law of 20 July 1990 on pre-trial detention.

²⁴ Art. 3 – 6 (6) Luxembourg CCP.

²⁵ Section 31 Interlocutory law of the Courts Constitution Act (ILCCA) and Section 148 s2 German CCP.

²⁶ Art. 8 (1) c Directive 2013/48/EU.

²⁷ Section 31 Interlocutory law of the Courts Constitution Act (ILCCA) and Section 148 s2 German CCP.

²⁸ Art. 3 – 6 (6) Luxembourg CCP.

²⁹ Art. 63-4-2 French CCP.

CCP.³⁰ In most cases, however, national legislation makes general reference to proportionality and the exceptional character of derogations³¹ or at least incorporates them in the scope of review undertaken by the competent authorities.³²

3. Incriminating statements obtained in breach of the right to legal assistance

3.1. Nullities and exclusionary rules

It has been underlined that judicial review of alleged violations of the right to access a lawyer may take place during the pre-trial or trial stage of the criminal proceedings. In the second case, the judicial control carried out by first instance trial courts consists in the assessment of evidence collected with a view to establishing whether the accused is guilty or innocent. Evidentiary rules in criminal proceedings call into play two competing interests.³³ On the one hand, effective prosecution relies on the use of material evidence collected in the previous stages of the proceedings that are necessary to establish the facts. On the other, the right to due process entails restrictions on the use of illegally or improperly obtained evidence.

Against this background, European countries have developed different approaches towards the use of evidence gathered in breach of defence rights that result in differing, although convergent, systems of nullities and exclusionary rules.³⁴ Criminal justice systems influenced by the accusatorial tradition, such as Germany and Poland, provide exclusionary rules that prohibit the use of evidence on the basis of constitutional principles or violations of specific statutory provisions. In contrast, Member States attached to the inquisitorial model, in particular France, Belgium, Luxembourg and Spain, adopt a system of nullities. The latter do not necessarily and directly affect the evidence itself. Nullities often relate to procedural acts that are, as

³⁰ Art. 73 Polish CCP.

³¹ See for instance Art. 3 – 6 (6) Luxembourg CCP.

³² Poland.

³³ For an historical perspective, S C Thaman, 'Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules' in: S C Thaman (ed), *Exclusionary Rules in Comparative Law* (2013, Springer) 403 ff.

³⁴ D Jackson, S J Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (2012, Cambridge University Press).

a consequence, declared null and void.³⁵ Despite this common feature, the national legislation and case law of the selected countries has developed over the years slightly different classifications of rules governing the use of evidence. The categorization that can be observed in these systems notably distinguishes between, on the one hand, grounds for nullity or exclusionary rules defined by law, and on the other, those developed by the case law (*nullité formelle – nullité substantielle*,³⁶ *gesetzliche Beweisverwertungsverbote – nicht normierte Beweisverwertungsverbote*³⁷). Moreover, national legislation enact automatic and non-obligatory prohibitions related to the use of evidence. For instance, absolute – as opposed to relative – exclusionary rules distinguish themselves according to grave breaches of rules related to the gathering of evidence (*absolute Verwertungsverbote – relative Verwertungsverbote*).³⁸ Other countries adopt a classification based on procedural defects that entail mandatory exclusion only where it is demonstrated that they cause a prejudice to the defendant's rights or regardless any proof of prejudice (*nullités d'ordre privé – nullités d'ordre public*).³⁹

One should also note that national systems sanctioning illegally obtained evidence and the national judicial structures are closely interrelated. Within the Member States providing for exclusionary rules, trial courts have exclusive competence to rule on the use of evidence gathered illegally or improperly.⁴⁰ Conversely, the exclusion of evidence may intervene at different stages of the criminal proceedings in countries that adopt a system of nullities. In France, Belgium and Luxembourg, the power to rule on the admissibility of evidence falls, under specific circumstances, within the jurisdiction of tribunals that are independent and distinct from trial courts in the course of the investigation or before the referral of the case for trial.⁴¹ The review thus undertaken, either *ex-officio* or upon request,

³⁵ S C Thaman (n33) 410.

³⁶ Luxembourg.

³⁷ Germany.

³⁸ Germany.

³⁹ France.

⁴⁰ Germany, Poland.

⁴¹ *Chambre de l'instruction* in France, *Chambre du Conseil* in Luxembourg, *Chambre des mises en accusation* in Belgium. By contrast, where national law empowers trial courts to review the regularity of the investigation, it may require the accused to raise grounds for nullity before any review of the merits, such as for instance in Spain and Luxembourg.

aims at precluding the admissibility of evidence that, once declared null and void, is removed from the case file in order to prevent judges sitting in trial courts basing the assessment of the facts on that evidence. Such a system entails an essential procedural consequence in as far as it anticipates the possibility for the accused to raise a ground of nullity that he can no longer invoke once the competent court reviews the case on the merits. This does not preclude, however, the power of trial courts to freely assess the evidential value of statements and materials that were not declared inadmissible in the previous stages of the criminal proceedings and eventually disregard such evidence. In this regard, the analysis conducted in the selected countries shows that even the Member States adopting a similar set of procedural rules governing the use of evidence in breach of defense rights differ as regards the substantive standards that national courts apply.

3.2. *A wide spectrum of sanctions*

With regard to procedural sanctions, Article 12 paragraph 2 Directive 2013/48/EU does not prohibit the use of evidence gathered in breach of defence rights. It simply requires trial courts to ensure the overall fairness of the proceedings in assessing statements made by the suspect or the accused person in violation of the right to access a lawyer.⁴² These minimum standards of protection granted by the EU Directive shall be construed in line with the ECHR.⁴³ In this light, it is worth recalling that the recent case law of the Strasbourg Court seems to abandon the stringent approach previously adopted in *Salduz*.⁴⁴ In its landmark judgment, the ECtHR held that ‘the rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction’.⁴⁵ In *Ibrahim*,⁴⁶ however, the Court takes a step back.⁴⁷ Unlike previous rulings

⁴² Art. 12(2) Directive 2013/48/EU.

⁴³ Art. 48 and 52 (3) EU Charter.

⁴⁴ M Caianiello, ‘You Can’t Always Counterbalance What You Want’ (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 283, 293.

⁴⁵ *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008) para 55.

⁴⁶ *Ibrahim and others v United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016).

⁴⁷ A Soo, ‘Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? Ibrahim and the others v. the UK (13th of September 2016)’ (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 327.

assessing the violation of the right to access a lawyer *in abstracto*, the ECtHR pays special attention to the specific circumstances of the case whilst applying the ‘overall fairness’ test.⁴⁸ Although the national court based the conviction on incriminating statements made in the absence of the lawyer, the denial of access to counsel did not amount to a violation of Article 6 of the Convention as far as the proceedings as a whole were fair.⁴⁹

As a result, both Directive 2013/48/EU and the ECtHR case law leave a wide margin for counterbalances, which prevent the automatic exclusion of evidence gathered in breach of defence rights. Such counterbalances can be found in all the Member States under analysis.⁵⁰ But beyond this common feature, national rules implementing Article 12 Directive 2013/48/EU provide a wide spectrum of sanctions that vary depending on the specific aspect of the procedural safeguard that has been violated.⁵¹ The comparative analysis of national law highlights three main thresholds. First, the violation of the right as such prohibits the use of evidence, notably where the statutes provide for absolute or automatic nullities and exclusionary rules.⁵² Second, the use of evidence obtained in breach of a procedural safeguard is prohibited only if this would - irretrievably - prejudice the proper and adequate exercise of the defence.⁵³ This implies that an assessment *in concreto* that aims to establish whether the violation that has occurred caused an actual disadvantage for the defendant and has therefore hampered the fairness of the proceedings. Third, trial courts are prevented from using illegally obtained evidence where the latter constitutes the sole

⁴⁸ M Caianiello (n 44) 293.

⁴⁹ *Ibrahim and others v United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016) para 294.

⁵⁰ For instance, the Belgian case law has established the so-called Antigone doctrine, according to which procedural defects entail nullities in three situations: pursuant statutory provisions, when the procedural irregularity compromises the right to a fair trial or harms the trustworthiness of the evidence. In a similar way, the French case law has acknowledged that procedural flows affecting the collection of evidence might be counterbalanced by subsequent fair trial guarantees, in particular the adversarial assessment of evidence by trial courts. M Marty, *La légalité de la preuve dans l'espace pénal européen* (2016, Larcier) 283 ff.

⁵¹ This reflects the approach adopted by the ECtHR, since ‘the test for deciding whether a remedy should be provided or not depends on which aspect of the right is breached’. A Soo (n 47) 45.

⁵² Eg Art. 81-10 Luxembourg CCP.

⁵³ An example of balancing test can be found in Art. 32 Belgian CCP.

and decisive evidence for conviction (and prosecution).⁵⁴ This simplified picture only provides an overall categorization of the multiple variety of standards adopted in the Member States. Thus, the effectiveness of remedies against breaches of the right to access a lawyer ultimately relies on the stringency of national rules governing the admissibility and assessment of evidence. In this light, one may wonder whether Union law may fully ensure the effective implementation of defence rights granted by the ABC Directives without providing minimum harmonized sanctions against breaches of these rights. Despite the reluctance of the Member States and the cautious approach adopted by European institutions, rules of evidence are undoubtedly a key challenge for promoting fair trial rights within the EU criminal justice area.

⁵⁴ See for instance, Art. 47bis Belgian CCP.

CONCLUSIONS

Silvia Allegrezza and Valentina Covolo

TABLE OF CONTENTS: 1. Reconciling EU and national approaches toward the effective protection of defence rights. – 2. Mapping the great complexity of judicial remedies. – 3. A European blueprint of the right to judicial review in criminal proceedings. – 3.1. Requirements related to the structure of judicial review. – 3.1.1. Independence and impartiality of the reviewing authority – 3.1.2. Time requirements. – 3.1.3. Procedural fairness. – 3.2. Requirements related to the functions of judicial review. – 3.2.1. Scope of review. – 3.2.2. Powers of review. – 4. Enhancing the effectiveness of EU defence rights by means of guarantees, remedies and sanctions. – 5. Further actions and challenges ahead. – 5.1. National level. – 5.1. European level.

1. Reconciling EU and national approaches toward the effective protection of defence rights

Does Union law effectively protect the rights of suspects and accused persons? And more specifically, what judicial remedies promote the effectiveness of defence rights in criminal proceedings? In answering this question, the present study addresses a major challenge that underlies the implementation of the ABC Directives into the domestic legal orders: reconciling the EU and national approaches toward the protection of defence rights in criminal matters. Indeed, the European legislature has undertaken a step-by-step harmonization¹ that led to the adoption of different legal instruments defining the substance of specific rights throughout the entire criminal proceedings.² By contrast, national criminal

¹ Recital 11 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/ 1.

² The ABC Directives apply from the time a person is made aware by the

procedures traditionally focus on activities at different pre-trial and trial phases and for each procedural act afford specific defence rights with the aim to counterbalance the powers allocated to the law enforcement and prosecuting authorities.

The same dichotomy reflects itself in the way EU and national legal frameworks approach the judicial protection of defence rights. On the one hand, the ABC Directives lay down a set of remedial obligations, which afford the right to effective judicial protection of specific guarantees without determining, however, the timing when judicial scrutiny must be undertaken. Furthermore, the EU Directives refrain from stating procedural sanctions against breaches of defence rights.³ Conversely, they allow the Member States to counterbalance such violations in so far as the legal system guarantees the overall fairness of the proceedings.⁴ On the other hand, national law generally makes judicial remedies available to the defendant against specific activities. It thereby enables suspects and accused persons to claim breaches of procedural safeguards that affect the legality of the impugned act or prohibit the use of illegally obtained evidence. Once the breach is ascertained, the national legislation triggers the applicability of specific sanctions that vary depending on the act and the stage of the criminal proceeding in question.

competent authorities that he is suspected or accused of having committed a criminal offence, until the conclusion of the proceedings including sentencing and resolution of any appeal. See Art. 1(2) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Art. 2(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Art. 2(1) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 [2013] OJ L294/1.

³ See in particular Art. 12 Directive 2013/48/EU and Art. 10 Directives 2016/343/EU. As regards the latter, it is worth recalling that the proposal made by the European Parliament to include a fully-fledged exclusionary rule under the Directives on the presumption of innocence was objected by the Council. S Cras, A Erbežnik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial' (2016) 1 *Eucrim* 25, 34.

⁴ Art. 12 Directive 2013/48/EU and Art. 10 Directives 2016/343/EU. Further references to the overall fairness of the proceedings can be found in Art. 3 (7) Directive 2010/64/EU, Art. 6 and 7 Directive 2012/13/EU.

2. Mapping the great complexity of judicial remedies

This explains both the great complexity and significant divergences characterizing the domestic legal provisions, which implement the remedial obligations set forth under the ABC Directives. As the comparative analysis showed, the existing judicial remedies are first fragmented along the different stages of the criminal proceedings. Although national legislations tend to anticipate judicial control over the most serious encroachments on fundamental rights during the pre-trial stage, such scrutiny may intervene *ex-ante* or *ex-post*, *ex-officio* or upon request. Moreover, different remedies apply within the same Member State depending on the type of activity (personal liberty, rights at trial, evidence), author of the breach or nature of the impugned decision.

Significant divergences also arise with regard to the standards of review that national courts apply to evidence gathered in breach of defence rights. A telling example is the spectrum of sanctions against violations of the right to access a lawyer during evidentiary activities (in particular, the questioning of the defendant without the assistance of a lawyer), which goes from excluding the sole and decisive evidence for conviction, prohibiting the use of evidence that entails an actual prejudice to the defendant's rights to exclusionary rules or fully-fledged nullities of the entire procedural phase.⁵ Finally, the strongest differences among the national criminal justice systems touch upon the structure and functions of appeals and review on constitutionality. Rules governing access to appellate and higher courts, full review or limited on errors of law, power to review old or fresh evidence are among the peculiar aspects that distinguish the Member States' criminal justice systems.

The implementation of the EU Directives on the right to translation and interpretation, the right to access a lawyer and the right to information has no or very little impact on the existing systems of judicial remedies at the national level. The reason for this lies first in the very wording of the remedial obligations provided by Union law. The ABC Directives do not require the Member States to provide for 'separate remedies or complaint procedure' against breaches of the rights that the suspect and accused person derives from Union law.⁶ Likewise, the ABC Directives do not set forth specific requirements

⁵ See Part IV, Chap III.

⁶ Recital 25 Directive 2010/64/EU; Recital 36 Directive 2012/13/EU.

related to the timing when the judicial scrutiny must be undertaken. And even when the remedial obligations deal with the structure (eg the nature of the reviewing authority)⁷ and the standards of review (eg use of evidence in breach of defence rights)⁸, they leave a wide room of discretion to the Member States.⁹

This observation must nonetheless be nuanced. In some Member States, the harmonization of defence rights indirectly led to a clarification of the scope and grounds for judicial review.¹⁰ Few examples also show that national rules implementing the ABC Directives into national law have punctually broaden the scope of decisions that are subject to judicial review.¹¹ However, none of the Member States under analysis has introduced new remedies nor have they undertaken substantial reforms of the existing judicial actions available to the defendant in criminal proceedings.

3. A European blueprint of the right to judicial review in criminal proceedings

The comparative analysis thus underlines that the design of judicial remedies adjust itself to the peculiar structure of each national criminal justice system. As a result, it would be worthless to identify the best system of judicial review or elaborate uniform model rules governing judicial actions without considering the characteristic features that distinguish criminal proceedings within the Member States. This also holds true when considering that the right to effective judicial protection has an ancillary nature¹² and does not constitute an absolute right.¹³ As the analysis of the European case law shows, standards and requirements stemming from Article 47 of the Charter and the guarantees of judicial review under the ECHR must be

⁷ For instance Art. 8 Directive 2013/48/EU.

⁸ Art. 12 Directive 2013/48/EU.

⁹ See Part II Chap I.

¹⁰ For instance, Article 8 (1) Directive 2013/48/EU lays down requirements governing temporary derogations on the right to access a lawyer, among which necessity, proportionality and procedural fairness.

¹¹ For instance in Luxembourg.

¹² H Hofmann, 'Article 47. Specific provisions' in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights : a commentary* (Hart Publishing, 2014) 1211, 1215.

¹³ See for instance Case C-300/11 *ZZ v Secretary of State for the Home Department*, para 66.

weighed against the specific circumstances of the case, including the seriousness of the charges and the complexity of the facts.¹⁴ They also vary according to the stage of the criminal proceeding, the type of activity in question and the alleged violation of the right at stake.

This results in a set of flexible parameters that allows to assess the effectiveness of judicial protection provided under national law with full regard to both the great complexity of criminal proceedings and the constitutional traditions of the Member States. The said parameters form a European blueprint of the ‘right to judicial review’ in criminal proceedings, which emerges from the analysis of the abundant case law of the CJEU and the ECtHR. The terminology used reflects the holistic approach adopted throughout the study. By referring to a ‘right to judicial review’, the proposed analysis aims indeed to overcome the blurring of lines between the overlapping fundamental guarantees to access a court, effective remedy, effective judicial protection and fair trial.

As regards the substance, the elaborated European blueprint identifies common requirements inherent to the right of judicial review and, consequently, key aspects that enhance or, on the contrary, hamper the effective protection of defence rights. Such parameters can be classified according to the following skeleton.

3.1. Requirements related to the structure of judicial review

3.1.1. Independence and impartiality of the reviewing authority

Among the common European standards inherent to the structure of judicial review are first institutional requirements. Indeed, the strongest convergences are about the very concept of court and judicial authority entitled to carry out judicial scrutiny. Only an independent and impartial tribunal previously established by law can guarantee effective control against encroachments on individual rights. The right to judicial review does not necessarily imply, however, the right to appeal in front of a court of higher instance,¹⁵ nor does the

¹⁴ In particular, the ECtHR undertakes a holistic assessment of the ‘overall fairness’ of the proceedings. The recent case law seems to pay increasing attention to the procedural peculiarities of domestic law and the specific circumstances of the individual case. M Caianiello, ‘You Can’t Always Counterbalance What You Want’ (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 283.

¹⁵ By reference to Article 47 EU Charter, see Case C-69/10 *Samba Diouf* EU:C:2011:524, para 69.

possibility to challenge a decision before a hierarchical superior authority necessarily provide the applicant with effective protection. For instance, the review undertaken by a General Prosecutor over the decision taken by another member of the Prosecution Office does not amount to an independent and impartial judicial control within the meaning of Article 47 of the Charter.

3.1.2. Time requirements

A second set of requirements is of a procedural nature. Within this category, the conducted analysis identified time requirements, which encompass three different guarantees. The first one lies in the right to be tried or more generally have claims about breaches of individual rights reviewed within reasonable time. Accordingly, the more judicial review intervenes closer in time to the alleged violation of defence rights, the more effective is the protection afforded. Underpinning this conclusion is the assumption that serious breaches of defence rights committed at an early stage of the criminal proceedings call for a prompt judicial review where they are likely to irretrievably jeopardize the holding of a fair trial. Examples are decisions allowing temporary derogations on the right to access a lawyer¹⁶ or refusing access to essential documents,¹⁷ which are subject to reinforced remedial obligations under the ABC Directives.¹⁸

Second, the time limits governing the admissibility of judicial actions must guarantee adequate time for the preparation of defence.

Third, within the EU criminal justice area, the principle of effective judicial protection prohibits that criteria governing the admissibility of a judicial action available to the defendant within a Member State discriminate between residents and non residents. In both situations, the applicant must be provided with the same period of time to access the competent court and prepare his defence.¹⁹

¹⁶ Art. 3 (6) Directive 2013/48/EU.

¹⁷ Art. 7 (4) Directive 2012/13/EU.

¹⁸ Art. 8 Directive 2013/48/EU; Art. 7 (4) Directive 2012/13/EU.

¹⁹ Case C-216/14 *Covaci* EU:C:2015:686; Joined Cases C-124/16, C-188/16 and C-213/16 *Tranca* EU:C:2017:228.

3.1.3. Procedural fairness

In addition, defence rights serve the effectiveness of judicial remedies given that they enable the suspect or accused person to put forward his defence before the competent judicial authority. From this perspective, effectiveness implies first that the person whose rights are violated is informed about the possibility to institute a judicial action. Such notification must include the date and place of the hearing, if any. Likewise, the right to access a court would be ineffective if the defendant is not informed about the charges or more generally the decision subject to judicial review.

The latter guarantee overlaps with the right to access essential materials enabling a person to put forward his defence. It should be noted, however, that the very content of the right to access the case file varies according the stage of criminal proceedings and may, under exceptional circumstances, be subject to restrictions.²⁰ In such situation, the right to judicial review entails a twofold assessment. The competent court shall have at its disposal the necessary information to verify whether restrictions to communicate confidential material are justified.²¹ If so, the judge must ensure that the consequent inability of the defendant to submit his observation did not affect the probative value of the confidential evidence.²² Accordingly, the judicial review thus undertaken aims to prevent that a conviction or more generally decisions against the interest of the defendant is based on facts and documents that were not subject to an adversarial debate.

Equally fundamental in granting the defendant an effective right of judicial review are the right to translation and interpretation where he or she does not understand the language of the proceedings. Both guarantees aim to enable the suspect or accused person to become aware of the reasons and content of acts subject to review and, thereby, to raise relevant arguments supporting his action.²³

Not all judicial remedies available to the defendant in the course of a criminal proceeding necessarily require the right to be heard in person in order to be effective.²⁴ However, the adversarial character of judicial

²⁰ Art. 7 (4) Directive 2012/13/EU.

²¹ Case C-300/11 *ZZ v Secretary of State for the Home Department*, para 56 – 57.

²² Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Commission v Kadi*, para 127 – 128.

²³ Case C-278/16 *Sleutjes* EU:C:2017:757, para 33.

²⁴ Such procedural guarantee fully applies in front of a judge called upon to review the lawfulness of detention and trial courts having competence to review

proceedings implies at least the possibility for the applicant to state his views and put forward arguments supporting his claims.

Finally, access to a lawyer must be guaranteed throughout the criminal proceedings, in particular where, given the seriousness of the charges and the complexity of the legal issues subject to review, the lack of legal assistance is likely to undermine the proper defence of the suspect or accused's interests.²⁵

3.2. *Requirements related to the functions of judicial review*

3.2.1. *Scope of review*

The second set of minimum standards stemming from the right to judicial review relates to the functions of the scrutiny. As regards the scope of review, effective judicial protection first implies that the competent judge is able to take a fully informed decision. This holds true even where strictly compelling grounds of State security, threat for the life, health and freedom of individuals justify the non-disclosure of materials and information to the defendant. In such situation, the judicial decision against the defendants' interests cannot be based on confidential information that the competent judge was not able to access nor to appreciate.²⁶

Likewise, the scope of effective judicial review encompasses an independent assessment of the arguments put forward by the parties following an adversarial debate. Thus, a procedural system that prevents the suspect or accused person or his lawyer from making his defence known to the competent court ultimately hampers the effectiveness of judicial review.²⁷ Lastly, requirements inherent to the scope of judicial review reflect themselves in the duty incumbent on the judge to provide the defendant with an adequately reasoned decision.²⁸ The completeness of the reasoning implies that all the issues raised by the

points of both facts and law. By contrast, the right to be heard in person does not systematically apply before appellate courts, which do not make a full assessment of the issue of guilt or innocence as to the facts and the law. See for instance *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) para 60.

²⁵ *Correia de Matos v Portugal* App no 48188/99 (ECtHR Decision, 1 April 1999).

²⁶ Case C-300/11 *ZZ v Secretary of State for the Home Department*, para 56 – 57.

²⁷ An illustration thereof is the excessive formalism that may characterize the admissibility of judicial action. *Labergère v France* App no 16846/02 (ECtHR, 26 September 2006) para 20 ff.

²⁸ Case T-67/11 *Martinair Holland v Commission* EU:T:2015:984, para 31.

appellant should be addressed by the reviewing authority. This leads the reviewing authority to base its decision on objective and clear arguments, while showing to the parties that they have been heard.²⁹

3.2.2. Powers of review

Lastly, the law must as a minimum entrust the judge with the power to adopt a legally binding decision on the legal question in issue. Once the violation of a right is ascertained, the consequent sanction against that breach varies, however, depending on the specific right (from the postponement of the hearing to the exclusion of evidence), the nature of the impugned decision and the possibility to redress such breaches at a subsequent stage of the proceedings (power to quash, remand or substitute its own assessment). In any event, the effectiveness of the remedy implies adequate redress for the alleged violation that has occurred, which may consist in preventing that violation or its continuation.³⁰

4. Enhancing the effectiveness of EU defence rights by means of guarantees, remedies and sanctions

The European blueprint described above does not solely provide transversal minimum standards of effective judicial protection in criminal matters. It also highlights that judicial review is one among the fundamental legal tools ensuring the effective exercise of defence rights in criminal proceedings. Indeed, the mere existence of judicial remedies is not *per se* sufficient to guarantee the full effectiveness of the rights granted by the ABC Directives to suspect and accused persons. The latter results from the interplay between three ‘shields of protection’: the formal protection of defence rights under national law, the effective judicial control over alleged breaches and an effective sanction against the ascertained violation.

The very purpose of guarantees of judicial protection consists in enabling a person to assert the rights conferred on him by Union law.³¹ Thus, the scope and strength of judicial scrutiny relies on upstream legal provisions, which define the substance of the

²⁹ *Ruiz Torija v Spain* App no 18390/91 (ECtHR, 09 December 1994) para 29.

³⁰ *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000) para 158.

³¹ H Hofmann (n 10).

defendant's rights. Hence, the formal effectiveness of those rights depends first and foremost on the proper implementation of the ABC Directives into national law. Indeed, the implementing measures adopted by the Member States guarantee the minimum content of procedural guarantees whose observance national courts ensure throughout the criminal proceedings.

Moving to the law in action, the formal protection of defence rights cannot be effective without adequate review mechanisms and, more specifically, judicial scrutiny. This assumption is precisely reflected in the remedial obligations set forth under the ABC Directives. The justiciability of the rights of suspects and accused persons within the Member States secures the effective enforcement of the EU defence rights in individual cases. In this perspective, guarantees of judicial protection are more than a fundamental right. They promote the primacy and direct effect of procedural safeguards granted to suspects and accused person in criminal proceedings by the EU Directives. Thus, remedies available to the defendant under national criminal procedure are to be seen as a second shield of protection that enables the defendant to claim specific breaches of procedural rights he derives from Union law and concomitantly entrusts an independent reviewing authority with the power to ascertain the alleged violation. This holds true where the system of judicial remedies meets the requirements stemming from the 'right to judicial review' as identified above.

Lastly, legal and judicial protection would remain ineffective if the competent reviewing authority were unable to provide adequate redress once it has ascertain a breach of defence rights. Hence, the right to judicial review further implies an effective remedy, here understood as the power to order a measure or to apply a sanction against procedural flows that undermine the right to a fair trial.

5. Further actions and challenges ahead

As a result, only a comprehensive strategy encompassing the legal, judicial and sanctioning shields of protection can enhance the full effectiveness of EU defence rights in criminal proceedings. Along this path, the conducted analysis led us to identify further actions to be undertaken both at the national and European levels.

5.1. National level

Firstly, there is a clear need to further monitor the implementation of

the ABC Directives into national law. Indeed, the comparative analysis conducted in the selected Member States shows that the domestic legal frameworks and judicial practice are still adapting to the recently adopted Directives and the resulting national reforms. In particular, the implementation into national law of the second package of Directives entered into force in 2016 is currently underway.³² Based on the findings of the present study, a comprehensive survey of national implementing measures should identify deficiencies undermining the effectiveness of EU defence rights with special focus on the following aspects: national legislation providing defence rights that do not meet the minimum standards of protection set forth under the ABC Directives; national judicial remedies, which do not enable the defendant to seek effective judicial control against breaches of defence rights; ineffective procedural sanctions against ascertained violation of defence rights that ultimately undermine the right to a fair trial.

Secondly, dissemination and training among practitioners of the national criminal justice systems are of fundamental importance. This shall not solely target law enforcement officials, prosecutors and lawyers. Special attention should be paid to training program for national judges, who play a forefront role in ensuring the proper and actual implementation of the ABC Directives in individual cases. Indeed, defence rights granted by EU law permeate every stage of national criminal proceedings, irrespective of any extraterritorial elements. Hence, the ABC Directives significantly intensify the role of national judges as Union courts of ordinary jurisdiction in a way no other EU legal instruments did before in criminal matters. It is thus essential to improve the knowledge of national judges of the fundamental principles governing the interplay between the EU and national legal orders. In particular, the primacy of Union law requires the national judge to interpret criminal procedures in compliance with the Charter and the ABC Directives³³ or to set aside domestic legal

³² Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

³³ Case C-106/89, *Marleasing* [1991] ECR I-7321, para 8.

provisions, where the latter violate the rights granted by the EU legal framework to suspects and accused person.³⁴ From this perspective, the preliminary reference procedure of Article 267 TFEU becomes a key tool for ensuring the proper interpretation of the defendant's rights in criminal proceedings.

5.2. EU level

EU policy-makers should consider further actions to be undertaken at the supranational level. At the outset, one should however exclude the adoption of EU legal instruments that specifically aim at harmonizing national judicial remedies. This would imply the competence of the Union legislature to design the very structure of the national criminal justice systems, which is rooted in the constitutional traditions of the Member States. Yet, Article 82 TFEU provides that the approximation of criminal procedures shall take into account the differences between the legal traditions and systems of the Member States.³⁵ This limit on EU harmonization is further confirmed in the third paragraph of the provision, according to which the Member States may oppose to the adoption of Directives that would affect fundamental aspects of their criminal justice systems³⁶.

Nevertheless, the EU legislature may still advocate the need for harmonized minimum requirements of judicial review to the extent necessary to ensure the *effet utile* of those provisions of Union law that grant defence rights to suspects and accused persons. Along this path, the EU could envisage to strengthen the remedial obligations set forth under the ABC Directives with regard to particularly serious breaches of defence rights. Among these are the denial to access certain materials of the case file³⁷ and temporary derogations on the right to access a lawyer,³⁸ which the ABC Directives only allow under exceptional circumstances and restrictive conditions. As previously underlined, a prompt judicial review of such decisions enhances the effectiveness of the rights of suspects and accused

³⁴ Case C-106/77, *Simmenthal* [1978] ECR 629, para 21.

³⁵ Article 67 (1) TFEU also recalls the duty of the EU to respect for the different legal systems and traditions of the Member States within the Area of Freedom, Security and Justice.

³⁶ Art. 82(3) TFEU.

³⁷ Art. 7(4) Directive 2012/13/EU.

³⁸ Art. 3(6) and 8 Directive 2012/48.

person, since it enables them to benefit from the right to access the case file and the right to legal assistance at an early stage of the criminal proceeding. The requirement of prompt judicial scrutiny leaves the Member States leeway for implementing the remedial obligation in the light of the peculiar feature and structure of the national criminal justice system, without however representing a disproportionate interference into the national procedural autonomy. Accordingly, the provisions in question could be amended as follow:

Denial to access to certain materials of the case file, Article 7§4 Directive 2012/13/EU

Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least **promptly** subject to judicial review.

Temporary derogations on the right to access a lawyer, Article 8§2 Directive 2012/13/EU

Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be **promptly** submitted to judicial review.

Having regards the competences provided by the Treaties, the EU can further enhance the effectiveness of defence rights by adopting minimum rules harmonizing sanctions against breaches of the rights of suspects and accused persons. The resulting EU Directives would perfectly meet the objective of Article 82 TFEU: they would strengthen individual rights in criminal proceedings and, thereby, enhance mutual trust and recognition of judicial decisions among the Member States.³⁹ At first, this may result in a roadmap on procedural sanctions, which should necessarily adopt a step-by-step approach. As emphasized above, effective redress against violations of defence rights varies depending on the procedural safeguard at stake, the stage of the criminal proceedings and should ultimately guarantee the fairness of the criminal trial. For instance, effective sanctions against violations of the right to interpretation may simply consist in the

³⁹ Art. 82(1) TFEU.

postponement of the hearing, while breaches resulting from the lack to access a lawyer trigger the application of rules preventing the use of incriminating evidence during the trial. Therefore, the implementation of a new European roadmap calls for further comparative studies aimed to identify adequate minimum sanctions against different breaches of differing defence rights.

Lastly, the ABC Directives substantially reinforce the role the CJEU plays in criminal matters. Indeed, the effective judicial protection of EU defence rights also relies on a smooth dialogue between national and European judges. Yet, several recent cases already illustrate that the CJEU faces a sensitive challenge: ensuring the harmonious interplay of supranational and constitutional standards for the protection of fundamental rights in criminal proceedings.⁴⁰ From a horizontal perspective, the EU Court increasingly underlines the need for an autonomous interpretation of the rights enshrined in the Charter in order to secure fundamental principles that underpin the process of European integration.⁴¹ Nevertheless, this approach shall not lead the CJEU to restrict or adversely affect the minimum substance of defence rights guaranteed by the abundant case law of the ECtHR.⁴²

From a vertical perspective, questions for preliminary rulings enable the CJEU to provide the national judge with guidance on the interpretation of fair defence rights at an early stage of the criminal proceedings. Can, and if so, how will the EU Court interpret the ‘overall fairness’ test echoed in the text of the ABC Directives? To what extent may the national criminal court refrain from sanctioning a breach of a defence right granted by the EU Directive or referring a question for preliminary ruling on the ground that such violation does not affect the fairness of the whole proceedings? On the other hand, the duty of the national judge to set aside rules conflicting with Union law shall not lead him to overcome his mandate nor to impinge on fundamental constitutional rules inherent to democratic criminal justice systems, such as for instance the separation of powers and the legality principle.⁴³ The aforementioned challenges therefore require the CJEU to develop a thoughtful approach for interpreting the rights of suspects and accused persons within the European criminal justice area.

⁴⁰ For instance Case C-310/18 PPU, *Milev* EU:C:2018:732

⁴¹ Opinion 2/13 EU:C:2014:2454, para 189.

⁴² Art. 53 EU Charter.

⁴³ Case C-42/17, *M.A.S. and M.B.* EU:C:2017:936.