

***Project "Training the judges in the field of securing
the rights of the EU citizens within the criminal proceedings"***

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**GUIDE TO PROCEDURAL RIGHTS
OF SUSPECTS AND DEFENDANTS:
THE RIGHT TO INFORMATION AND THE RIGHT
TO TRANSLATION AND INTERPRETATION**



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CHAPTER I

1.1. Introduction. General aspects

Over the recent years, the new issue of knowing the place of national law, in the context of European implementation of criminal law, has taken the lead in the scientific fora debate on criminal matters and will most likely keep a vivid interest in the coming years¹.

In building the European process, on the European integration functional model that is based on Jean Monnet's "step-by-step" method², various stages have already been implemented in which the states voluntarily yielded a substantial portion of their powers to a higher entity and recognized, along with their exclusive powers and shared powers, the authority of the latter; at the present time, joint actions are carried out with the support, coordination or help of all Member States.

Without any doubt, the most recent challenges of the European Union include putting the freedom, security and justice area on new bases (pursuant to changes brought by the Lisbon Treaty) with the guarantee of freedom viewed to provide affordable justice and safety to all citizens who can now resort to courts in any Member State with the same ease as they would go to courts in their own countries, on the one hand, and allowing the criminals, on the other hand, whose mobility is guaranteed by the freedom of movement principles, to take advantage of the differences existing between the various judicial systems of Member States.

This objective that the Union set itself can be achieved depending on the compatibility and convergence of the member state justice systems and it is expected to build, together and among those systems, a homogenous criminal justice system.

Significant achievements occurred to this end, including the set-up of police and judiciary cooperation bodies³, the implementation of the

¹ To be called "European Criminal Law" or "Criminal Law of the European Union".

² Jean Omer Marie Gabriel Monnet, a French economist and diplomat considered to be the union's architect and who in 1945, brought up the "Monnet Plan", known as the "spill over theory", that should not to be mistaken with the Schuman Plan.

³ Europol, Eurojust, OLAF, RJE, and the intended European Public Prosecutor Office (EPPO) that is to be established pursuant to a Regulation proposed by the European Parliament and the Council regarding the European Union Agency for Cooperation on criminal justice matters (as legal successor **Eurojust**) /* **COM/2013/0535 final - 2013/0256 (COD) */; the new institution is to be set-up building on Eurojust** (that is to provide administrative support services to the

principle regarding the Member State mutual recognition of judgments⁴, with the latest Framework Decision 2008/909/JAI of 27 November 2008⁵ focusing on the „Mutual recognition principle – the foundation of the cross-border judiciary cooperation”.

To help reaching the objective, the Council adopted, in Tampere, a program of measures aimed at the implementation of the mutual recognition of judgments in criminal matters.

Modern mechanisms for the mutual recognition of judgments involving imprisonment (Measure 14) and the extensive application of the principle of transferring convicted persons, with inclusion of residents in a Member State, were made possible through the Hague Program on strengthening freedom, security and justice in the European Union, calling on the Member States to finalize the program of measures, including in the area of the execution of custodial sentences.

The Hague Program, included in the EC Conclusions of November 2004 – completion of the overall program of measures for the enforcement of this principle, allowed the implementation of the Framework Decision 2008/978/JHA on the European Evidence Warrant to get hold of objects, documents and data to be used in the criminal proceedings⁶.

This decision aims to improve judicial cooperation by applying the principle of mutual recognition of decisions in the form of a European warrant for evidence – objects, documents or data to be used in criminal proceedings.

European Prosecutor's Office, including in financial matters, human resources, security and IT) and should have the exclusive authority to investigate and prosecute people who commit crimes against the Union's financial interests

⁴ 2002/584/JHA regarding the European warrant arrest the transfer procedure between Member States; 2003/577/JHA on the implementation of freezing orders and provision of evidence; 2005/214/JHA on the implementation of the mutual recognition of financial sentences; the Framework Decision 2008/947/JHA on the implementation of the principle of mutual recognition sentences and probation orders for the purpose of supervising the probation measures and the alternative punishments

⁵ The Decision was due for enforcement on 5 December 2011

⁶ Replaced with Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 on the European Investigation warrant in criminal proceedings. The deadline for the enforcement of this directive was 22 May 2017, only 7 Member States passed it into their legislation before October 2017 (the Kingdom of Belgium, France, Germany, Hungary, Latvia, Lithuania and the Netherlands), with 2 other states having notified a partial transposition (Romania and Slovenia).

1.2. Building the European Criminal Law, a step-by-step approach

In this context of building consistent criminal justice systems, the possibility for the European Union to adopt a single policy on the prevention and treatment of delinquency at the same time safeguarding the procedural rights of the person suspected or accused, along with the rights of the injured person, is undoubtedly a desideratum that prompted vivid discussions⁷ about the need of having an European criminal law, providing a description of criminal types and their corresponding responses, while observing the exclusive power of Member States to incriminate specific facts provisioned in the criminal law.

The European law however, has begun to indicate⁸, still shy but potential ways of influencing the criminal law of the Member States, by imposing, to the extent possible, the obligation to interpret criminal law in a consistent manner with European law; this implies the interpretation of the normative elements of the criminal types in accordance with the European norms⁹.

Above these names, an overarching state criminal law emanating from the European Union starts to take shape, for a consistent implementation on its territory, a science of the law on which creative possibilities express opinions that are different and sometimes contrary.

Hence, since the negotiations on the powers of the European Union in criminal matters took place, to the full power to directly create or amend criminal legal rules, there has also been an intermediate position that favoured a limited recognition of powers in criminal matters, which comes along with the creation of general criminal directions on the protection of

⁷ Castillo Garcia, J.F., „La comunitarizacion del tercer pilar: un paso necesario para consolidacion del espacio penal europeo”, *Revista general de Derecho Europeo*, 2006, nr. 11, p. 4-35

⁸ S. Franguloiu, R. Moroşanu, „Ghid de lucru în cauzele cu minori în lumina dispoziţiilor Noului Cod penal şi Noului Cod de procedură penală” drawn up under the Project called „Development of the Romanian juvenile justice system”, in a joint effort with IRZ, Bucureşti, 2012, p. 3-14

⁹ For example, the Council Framework Decision 2002/475/JHA of 30 June 2002 on fighting terrorism, that defines the crime of terrorism, the crimes related to a terrorist group and terrorist operations, sets the minimum enforceable punishments, cases for the reduction of punishments, the criminal liability of entities and the punishments applicable thereto, as well as the powers of states in various situations, the protection and assistance of victims

Community goods, values and concepts and the approximation of the national rules that form the basis thereof¹⁰.

In this context, a general framework was adopted to serve the Union's financial interests, namely the Convention on the Protection of the European Communities' Financial Interests and the accompanying protocols (known as PIF¹¹). The PIF Convention was subsequently ratified and enforced by almost all Member States¹². Relevant overarching measures introduced by the EU in the criminal law include the Council's Framework Decision 2005/212/JAI of 24 February 2005 on the confiscation of criminal proceeds, instruments and assets¹³, that has been replaced by the Commission with a directive on the freezing and confiscation of criminal proceeds in the European Union¹⁴, intended for participating Member States.

This framework was completed with general measures of criminal law, taken by the Union to fight certain illegal activity especially harmful to the licit economy, such as money laundering¹⁵ and corruption¹⁶, which help

¹⁰ This topic, while controversial, was also discussed by the Luxembourg European Court that decided for the existence of implicit general powers of the European Union on environment-related criminal matters. The Court established that these powers translate into the possibility provided to the European law makers to pass criminal law measures for the Member States when these are judged as necessary for the purpose of implementing the environment protection laws, if the relevant authorities of a country consider that criminal, specific, proportional and deterring punishments are a sine-qua-non pre-requisite in the fight against serious crimes against the environment; this is obviously not about the powers to decide on the types of criminal penalties to be applied and how serious is their nature: C – 176/03, the Commission v. the Council, Decision of 13 September 2005

¹¹ The Convention of 26 July 1995 (OJ C 316, 27 November, p. 49) (fraud); the first protocol of 27 September 1996 (OJ C 313, 23 October 1996, p. 2) and the Convention of 26 May 1997 (OJ C 195, 25 June 1997) (corruption); the protocol of 29 November 1996 (OJ C 151, 20 May 1997, p. 2) (interpretation by the Court of Justice); the second protocol of 19 June 1997 (OJ C 221, 19 July 1997, p. 12) (money laundering)

¹² The second Commission report on the enforcement of the Convention on protecting the European Communities financial interest and the attached protocols, 14 February 2008, COM(2008) 77 final, in section 4.1. After this date, a few other Member States ratified the Convention and protocols thereof

¹³ OJ L 68, 15 March 2005, p.49

¹⁴ COM(2012) 85 final of 12 March 2012

¹⁵ Directive 91/308/EEC, repealed and subsequently replaced with Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 that prevents the use of the financial systems for the purpose of money laundering and terrorism financing, OJ L 309, 25 November 2005, p. 15

protecting the financial interests of the European Union¹⁷, although they not specific to this area.

In May 2011, the Commission issued a release concerning the protection of the Union's financial interests through criminal law measures and administrative investigations¹⁸; the communication was accompanied by a working document of the Commission services¹⁹.

These documents draw attention to the heterogeneous nature of the definitions of crimes and penalties in the European Union, in the current legal framework, stressing that “the criminal law should be viewed by the Commission as an important element to improve that situation.”

The paper “Towards a Union policy on criminal matters: ensuring the effective implementation of EU policies using the criminal law” of September 2011 proposes a general framework on the content and structure of Union criminal law and general principles of EU criminal law, including the principle that Union criminal law should not go beyond what is necessary and proportionate to its objectives²⁰.

The next move was a gradual development of a body of administrative law to fight the illegal operations conducted against the Union's financial interests. Regulation (EC, Euratom) 2988/95 sets out administrative rules for the action taken in respect of illegal operations conducted against the Union's financial interest²¹; those administrative rules came with attached administrative rules dedicated to each sector²². In addition to the horizontal instruments that refer particularly to the protection of the financial interests of the Union, as mentioned above, the Union has relevant administrative law tools in respect of the illegal operations leading to loss of the Union's public funds²³.

¹⁶ Commission Decision of 06 June 2011 on establishing a reporting mechanism aimed at fighting corruption within the EU, C(2011) 3673 final

¹⁷ Directive 2012/0193 Proposal, (COM)2013/363 final, on fighting frauds against the EU financial interests through the criminal code

¹⁸ COM(2011) 293 final of 26 May 2011

¹⁹ SEC(2011) 621 final of 26 May 2011

²⁰ COM(2011) 573 final of 20 September 2011

²¹ OJ L 312, 23 December 1995, p. 1

²² As an example, in the farming sector, the Regulation (EC) 73/2009 on direct payments to farmers, OJ L 30, 31 January 2009, p. 16

²³ These instruments are listed in the Paper on the legal framework for the protection of EU financial interests using the criminal code RS 2011/07, 4 May 2012, p. 22

In addition, there various mechanisms established for purpose of building the European Criminal Law²⁴:

1. *Assimilation* – where the European rule (in an initial law provision) provides that the community interests govern the internal rules of Member States that protect their corresponding interests, reminding of the “Greek grains” case²⁵. Those 3 provisions introduced by the above-mentioned decision (discretion about the means, analogue implementation and efficiency in terms of the intended outcome) represent what is currently known as the “assimilation principle” that is, in fact, a derived version of the loyalty principle, a general principle in the EU law that is extensively used in the enforcement of the common agricultural policies, meaning that the obligation to provide protection for the interests of the Union is equivalent or assimilated to the obligation regarding the protection of a country’s interests;

2. *Approximation or coordination* – the European rule (either a directive or a framework decision) sets out the obligation for all Member States to protect the Community interests and, at the same time, it outlines the objectives for the achievement of which this obligation requires an adjustment of a country law, in the sense that it could restrain the freedom of a Member State to establish the criminal activity (*verbum regens*), as well as the nature and length of punishments (such as, for instance, the

²⁴ Castillo Garcia, J.F., „La comunitarizaci3n del tercer pilar: un paso necesario para consolidaci3n del espacio penal europeo”, *Revista general de Derecho Europeo*, 2006, nr. 11, p. 4-35

²⁵In the case, known as the ‘case of Greek cereals’, EUCJ (formerly ECJ) issued the ruling of 21 September 1989 (C-68/88) recognizing the obligation on Member States to punish the breach of a Community and substantiated it by saying that the respective infringement must be punishable under substantive and procedural conditions similar to those applicable to the infringement of a national law that is similar in terms of importance and nature, so that the punishment is effective, proportionate and dissuasive. In this sentence, Art. 5 of the TEC (in its original form, later Article 10), the Court stated that: “Member States shall take all necessary measures, whether general or specific, to ensure obligations derived from this Treaty or resulting from criminal law provisions of the Union are fulfilled”. Hence, in the light of this interpretation, we are in front of the starting point of a genuine criminal policy of the European Union. On the other hand, this obligation to protect the financial interests of the European Union similarly to the national financial interests is found in art. 290A (now Article 280), which provides that: “Member States shall adopt, for the purpose of fighting the cases of fraud affecting the EU financial interests, the same measures as taken to combat fraud affecting their own financial interests”.

Directive on abuse of privileged information²⁶ describing the behaviour of an active subject and the punishment);

3. *Cooperation* - introduced by foreign treaties concluded by the European Union and the Member States, which provide criminal intervention models in specific areas (for instance, the Convention adopted pursuant to the article 31 of the EU Treaty²⁷ for the protection of the EU financial interests, together with subsequent protocols setting out the obligation of Member States to pass criminal rules at country level to include the behaviours described in article 1 of the Convention on the fight against fraud and on the financial interests of the European Union, introducing general provisions such as those on the distinction between authors and participants (article 4), the criminal liability of the heads of economic entities (article 3), the *non bis in idem* principle (article 7);

4. *Unity* – creates common rules for the European legal area²⁸.

The Member States, despite of the European Union's implicit powers, supported the idea that the national authorities must work together to set out new forms of criminal law. This concept is usually used in the sector of international cooperation in the EU with respect to the capacity thereof to enter into foreign agreements and it has interestingly evolved into something that could be called an internal version.

From a simply theoretical angle, neither the criminal law, nor the criminal procedure regulations are within the Union's powers, according to an opinion issued by the European Union Court of Justice in case C – 173/03²⁹; however, this could not prevent the European law maker to pass the Member States criminal law viewed as necessary to make the European legislation on environmental matters fully efficient³⁰, when effective, balanced and dissuasive criminal penalties as enforced by the competent authorities of a Member State are a required to fight harmful environmental action.

²⁶ Directive 592/89/CEE

²⁷ Formerly K.3, now replaced with art. 69A, 69B and 69D of the TFEU with the new numbering – articles 82, 83 and art. 85, respectively, setting out minimum common requirements on the elements of crimes and punishments applying in organized crime, terrorism and drug traffic

²⁸ This technique is reflected by the activity of a group of experts part of the „Corpus Juris”, published in 1997: Delmas-Marty M., „Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne”, proposing common rules to protect the financial interests of the European Union

²⁹ C-173/02 commission v. Council of 13 September 2005

³⁰ On other matters as well, such as money laundering, terrorism, organized crime, drug and human trafficking, smuggling of migrants, juvenile pornography, IT crime, areas in which the European lawmakers provided for the material law

Whereas at the time this case was settled there was no explicit European power to set out substantial criminal norms against environmental crime, the Framework Decision 2003/80/JAI of 27 January 2003 on environment protection through criminal law measures was seen as being compatible with the Treaty provisions, as these should be construed in the sense that they are providing to the EU institutions implicit powers to enable legislation on criminal law, provided it can be proved that such a legislative measure is required for the environment protection as a common sector policy, according to the Treaty.

Starting from this decision, the European Union felt encouraged to legislate on criminal law and in another case of reference³¹, the European Court ruled that “the determination of the type and level of criminal penalties to be applied” must be considered as excluded from the Community's area of authority”, which resulted in the fact that the scope and size of this implicit power not being well understood, because the Court ruled only on the environmental matters, as they related to the environmental policy sector.

Since the European Court did not give explicit power for the Union to legislate, and after the Member States rejected the European Constitution draft, the Lisbon Treaty brought an important change in the sense that Article 82 and 83 of the EU Treaty provided explicit power for granting autonomous authority to adopt both criminal and material criminal law measures³².

It is worth mentioning that prior to the entry into force of the Lisbon Treaty, different types of sector instruments existed in which rules could be found which the Member States were required to observe in the process of drawing up their own criminal laws³³ and in this manner the European

³¹ C-440/05 Commission v. Council of 23 October 2007

³² With regard to the authority to legislate from a criminal proceeding perspective, things are clearer, but also more developed, in the sense that after the Tampere Council decision, the Framework Decision 2002/584/JHA was adopted by the Council on 13 June 2002, on matters related to the European arrest warrant and the transfer procedures between Member States.

³³ For instance, the Framework Decision 2002/629/JHA of the Council of 19 July 2002 on fighting human trafficking (repealed by Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and fighting human trafficking and protection of victims, and replacing of Framework Decision 2002/629/JHA of the Council) in which several categories of obligations were introduced for the Member States, such as the definition of the crime by describing the behavioural types – recruitment, transport, transfer, accommodation, or subsequent hosting of persons, including the exchange or transfer of the power on those persons, taking place under specific circumstances (by using means of constraint, force or threat, deception or fraud, or the misuse of authority or

legislator decided the content of the criminal provisions in the matter, as traditionally it was an area reserved for the national lawmakers, now restricted.

When the Lisbon Treaty came into force, due to the provisions of article 83 of TFEU, the European Union was provided the power, using directives, to establish minimum rules to define crimes and punishments in areas that refer to very serious crimes with a cross-border dimension, resulting from either the nature or the impact of the crime, or even from a special need to fight those crimes on a common base.

The respective areas were specifically and thoroughly identified by the European law-makers, without limitations, living the possibility to update the list “as crime evolves”: terrorism, human trafficking and sexual exploitation of women and children, drug traffic, firearms traffic, money laundering, corruption, counterfeit payment means (money or electronic means of payment), IT crime, organized crime³⁴.

Since the fight against organized crime and annihilation of criminal organizations remain a challenge and that, unfortunately, the recent years saw a spectacular increase of the cross-border crimes – drug traffic, human traffic, terrorism and IT crime, including juvenile pornography – the legislative approach needs to be considered both from the substantive law and criminal procedure angle, in order to make sure that the right of people accused of those crimes are observed.

A specific common feature of all these forms of crime is the fact that they are cross-border crimes committed by highly mobile and flexible groups operating in several jurisdictions and sectors. Therefore, it takes a coordinated pan-European response to put up an effective fight against those groups.

vulnerability, or by means of payments and financial advantages; the obligation to punish some forms of participation to crimes, namely abetting, complicity, as well as the attempted crime; a new provision was introduced setting out a ceiling for punishments, namely the maximum punishment that should be at least 8 years when crimes are committed under any of the above circumstances; another obligation was to establish the cases of liability of the legal persons and the penalty to be inflicted in these cases; in addition, the rights to be allowed to victims of human trafficking by the court sentence were established.

³⁴ On these matters, the European Union worked with Framework Decisions before the Lisbon Treaty effective date, and with directives afterwards; one shall notice that over the recent years the European law-makers adopted several directives, on substantive law and criminal procedures, that will be further detailed in this paper; however the current scientific work is not meant to be thorough and will provide a simple review of the directives that are the subject matter of this paper.

Increased and diversified cross-border crime with multiple criminal operations makes it more difficult for Member States to identify and fight cross-border crime, in particular the organized crime.

As a result, action at the level of the European Union is necessary as the envisaged measures have an intrinsic European dimension, involving the creation of a legal system aimed to support and strengthen the coordination and cooperation between the national judicial authorities on serious crimes affecting two or more Member States or requiring prosecution on a common basis, together with the creation of an entity to ensure these forms of co-ordination and cooperation³⁵. This objective can only be achieved at EU level, in accordance with the subsidiarity principle.

1.3. From criminal to procesual law in the European Union

At the same time with the development of Union's criminal law, there is a constant concern for the respect of the persons accused or suspected under the criminal proceedings and of the victims of crime.

For this reason, if we considered a more restraint area in the European Union law, we can see that legal or principles of general law have been created and used in extenso by the European court – the Court of Justice of the European Union.³⁶

The initial driver of the Court declaration on the fundamental rights as part of the judicial order of the Union (EC) was the challenge of the European law supremacy by the courts of the Member States sustaining that the European legislation failed to observe important rights there are safeguarded by the national law.

As a result, the judicial establishment developed by the Court was initially supported by the Member States, as long as the protection of such rights was introduced by the Court in the European law as a limitation of the tasks of European institutions³⁷ and a restriction imposed on the Member States.

The judicial and legislative activity in respect of the human rights extended considerably over time, including an extended control by the Court of certain acts of the Member States over the observance of these rights. Under the circumstances, it is important to note the fact that the

³⁵ Draft Regulation of the European Parliament and the Council and of the European Judicial Cooperation Agency (Eurojust) / * **COM/2013/0535 final - 2013/0256 (COD) */**

³⁶ P. Craig, G. de Burca, „Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină”, edition a IV-a, coordinated by B. Andreșan-Grigoriu and T. Ștefan, Hamangiu Publishing House, Bucharest, p. 478-481

³⁷ Ibidem point 36, p. 477

debates on the Chart of Fundamental Rights of the European Union created tensions between the Member States and the European institutions, with some³⁸ requesting a larger and strengthened role of the Union, and therefore of the Court, and others requesting a limitation of this role and of the Chart as being opposable not to the Member States, but to the Union's institutions in the first place.

By taking a brief look at the history of the protection of fundamental rights, necessary for a correct approach and understanding of the phenomenon and manner in which the European Union is involved in the European law system and implicitly of the Member States, it should be pointed out that since the *Handelsgesellschaft*³⁹ ruling, the Court of Justice of the European Union has continuously emphasized the autonomy of the Union's general principles of law. At the same time, the Court emphasized that the source of these general principles is not entirely independent of the cultures and judicial traditions of the Member States⁴⁰.

In the course of this development, the question arises⁴¹ as to whether the human rights agreements to which all the Member States are party should be regarded as representing only the smallest common denominator (a "floor") beyond which the Court is free to develop higher European standards of protection or should they be regarded as the only common standard of the Member States and therefore the highest standard (the "ceiling") from which the general principles of the Union can be derived?

Obviously, in connection with the European Convention on Human Rights and Fundamental Freedoms, it is unanimously accepted that it is a floor and not a ceiling⁴² and that while the level of protection of rights should not fall below that provided by the Convention, so that Union law may provide for extensive protection⁴³ ..

³⁸ The comments belong to the United Kingdom representatives who took part in the Chart writing process, Lord Goldsmith, „A Charter of Rights, Freedoms and Principles”, 2001, 38 CMLRev 1201 și „The Charter of Rights – A brake not an accelerator”, 2005, EHLRev, 473, apud. P. Craig, G. de Burca, op. cit., p. 478

³⁹ C-11/70

⁴⁰ C-4/73, *Nold v. Commission*

⁴¹ P. Craig, G. de Burca, op. cit., p. 483

⁴² AG Lenz on the case C-137/84 *Ministere Public vs Mutsch* ECHR 2681, p. 2690, regarding the rights in respect of the language of the criminal procedure and *Scheuner*, supra n.31, p. 181, apud P. Craig, G. de Burca, op. cit., p. 483, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61984CC0137&qid=1507394380140&from=RO>

⁴³ AG in C-49/88 *Al-Jubail Fertilizer Co. c. Saudi Arabian Fertilizer Co. v. the Council*, 1991, ECHR I-3187, p. 3230-3231, apud P. Craig, G. de Burca, op. cit., p. 483

It should also be noted that the recent practice of other Council of Europe human rights instruments, such as the Convention on Action Against Trafficking in Human Beings, where the European Union insisted on the inclusion of a "clause of non-connection" which states that the European Union and the Member States, in their relations, will apply the rules of Union law on trafficking in human beings, not the provisions of the new Convention⁴⁴.

This practice has been criticized for undermining the application of human rights conventions of this kind to the European Union and its Member States, but also because it could possibly allow for lower human rights standards, below the "flooring fixed by the Council of Europe instrument"⁴⁵.

In the light of developments in the field of practice, it is noted that the Network of Independent Human Rights Experts established in 2002 has consistently called for standards of safeguarding fundamental rights within the Union, in particular, as laid down and expressed in the Charter of Fundamental Rights of the Union to be "escalated" to standards of international human rights, precisely in order to avoid requiring Member States to choose between loyalty to the Union law and other international commitments⁴⁶.

In this context, it should be noted that Member States are not obliged to comply with general principles of law in situations where they are "outside the scope of European law"⁴⁷.

However, in other cases⁴⁸, the Court has stated that it is "difficult to foresee what situations the Court may regard as outside or within the scope of Community law from the point of view of judicial review of respect for human rights."

Still, the practice of the European Contentious Court has lately revived, in the sense that, while not verifying this compatibility, it requires national courts to verify the respect of human rights in third countries, for example, to resolve requests for extradition. It is therefore for the courts of

⁴⁴ Art. 40 par. 3 of the European Council Convention on the action taken against the trafficking in human beings, 2005, (CETS nr. 197)

⁴⁵ P. Craig, G. de Burca, op. cit., p. 484

⁴⁶ Annual Reports of the expert network, http://ec.europa.eu/justice_home/cfr/index_en.htm.

⁴⁷ For instance, in the Demirel case (C-12/86) the Court explained that "the compatibility with the human rights and the measures undertaken by the Member States which are not covered by the Community Law scope were not subject to examination"

⁴⁸ For instance, Carpenter (C-60/00) or Akrich (C-109/01)

the Member States to verify, by any relevant means, that in the requesting third country the extradited person will not be subjected to inhuman or degrading treatment. This is what the Court of Justice of the European Union has ruled in the case of Aleksei Petruhhin⁴⁹, which we will look at from several perspectives, given its implications in the practice of the Member States, including in the two directives which are the subject of our scientific approach.

In short, Aleksei Petruhhin, an Estonian national, was the subject of a prior search notice published on Interpol's internet site on 22 July 2010. This national was caught on 30 September 2014 in Bauska (Latvia) and put in preventive arrest on 3 October 2014.

On 21 October 2014, the Latvian authorities were notified of an extradition request by the General Prosecutor of the Russian Federation. It was apparent from this request that Mr Petruhhin was prosecuted according to a ruling of 9 February 2009 and that he should be arrested. Mr Petruhhin was accused of attempting to traffic a large quantity of drugs, in an organized group. Under Russian law, the punishment for this offense is a custodial sentence between 8 years and 20 years of imprisonment.

The Latvijas Republikas Ģenerālprokuratūra (General Prosecutor's Office of the Republic of Latvia) authorized the extradition of Mr Petruhhin to Russia.

However, on 4 December 2014, Mr Petruhhin sought the annulment of the extradition ruling on the ground that, under Article 1 of the Treaty on Legal Assistance and Legal Relationship between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania, he had in Latvia the same rights as a national Latvian and, as a consequence, the Latvian State had the duty to protect him against unjustified extradition.

The referring court pointed out that neither Latvian national law nor any of the international agreements concluded by the Republic of Latvia, in particular with the Russian Federation or the other Baltic States, provide for the restriction of the extradition of an Estonian national to Russia. According to these international agreements, protection against such extradition is only provided for Latvian nationals.

However, according to the referring court, the lack of protection of Union citizens against extradition, when moving to a Member State other than that of which they are nationals, is contrary to the essence of European citizenship, namely the right of European Union citizens to safeguards equivalent to Member States nationals.

Under the circumstances, the Augstākā tiesa (Supreme Court, Latvia) annulled the decision to arrest Mr Petruhhin on 26 March 2015 and

⁴⁹ C-182/15, the decision of 06 September 2016, in extenso in the annex

decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

1. Should the first paragraph of Article 18 and Article 21 (1) TFEU be interpreted as meaning that, for the purpose of applying an extradition agreement concluded between a Member State and a third State, the citizen of any Member State of the Union must enjoy the same level such as that enjoyed by its own nationals of the Member State notified in the case of extradition to a State which is a non-member state of the Union?

2. In those circumstances, is the court of the Member State to which extradition has been requested to apply the extradition conditions laid down by the Member State of the European Union of which the person concerned is a national or those of the Member State in which the person [concerned] is normally resident?

3. If the extradition is to be allowed without regard to the special level of protection provided for the nationals of the State being notified, it is for that State to verify compliance with the safeguards provided for in Article 19 of the Charter, namely that no one can be extradited to a State where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment? Can that verification be confined to finding that the State requesting extradition is a contracting party to the Convention against torture or must the facts be assessed in the light of the Council's assessment of that State?"

The European Union Court of Justice recalled that, in the context of the cooperation between the Court and the national courts, it is only for the national court, which has jurisdiction to hear the case and has to assume responsibility for the judgment to be given, to assess, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Hence, where the questions referred concern the interpretation of European Union law, the Court is, in principle, bound to give judgment (Ruling of 6 October 2015, *Capoda ImportExport*, C354/14, EU:C:2015:658, point 24).

In the case, the Latvian Government informed the Court that, following its release on 26 March 2015, Mr Petruhhin left Latvia to return to Estonia and added that the extradition procedure remained pending before the Latvian courts. The Latvian Government stated that the General Prosecutor's Office of the Republic of Latvia had not withdrawn its decision authorizing the extradition of Mr Petruhhin and that decision was still subject to the jurisdiction of the *Augstākā tiesa* (Supreme Court), so that the latter would be obliged to either accept or to refuse extradition or to request further information before deciding.

Therefore, although the requested person Petruhhin was no longer in Latvia, it was still necessary for the referring court to rule on the legality

of the extradition decision, since that decision, if not annulled by that court, could be executed at any time, if appropriate, following the arrest of the person concerned on the Latvian territory. It does not therefore follow that the questions asked, which seek to determine the conformity with European Union law of the national rules on the basis of which such an extradition decision was adopted, would have been of no interest in resolving the main proceedings.

By its first two questions, which the Court has examined together, the referring court has essentially sought to ascertain whether TFEU Articles 18 and 21 must be interpreted as meaning that, for the purpose of applying an extradition agreement concluded between a Member State and a third country, the nationals of another Member State must benefit from the rule prohibiting the extradition of their own nationals by the first Member State.

In this regard, it was noted that in the absence of an international convention between the Union and the third country concerned, the rules on extradition fall within the competence of the Member States.

However, the Court has held that, in situations falling within the scope of European Union law, the national rules at issue must comply with that rule (Ruling of 2 March 2010, Rottmann, C135/08, EU:C:2010:104, point 41). Or, by its first two questions, the national court sought to ascertain whether national extradition rules such as those at issue in the main proceedings are compatible with TFEU Articles 18 and 21.

By prohibiting “any discrimination on grounds of citizenship or nationality”, TFEU Article 18 imposes equal treatment on persons who are in a situation falling within the scope of the Treaties (Ruling of 2 February 1989, Cowan, 186/87, EU:C:1989:47, point 10).

In the present case, although the rules on extradition fall within the authority of the Member States, in the absence of an international convention between the Union and the third country in question, it must be borne in mind that, in order to assess the scope of the Treaties within the meaning of Article 18 TFEU, this article has to be read in conjunction with the EU citizenship provisions of the EU Treaty. The situations falling within that scope include, *inter alia*, those relating to the exercise of freedom of movement and of residence on the territory of the Member States, as conferred by Article 21 TFEU (Ruling of 15 March 2005, Bidar, C209/03, EU:C:2005:169, points 31 to 33).

Mr Petruhhin, an Estonian national, used in the main proceedings, in his capacity as a citizen of the Union, his right to move freely to the Union by moving to Latvia, so that the Court found that the situation at issue in the main proceedings falls within the application of the Treaties within the meaning of Article 18 TFEU, which contains the principle of non-

discrimination on grounds of citizenship or nationality (Cowan Ruling of 2 February 1988, 186/87, EU:C: 1989:47, points 17 to 19).

However, national extradition rules such as those at issue in the main proceedings introduce a difference in treatment as the person concerned is a citizen national or a national of another Member State, because it leads to the non-granting to nationals of other Member States, such as Mr Petruhhin, the protection against extradition enjoyed by citizen nationals. In this way, such rules can affect the freedom of the former to move to the Union.

Accordingly, the Court has found that, in a situation such as that at issue in the main proceedings, the inequality of treatment consisting in the allowing the extradition of a Union citizen of another Member State, such as Mr Petruhhin, constitutes a restriction on freedom of movement within the meaning of Article 21 TFEU, and that such a restriction can be justified only if it is based on objective considerations and proportionate to the legitimate aim pursued by national law (Runevič-Vardyn and Wardyn Ruling of 12 May 2011, C-391/09, EU:C: 2011:291, point 83).

It should be noted that several governments which have submitted observations to the Court argue that the measure providing for extradition has been adopted in the framework of international criminal law in accordance with an extradition convention and seeks to avoid the risk of impunity.

In this regard, the Court recalled that, under Article 3 par. (2) of the EU Treaty, the Union provides its citizens with an area of freedom, security and justice without internal frontiers, within which the free movement of persons is ensured, in conjunction with appropriate measures on border control at external borders, as well as preventing and combating this crime.

The objective of avoiding the risk of impunity for persons who have committed a criminal offense exists in that context (Ruling of 27 May 2014, Spasic, C129/14 PPU, EU:C:2014:586, points 63 and 65) and, as the Advocate General pointed out in point 55 of his Opinion, it must be regarded as having a legitimate effect in European Union law.

However, the Court noted that measures restricting a fundamental freedom such as that provided for in Article 21 TFEU cannot be justified by objective considerations unless they are necessary for the protection of the interests that they seek to safeguard and only to the extent that those objectives can be achieved by less restrictive measures (Runevič-Vardyn and Wardyn, C391/09, EU:C:2011:291, point 88). The Court also noted that extradition is a procedure aimed at combating the impunity of a person who is on a territory other than the one that the person is alleged to have committed an offense.

Thus, as several national governments have pointed out in the observations submitted to the Court, while according to the admissibility of

the case, extradition or trial, the non-extradition of national nationals is generally compensated by the possibility of the requested Member State to prosecute its own nationals for serious offenses committed outside its territory, that Member State is generally incompetent to hear such facts when neither the author, nor the victim of the alleged offense, has the nationality of that Member State. The extradition thus helps prevent crimes committed on the territory of a state of people who have fled from that territory from going unpunished.

In that context, national rules such as those at issue in the main proceedings, which make it possible to respond favourably to a request for extradition for the purposes of prosecution and trial in the third State where the offense is alleged to have been committed, appear to be appropriate to reach the target.

However, the Court noted that it is necessary to ascertain whether there is no alternative measure which would lessen the exercise of the rights conferred by Article 21 TFEU and which would enable the objective of avoiding the risk of impunity of a person who would have committed a criminal offense.

In that regard, the Court recalled that, in accordance with the principle of loyal cooperation provided for in Article 4 par. (1) subpar. (3) of the EU Treaty, the Union and the Member States shall respect and assist each other in carrying out their tasks under the Treaties.

On the other hand, in its relations with the rest of the international community, the Union affirms and promotes its values and interests and contributes to the protection of its citizens in accordance with Article 3 (5) of the EU Treaty, and this protection is gradually being built up through cooperation instruments such as extradition agreements concluded between the Union and third countries.

However, there is no such convention between the Union and the third country at issue in the main proceedings and, in the absence of rules of Union law governing extradition between the Member States and a third country, the implementation of all mechanisms for cooperation and mutual assistance in criminal matters under Union law is required in order to protect Union citizens in the face of measures which may deprive them of the rights to move and reside freely provided for in Article 21 of the Treaty, while combating the impunity of criminal offenses.

Hence, in such a case, the exchange of information with the Member State of the person concerned is to be privileged in order to offer the authorities of that Member State, in so far as they are competent under their national law to prosecute that person for acts committed outside the national territory, the possibility to issue a European arrest warrant for criminal prosecution. Thus, Article 1 (1) and (2) of Framework Decision

2002/584 does not exclude in such a case the possibility for the Member State of the alleged author of the offense to issue a European arrest warrant in order to surrender that person for the purpose of criminal prosecution.

By cooperating in this way with the Member State of the person concerned and by giving priority to this possible arrest warrant in relation to the extradition request, the Court has stated that the host Member State acts in a way that affects less the freedom of movement while avoiding, to the extent possible, the risk that the offense to be prosecuted goes unpunished.

The Court has stated accordingly that the first two questions must be answered as follows: Articles 18 and 21 TFEU must be interpreted as meaning that when a Member State in which a citizen of the Union who is a national of another Member State is traveling to a Member State a request for extradition by a third country with which the first Member State has concluded an extradition agreement shall be required to inform the Member State of which that citizen is a national and, if so, at the request of the latter Member State, surrender that citizen in accordance with the provisions of Decision 2002/584, provided that that Member State is competent, under its national law, to prosecute that person for acts committed outside its national territory.

By its third question, the referring court has essentially sought to ascertain whether, should the requested Member State envisage extraditing a national of another Member State at the request of a third country, that first Member State must to verify and ensure that the extradition does not affect the rights set out in Article 19⁵⁰ of the Charter and, if so, which criteria must be taken into account for the purposes of this verification.

With regard to this question, the Court noted that, as apparent from the answer to the first two questions, the decision of a Member State to extradite a citizen of the Union in a situation such as that in the main proceedings falls within the scope of Articles 18 and 21 TFEU and, therefore, of European Union law, within the meaning of Article 51 (1) of the Charter (Åkerberg Fransson Ruling of 26 February 2013, C617/10, EU:C:2013:105, points 25 to 27).

Consequently, the provisions of the Charter, and in particular Article 19 thereof, are entitled to apply to such a decision, and according to this

⁵⁰ Article 19: „Protection in the case of relocation, expulsion or extradition. (1) Collective expulsion is forbidden. (2) No person shall be subject to relocation, expulsion or extradition to a state in which there is a high risk of facing a death sentence, torture or other punishments, or inhuman or degrading treatment.

article no one can be relocated, expelled or extradited to a State where there is a serious risk of being punished by a death sentence, torture or other inhuman or degrading treatment or punishment.

It is relevant what the European Court has ruled to assess whether that provision has been infringed, since the referring court has sought to ascertain in particular whether a Member State can confine itself to finding that the requesting State is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which prohibits torture, or whether the situation in the latter State must be analysed in the light of its assessment by the Council of Europe.

So the Court has noted, in this regard, there should be a reference to Article 4 of the Charter, which prohibits inhuman or degrading treatment or punishment, and it should be reminded that that prohibition is absolute insofar as it is closely linked to respecting the human dignity, referred to in Article 1 of the Charter (Ruling of 5 April 2016, Aranyosi and Căldăraru, C404/15 and C659/15 PPU, EU:C:2016:198, point 85).

“The existence of declarations and the acceptance of international treaties guaranteeing in principle the observance of fundamental rights are not sufficient in themselves to ensure adequate protection against the risk of ill-treatment when reliable sources show practices of the authorities - or tolerated practices – which are manifestly contrary to the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Court of Human Rights, Saadi v. Italy, Ruling of 28 February 2008, CE:ECHR:2008:0228JUD003720106, § 147).

Consequently, to the extent that the competent authority of the requested Member State holds evidence of a real risk of the application of inhuman or degrading treatment to persons in the requesting third country, it is under an obligation to assess the existence of that risk when deciding on the extradition of a person to that State (see, to that effect, Article 4 of the Charter, Ruling of 5 April 2016, Aranyosi and Căldăraru, C404/15 and C659/15 PPU, EU:C:2016:198, point 88).

To that end, the competent authority of the requested Member State must rely on objective, reliable, accurate and duly updated elements. These elements may result, *inter alia*, from international judicial decisions, such as rulings of the European Court of Human Rights, judgments of the requesting third country, decisions, reports or other documents drawn up by the Council of Europe bodies or those who are part of the United Nations system (Ruling of 5 April 2016, Aranyosi and Căldăraru, C404/15 and C659/15 PPU, EU:C:2016:198, point 89).

Consequently, the answer to the third question must be that, where a Member State is notified by a request from a third country for the extradition of a national of another Member State, that first Member State

must verify that the extradition does not prejudice the rights provided for in Article 19 of the Charter.”

Hence, by this ruling, the Court of Justice of the European Union imposes on the national courts the obligation of a specific verification to ensure that a procedure such as extradition will not undermine the rights provided for in Article 19 of the Charter of Fundamental Rights of the European Union, and that the requested person will not be subjected to inhuman or degrading treatment, which is equivalent to the imposition of a positive obligation on the courts which will be required to administer evidence in this respect.

We will not comment here on the legal possibility for the judicial authorities to issue a European arrest warrant against their own citizens who have committed crimes on the territory of other Member States, as it goes beyond the scope of this approach, although it requires an in-depth analysis not only of the principles of territoriality and of the personality of the criminal law, but also of the issuing terms of such a mandate, not only under 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 Decision 2009/299/JHA of 26 February 2009.

By this decision we note once again that the case-law provided by the Court of Justice of the European Union does not hinder the development of the level of protection of human rights at European level, both the Charter and the case-law of that court demonstrating the European Union's interest in respect for one of its fundamental values, human rights, and that the national courts must ensure, in any pending proceedings, that the rights enshrined in the Charter are respected.

1.4. Brief retrospective of the European law development and the new perspective opened by the Charter of European Union Fundamental Rights

The most important of recent developments are the endorsement of the Charter of Fundamental Rights of the European Union at the Nice European Council in 2000⁵¹, along with the creation of a network of independent human rights experts from the Union⁵².

The Charter of Fundamental Rights, at the time not a legally binding tool, has main objective, as stated in its preamble, to reaffirm the "rights deriving mainly from the constitutional traditions and international

⁵¹ On 7 December 2000, the European Parliament, the EU Council and the Commission proclaimed in Nissa the Chart of EU fundamental rights (OJ C 364, p. 1)

⁵² http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.

obligations common to the Member States, the Treaty on European Union the Treaty of the European Convention and Community treaties, of [...] The European Convention on Human Rights and Fundamental Freedoms], Social Charters adopted by the Community and by the Council of Europe and the case-law of [the Court] and of [the European Court of Human Rights]" (Parliament v Council, C540/03, EU:C:2006:429, point 38).

The Lisbon Treaty entered into force on 1 December 2009 amended Article 6 EU. That provision, as amended, which now constitutes Article 6 TEU, is drafted in the following terms:

"(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties

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 and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

(2) The Union shall accede to [the European Convention for the Protection of Human Rights and Fundamental Freedoms]. Such accession shall not affect the Union's competences as defined in the Treaties.

(3) Fundamental rights, as guaranteed by the [European Convention for the Protection of Human Rights and Fundamental Freedoms] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Therefore, in a variety of ways, the Charter of Fundamental Rights of the European Union plays an important role in shaping Union policies, both sectoral and CFSP policies.

The network was built at the request of the European Parliament in 2002 to assist Parliament in assessing how the European Union and the Member States implement the rights set out in the Charter⁵³. In addition to publishing annual reports on the respect of these rights by the European Union and the Member States, including thematic reports on a selected topic, the network has also published other reports and detailed opinions on specific issues, both on its own initiative and at the request of the Commission, alongside a very long comment on the Charter of Fundamental Rights of the European Union⁵⁴.

⁵³ Situation Report of the EU Fundamental Rights, 2000, A-5 223/2001.

⁵⁴ http://ec.europa.eu/justice_home/cfr_cdf/list_opinions_en.htm. These topics addressed in the reports, including the profiling based on ethnic criteria,

It is also worth mentioning that in 2007 the Fundamental Rights Agency of the European Union⁵⁵ was set up and covered and replaced the European Monitoring Centre on Monitoring Racism and Xenophobia, which existed since 1997; the Agency aims to contribute to the promotion and protection of fundamental rights across the European Union, as effectively as possible.

To this end, the Agency consults and cooperates with partners on collecting and analysing information and data through social and legal surveys; providing specialized assistance and advice and communicating and raising awareness about rights. In carrying out these tasks, the Agency collects information, formulates opinions, highlights good practices and publishes thematic reports⁵⁶.

We need to make clear that the provisions contained in the Charter are binding in the context in which the principle of mutual trust between Member States is fundamentally important to the Union law, as it allows for the creation and maintenance of an area without internal frontiers. Or this principle requires, in particular with regard to the area of freedom, security and justice, for each of these states to consider, except in exceptional circumstances, that all other Member States abide by the Union law and, in particular, by the fundamental rights recognized by such law⁵⁷.

Hence, when implementing Union law, Member States may have to assume, on the basis of that provision, that the other Member States respect fundamental rights, so therefore they are deprived not only of the possibility of claiming from another Member State a level national protection of fundamental rights which is higher than that provided for by Union law but also, in exceptional circumstances, of the possibility to verify whether that other Member State has in fact respected, in a specific case, the fundamental rights guaranteed by the Union⁵⁸.

It should also be underlined that Protocol 16 authorizes the highest courts of the Member States to file with the European Court of Human Rights requests for an advisory opinion on issues of principle concerning the interpretation or implementation of the rights and freedoms

responsibilities of the Member States in relation with the CIA activity and “extraordinary extraditions”, as well as the right to raise objections on reasons of conscience, and other similar topics

⁵⁵ FRA, introduced in the Council Regulation (EC) no 168/2007, OJ L 53/2007, p. 1

⁵⁶ https://europa.eu/european-union/about-eu/agencies/fra_ro

⁵⁷ Decision N. S. et al, C411/10 and C493/10, EU:C:2011:865, points 78-80; Decision Melloni, EU:C:2013:107, points 37 and 63)

⁵⁸ This verification, however, became possible and mandatory after the EU Court of Justice ruled in the Petruhhin Case, presented above

safeguarded by the European Convention on Human Rights and Fundamental Freedoms or by its protocols, where the European Union law, for that purpose, requires those courts of law to bring before the Court a request for a preliminary ruling under Article 267 of TFEU.

Therefore, it is not excluded that a request for an advisory opinion submitted under Protocol 16 by a court of a Member State which has acceded to that protocol may initiate the procedure of prior involvement of the Court, thereby creating a risk of circumvention of the reference procedure laid down⁵⁹ in Article 267 TFEU, the cornerstone of the judicial system established by treaties.

1.5. The obligation to observe the procedural rights of people involved in criminal proceedings. The protection provided by that the Charter of European Union Fundamental Rights

Fundamental rights are an integral part of the general principles of Union law. The Union is endowed with a new type of legal order with a specific nature, a constitutional framework and founding principles that are its own, a very elaborate institutional structure, as well as a complete set of legal rules that ensure its operation.

It is also important to note the specific characteristics of the very nature of Union law. In particular, as the Court of Justice of the European Union has repeatedly pointed out, the Union law is characterized by the fact that it originates from an independent source constituted by the treaties, by its primacy with regard to the law of the Member States⁶⁰, and by the direct effect of a whole set of provisions applicable to Member States and their nationals⁶¹.

These essential features of Union law have given rise to a structured network of mutually interdependent principles, norms and legal relations that bind the Union itself and its Member States and the Member States among themselves, which are currently engaged, as mentioned in the second paragraph of article 1 of the TFEU, in a “process of creating an ever closer union among the peoples of Europe”.

⁵⁹ Opinion 2/2013 EU Court of Justice, plenary session, of 18 December 2014, ECLI:EU:C:2014:2454

⁶⁰ Costa Decision, EU:C:1964:66, p. 1159 and 1160, and Internationale Handelsgesellschaft Decision, EU:C:1970:114, point 3, Opinion 1/91, EU:C:1991:490, point 21, Opinion 1/09, EU:C:2011:123, point 65, and Melloni Decision, C399/11, EU:C:2013:107, point 59

⁶¹ Van Gend & Loos Decision, EU:C:1963:1, p. 23, and Opinion 1/09, EU:C:2011:123, point 65

Such a legal construction is based on the fundamental assumption that each Member State shares values with all the other Member States and recognizes that, in their turn, they share with it a series of common values on which the Union is founded, as set out in Article 2 TFEU. This assumption implies and justifies the existence of mutual trust between Member States in the recognition of those values and, therefore, in the compliance with the law of the Union that puts them into practice.

In addition, the fundamental rights are the central point of the legal construction as enshrined in the Charter of Fundamental Rights of the European Union, which, under Article 6 (1) TFEU, has the same legal power as the Treaties, the observance of those rights being a precondition the legality of Union acts so that measures incompatible with those rights cannot be admitted into the Union⁶².

Hence, the Charter covers all the rights of the person involved in judicial proceedings:

„Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49

Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under

⁶² ERT Decision, C260/89, EU:C:1991:254, point 41, Kremzow Decision, C299/95, EU:C:1997:254, point 14, Schmidberger Decision, C112/00, EU:C:2003:333, point 73, and the Decision Kadi & Al Barakaat International Foundation/Council and Commission, EU:C:2008:461, points 283 and 284

national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for a criminal offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

It should be pointed out that this guarantee is supplementary to that provided by the European Convention on Human Rights and Fundamental Freedoms, although the Court of Justice of the European Union has unexpectedly decided in the opinion of 18 December 2014 that the draft Accession Agreement is incompatible with the European Union law (on the grounds that it is liable to infringe Article 344 TFEU and the specific characteristics and autonomy of Union law as it does not ensure coordination between Article 53 of the European Convention on Human Rights and Fundamental Freedoms and Article 53 of the Charter of Fundamental Rights, it does not prevent the risk of undermining the principle of mutual trust between the Member States by Union law and provides no correlation between the mechanism established by Protocol 16 and the reference for a preliminary ruling under Article 267 TFEU), so that the two European courts will continue to have shared competences.

Or, the autonomy enjoyed by the Union law in relation to the law of the Member States and international law requires that the interpretation of fundamental rights be ensured within the structure and objectives of the Union⁶³.

As regards the structure of the Union, we have to emphasize that compliance with the Charter is imposed not only on the Union institutions, bodies, offices and agencies but also on the Member States when they

⁶³ Decision Internationale Handelsgesellschaft, EU:C:1970:114, point 4, and Decision Kadi & Al Barakaat International Foundation/Council and the Commission, EU:C:2008:461, points 281-285

implement the Union law⁶⁴ and, in this context, on judicial bodies in particular.

As regards the pursuit of the objectives of the Union, as referred to in Article 3 TEU, it is entrusted with a number of fundamental provisions, such as those which provide for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, as well as competition policy. These provisions, which are inserted in a Union system, are structured in such a way as to contribute, each in its specific field and its particular characteristics, to the completion of the integration process, which is the *raison d'être* of the Union itself.

In addition, it is also for the Member States, in particular on the basis of the principle of loyal cooperation, as provided for in the first paragraph of Article 4 (3) of TEU, to ensure the application and respect of Union law in their territories. Moreover, pursuant to the second subparagraph of the same paragraph, Member States shall take any general or specific measure to ensure fulfilment of the obligations arising from the Treaties or derived from acts of the Union institutions⁶⁵.

In order to guarantee the preservation of the specific features and autonomy of this legal order, the Treaties have established a judicial system designed to ensure coherence and unity to the interpretation of Union law and, within that framework, it is for the national courts and the Court of Justice to ensure full application of Union law in all Member States, as well as the judicial protection of the rights conferred on the persons concerned by that law⁶⁶.

1.6. Council Resolution of 30 November 2009 regarding a roadmap for strengthening the procedural rights of persons suspected or accused in criminal proceedings. Brief overview.

As repeatedly underlined in the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms is the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, including the stage preceding the criminal proceedings and the stage of the criminal proceedings.

To ensure a consistent application of the way these rights are respected, the Council of the European Union adopted in its resolution of 30 November 2009 a roadmap for strengthening the procedural rights of persons suspected or accused in criminal proceedings⁶⁷.

⁶⁴ Decision Åkerberg Fransson, C617/10, EU:C:2013:105, points 17-21

⁶⁵ Opinion 1/09, EU:C:2011:123, point 68

⁶⁶ Ibidem, *supra* 65

⁶⁷ 2009 C 295/01, relevant for EEA

The European Union has successfully created an area of free movement and residence in which citizens can take advantage of the increasing opportunities to travel, study and work in countries other than their country of residence. However, the abolition of internal borders and the increasingly frequent use of the right to move and reside freely mean that an increasing number of people are involved in criminal proceedings in a Member State other than the residence. In these situations, the procedural rights of suspected or accused persons become particularly important in order to guarantee the right to a fair trial⁶⁸.

Consequently, specific measures on procedural rights are necessary so that the fairness of the criminal proceedings is guaranteed. Such measures, which may include legislation and other measures, will increase the citizens' confidence that the European Union and its Member States will protect and guarantee their rights, and will also enjoy uniform on the Union territory.

In a phased-in approach, the roadmap provides for the adoption of measures on the right to translation and interpretation (Measure A), the right to information on rights and information on charges (Measure B), the right to legal counsel and legal assistance (measure C), the right to communication with relatives, employers and consular authorities (Measure D) and special protection measures for the persons suspected or accused who are vulnerable (Measure E) and a green card on preventive arrest (Measure F).

The European Council on 11 December 2009 welcomed the roadmap and included it in the Stockholm Program - An open and secure Europe serving and protecting citizens (point 2.4). The European Council underlined the non-exhaustive nature of the roadmap, inviting the Commission to analyse other elements of the minimum procedural rights of the persons suspected and accused and to assess the need to address other issues as well, such as the presumption of innocence, in order to promote better cooperation in this area, and this directive was also adopted last year.

It has also been stressed that the order of rights set out in this roadmap is indicative and that it is not an inventory in the order of preference. It is also pointed out that the explanations provided in its contents serve only as guidelines for the proposed action and do not seek to regulate the content and general scope of the measures concerned in advance.

According to these measures, the suspected or accused person needs to understand what is happening and make themselves understood. A suspected or accused person who does not speak or understand the

⁶⁸ Item 3 of the Resolution

language used in the proceedings will need an interpreter and the translation of the essential procedural documents, also paying special attention to the needs of persons suspected or accused with hearing deficiencies (measure A).

The roadmap provides that a person suspected or accused of an offense should receive information about his or her elementary rights, either verbally or in writing, as the case may be; for example through a written notice of rights. In addition, the person concerned should also receive swiftly information on the nature and cause of the accusations brought against them. A person who has been charged should have the right to receive, at the right time, the information necessary for the preparation of their defenses, and it is understood that it should not affect the normal course of criminal proceedings (Measure B).

In addition, the right to legal counsel (provided by a lawyer) to the person suspected or accused in criminal proceedings as early and appropriate as possible of these procedures is fundamental to ensuring the fairness of the proceedings; the right to legal assistance should guarantee effective access to the above-mentioned legal counsel right (Measure C).

Moreover, a person suspected or accused who is imprisoned shall be promptly informed of the right to inform at least one person, such as a relative or an employer, of the imprisonment, being understood that this should not interfere with the normal course of criminal proceedings. In addition, a suspected or accused person who is imprisoned in a State other than that in which they originate is informed of the right to inform the competent consular authorities of the imprisonment (Measure D).

In order to guarantee the fairness of procedures, it is important to pay special attention to persons suspected or accused who cannot understand or follow the content or meaning of procedures, for example for reasons of age and mental or physical condition (E-measure).

The roadmap also provides that the time interval that a person can spend in arrest before and during the trial varies significantly across Member States. Excessively long periods of preventive arrest affect the persons concerned, can affect judicial cooperation between Member States and do not represent the values promoted by the European Union. The proper measures that can be adopted in this context should be assessed in a Green Paper (Measure F).

To date, four measures on procedural rights in criminal proceedings have been adopted on the basis of the roadmap, namely: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU on the right to information in criminal proceedings; Directive 2013/48/EU on the right of access to legal counsel in criminal proceedings and proceedings concerning the European arrest warrant, as well as the right to inform a third person of the imprisonment

and the right to communicate with third parties and consular authorities during imprisonment; and Directive 2016/343/EU on strengthening certain aspects of the presumption of innocence and the right to be heard in criminal proceedings⁶⁹ of the European Parliament and the Council.

By establishing common minimum rules on the protection of procedural rights of suspected and accused persons, the above-mentioned Directives aim to strengthen Member States' trust in the criminal justice systems of other Member States, thereby facilitating the mutual recognition of criminal rulings. "Such common minimum rules may also remove obstacles to the free movement of citizens within the territory of the Member States."⁷⁰

It is worth noting that these directives apply only to criminal proceedings as interpreted by the Court of Justice of the European Union, without prejudice to the case-law of the European Court of Human Rights. *Per a contrario*, these directives do not apply to civil or administrative proceedings, including where administrative procedures can lead to sanctions, such as competition, trade, financial services, road traffic, taxation or additional charges, or investigations carried out by the administrative authorities in connection with these procedures.

The fundamental principles considered by the European legislator for the adoption of framework directives and decisions protecting procedural rights are as follows: the limitation of mutual recognition; the balance of European criminal proceedings; compliance with the principle of legality and judicial principles in the European criminal procedure; maintaining coherence; compliance with the principle of subsidiarity; compensation for shortcomings in the European criminal proceedings.

As regards the principle of limiting mutual recognition, it should be noted that the interest of EU Member States or of the European Union in the implementation of effective cross-border criminal proceedings based on the principle of mutual recognition must not lead to the absolute application of this principle⁷¹.

⁶⁹ The deadline for the transposition of this directive is 1 April 2018 and this is the only one that has not yet been passed into the member state legislation.

⁷⁰ Recital 10 of Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be heard in criminal proceedings

⁷¹ S. Bogdan, "Manifesto on Criminal Law of the European Union", Timișoara, conference on "Problems of the New Criminal Procedure Code", 22 February 2014. The conference took place after several researchers from different universities European Union have devised and signed the "Manifesto on Criminal Law of the European Union", designed as "an evaluation tool that can be used to evaluate new proposals for European legislation that have an impact on criminal law". The authors also recall that "the rules of criminal procedure and those governing mutual legal assistance, rules which have been increasingly shaped by

This principle can no longer be applied where there is a risk that the criminal proceedings might adversely affect the legitimate interests of individuals or of a Member State (run the proportionality test). It should be noted that such a limitation of the principle of mutual recognition also strengthens both mutual trust between Member States and the confidence of citizens in the Union.

It must also be pointed out that it has always been held that the obligation to recognize the judicial decisions of a Member State and the extent to which that recognition must operate must be determined individually for each individual measure based on the particular circumstances of the case. In this context, the suspect or accused persons must enjoy all the rights and guarantees conferred by the European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, although violations of fundamental rights do not lead, in practice, to a limitation of the principle of mutual recognition⁷².

In most cases, only optional refusal reasons are provided to avoid non-compliance with the *ne bis in idem* principle - Article 4 (3) of the Framework Decision on the European arrest warrant/Directive on the European Investigation Order/Framework Decision on the mutual enforcement of the financial penalties.

Also, the Framework Decision on Conflict Prevention and Settlement relating to the exercise of jurisdiction in criminal proceedings does not provide for a compulsory cessation of parallel proceedings.

Analysing the taxonomy of European provisions, it is clear that fundamental rights guaranteed in the Union and Article 4 paragraph 2 of the TEU require that the public interest in prosecuting offenses, the interest of States in the preservation of national identity, and the rights of the affected persons must be balanced, based on the principle of proportionality.

Thus, a matter of particular importance in the context in which the criminal trial becomes more and more overnationalised, is the observance of the rights of the individual, and this aspect has for several years been brought to the attention of the European legislator. Therefore, the suspect is given the right to have access to a lawyer in each of the States involved

Union law in the recent years, must comply with the requirements of the rule of law and safeguard fundamental rights in any circumstance, despite the fact that in this field of law we have to balance the various interests of the state, of society and of the individuals"; the list of ECPI members can be found at the end of the manifesto ZIS 12/2009, http://www.zis-online.com/dat/artikel/2009_12_383.pdf.

⁷² Case Radu & Melloni, C-399/11, OJ C 290, 1.10.2011

in a cross-border⁷³ criminal proceedings, the right to respect of the presumption of innocence⁷⁴, the right to be informed about the charge⁷⁵, the right to interpretation and translation⁷⁶, procedural rights that apply when a person is suspected of having committed a crime.

Some authors⁷⁷ argued, using highly valuable opinions, that when the European legislative body adopts rules on cross-border procedures, there is a risk that they are in contradiction with the existing rules at Union level (horizontal coherence), but also that the approximation of the criminal procedure may interfere with the coherence of national systems in criminal matters (lack of vertical coherence).

The coherence and balance of national legislation can also be affected if, based on the principle of mutual recognition, rules in different procedural systems are mixed (the so-called “hybrid procedure”).

It should be noted that horizontal coherence requires the Union legislator to ensure that legal instruments are not in contradiction with the legal framework created by other provisions of Union law, while vertical coherence requires that the Union legislator takes into account the consistency of the legal order of the Member States, with due regard to their tradition.

The same authors have also pointed out that, to the extent that the coherence of a Member State's criminal law is likely to be seriously affected, the European legislator should ensure adequate compensation under the principle of compensation⁷⁸.

The same author has rightly stated, in our opinion, that the gravity of the effects of a legislative act generates compensation measures proportionate to the level of gravity; thus, the more serious the effects of the legislative act, the more extensive the compensation measures must be.

⁷³ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right to legal counsel in criminal proceedings and related to the European arrest warrant, as well as the right of a third person to information following the arrest and to communicate with other parties and consular authorities during the arrest, OJ L 294 din 6.11.2013

⁷⁴ Directive 2016/343/EU of the European Parliament and the Council of 9 March 2016 on strengthening of certain aspects related to the presumption of innocence and the right to be present in court during the proceedings, OJ L 65/1 of 11.3.2016

⁷⁵ Directive EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142 of 1.6.2012

⁷⁶ Directive EU of the European Parliament and the Council of 20 October 2010 on the right to translation and interpretation in criminal proceedings, OJ L 280 of 26.10.2010

⁷⁷ S. Bogdan, op. cit.

⁷⁸ S. Bogdan, op. cit.

Indeed, noting the decisions implementing the instruments on the mutual recognition principle, it can be noted that a piece of legislation must ensure that the executing State has a degree of discretion in relation to the extent that the relevant provisions have not been previously approximated.

Practice has proved that in a cross-border procedure, the suspect/accused must interact with at least another legal order, usually foreign, and therefore the legal (technical) language that they usually does not speak or understand well, can create problems with respect to the fairness of the procedure and in particular with the right of defence. In order to exercise their rights effectively, the suspected persons need to have an additional strategy defined and, for that reason, they need to understand the procedure to which they are subjected and the consequences thereof. In the case of a transfer to another Member State, the suspected persons are also separated from their social environment.

As a consequence, the European criminal policy must respond to the dangers to which the accused/suspected persons is subjected by creating minimum standards for the protection of their rights, to compensate for the disadvantages suffered by suspects in the context of a cross-border procedure and it can be rightly argued, that this was the *ratio legis* of the four directives mentioned above which, along with others that we have already mentioned⁷⁹, will crystallize what will be called the criminal procedural law of the European Union, despite opposition by some Member States.

⁷⁹ For example, Directive 2014/41 EU on the European investigation warrant

CHAPTER II

OVERVIEW OF DIRECTIVES 2010/64/EU AND 2012/13/EU. *RATIO LEGIS*

Without reiterating the purpose sought by the European legislator, which has already been discussed in the previous chapter, we will only mention that the *ratio legis* is the need to guarantee the full enforcement of the EU law in all Member States, as well as the jurisdictional safeguarding of the rights granted by such law to individuals in order to guarantee equitable criminal procedures to suspected or accused persons in particular.

The Council stressed that, in enforcing the principle of mutual recognition, work should also be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States⁸⁰.

Furthermore, the Hague Programme of 2004 states that the further realization of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions⁸¹.

Mutual recognition presupposes that Member States have trust in each other's criminal justice systems. In order to improve mutual trust within the European Union, it is important that the member States have in place and properly enforce and apply, in addition to the Convention, EU standards on safeguarding the procedural rights.

Recent research shows that experts largely support the actions of the European Union concerning procedural rights, by legislation and other measures, and consider it necessary to improve the level of mutual trust among the judicial authorities in the Member States⁸². This belief is also shared by the European Parliament⁸³. In its communication for the

⁸⁰ Conclusion 37 of Tampere European Council

⁸¹ Section III 3.3.1. of the Hague Programme, 2004

⁸² "Analysis of the future of mutual recognition in criminal matters in the European Union", a report of Université Libre de Bruxelles from 20 November 2008

⁸³ "European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area", 2009/2012(INI), item 1, letter (a)

Stockholm Programme⁸⁴, the European Commission stated that the rights of individuals, the rights of the defence, in particular, need to be strengthened in order to maintain mutual trust between Member States and public confidence in the EU.

Considering the importance and complexity of these matters, it appears appropriate to approach them gradually, while maintaining an overall consistency. By approaching this type of actions one by one, depending on area, it can be noted that particular attention was paid to each individual measure to identify and approach issues in a manner that added value to each measure in order to improve their effectiveness.

All the new regulations of the European Union in this field should be and, in our opinion, are, indeed, in line with the minimum standards defined by the Convention, as interpreted by the European Court of Human Rights, in order to strengthen the rights of suspected or accused persons in criminal proceedings and to safeguard the fairness of criminal proceedings as a whole.

2.1. Directive 2010/64 EU on the right to interpretation and translation in criminal proceedings. Brief overview.

According to Directive 2010/64 UE on the right to interpretation and translation in criminal proceedings, it is essential to assure that suspected or accused persons speak and understand the language of the criminal proceedings, as a person who does not speak or understand the language used in the proceedings will need the assistance of an interpreter and the translation of the key procedural documents. This is why particular attention should also be paid to suspected or accused persons with hearing impediments, since such deficiencies makes it more difficult to understand and to make themselves understood, including during police questioning, the essential meetings of clients with their legal counsel, all court hearings and any necessary interim hearings.

Furthermore, in certain situations, interpretation by videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is possible or required in order to safeguard the fairness of the proceedings.

In addition to that, suspected or accused persons who do not understand the language of the criminal proceedings must be provided with written translations of all documents that are essential for defence.

⁸⁴ "An area of freedom, security and justice serving the citizen" COM(2009) 262/4 (paragraph 4.2.2.)

Such documents include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

Since the Directive also applies to decisions on enforcing the instruments concerning the principle of mutual recognition, in proceedings for the execution of a European arrest warrant, the persons concerned should be provided with interpretation and written translation of the warrant, if necessary, either in their native language or in any other language that they understand.

The Directive also requires that the translation and interpretation provided be of a quality sufficient to ensure that suspected or accused persons have knowledge of the proceedings and the case against them and are able to exercise their right of defence. To this end, the Member States must establish a register of independent translators and interpreters who are appropriately qualified, which must be made available to legal counsel and relevant authorities, as well as to any person concerned.

2.2. Directive 2012/13 EU on the right to information in criminal proceedings. Brief overview.

According to Directive 2012/13 EU on the right to information in criminal proceedings, a person suspected or accused of a crime must be informed on his essential rights, either verbally or in writing, as the case may be, e.g. by written communication of his rights, to ensure that he knows his rights and the fact that such rights are respected by the judicial authorities. Moreover, the person concerned must be promptly informed on the nature and cause of the accusations brought against him. In this respect, a person accused or suspected of a crime must have the right to timely receive the necessary information to prepare his defence. Obviously, this should not interfere with the normal course of the criminal proceedings or affect the reasonable duration of such proceedings.

The Directive stipulates that suspected and accused persons must be promptly informed, either verbally or in writing, on a number of procedural rights. They include: the right of access to a lawyer; any entitlement to free legal advice; the right to be informed of the accusation; the right to interpretation and translation; the right to remain silent.

Furthermore, persons who are arrested or detained must be provided promptly by the law enforcement authorities (i.e. the police or the Ministry of Justice, depending on Member State) with a Letter of Rights written in simple and accessible language, offering information on the subsequent rights, including 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; any possibility to challenge the lawfulness of the arrest.

A person arrested under a European Arrest Warrant must be provided by the law enforcement authorities with a Special Letter of Rights reflecting the rights applicable in this particular case⁸⁵.

Moreover, suspected and accused persons must be provided promptly with information regarding the criminal act they are suspected or accused of having committed and (at a later stage) detailed information on the accusation. Persons who are arrested or detained must be informed of the reasons for their arrest or detention. They must have access also to the materials of the case in order to exercise their rights of defence.

Both directives establish minimum standards for all EU Member States, regardless of the legal status, citizenship or nationality of a person. Their purpose is to help preventing judicial errors and reducing the number of appeals.

⁸⁵ A Letter of Rights model is provided in the Annex to the Directive

CHAPTER III

TRANSPOSITION OF THE DIRECTIVES IN THE ROMANIAN LAW

3.1. Directive 2010/64 EU on the right to interpretation and translation in criminal proceedings.

3.1.1. Shared implementation aspects with respect to both directives

According to a Eurostat report, every year, the courts in the Member States have to deal with 11 million criminal proceedings that involve, besides their own citizens and nationals, citizens and nationals of other EU countries or other states.

Article 6 of the European Convention on Human Rights and Fundamental Freedoms enshrines the right to a fair trial on several levels, as it is a complex principle, which includes the right to a public hearing within a reasonable time by an independent and impartial judge, the presumption of innocence, the principle of equality of arms and the giving and interpretation of evidence.

According to the Convention, suspected or accused persons have the right to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusations against them – art. 6 par. 3 letter a.

Therefore, the rights provided by the European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union require a holistic approach, considering that both protect the same rights of the suspected or accused persons in criminal proceedings.

Indeed, the respect and safeguarding of individual rights is a matter that the courts of law constantly have to deal with and, as a consequence, considering that the decisions delivered by both European courts are mandatory, they must be applied in the activity of the courts of law and in their decisions.

At the same time, one cannot ignore the fact that, as the Council itself stressed in the roadmap, as well as in the recitals of the two Directives, there are differences among the criminal proceedings of the Member States, including with regard to the procedural rights of suspected or accused persons, and that those differences give rise to debates, including with regard to their consistent application in the Member States, which is the very purpose of the Directives. In this respect, it must be noted

that, although the objective set by the Directives is mandatory, the Member States are free to choose the means and ways of achieving it and there are differences in the manner in which the Member States transposed the Directives in their laws, generating certain problems related to the different approaches to these rights in the Member States.

3.1.2. The notion of "criminal proceedings"

However, the holistic approach referred to above requires a clear definition of the notion of "criminal proceedings", considering that the criminal justice systems of the Member States differ and both Directives safeguard rights of the persons involved in criminal proceedings.

Thus, in a reference decision⁸⁶, the Court of Justice of the European Union offered the interpretation of the notion of criminal proceedings. In that case, Mr. Åkerberg Fransson was summoned to appear before the Haparanda tingsrätt (Haparanda District Court) on 9 June 2009, in particular on charges of serious tax offences. He was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ("VAT"), amounting to SEK 319,143 for 2004, of which SEK 60,000 was in respect of VAT, and to SEK 307,633 for 2005, of which SEK 87,550 was in respect of VAT. Mr. Åkerberg Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35,690 and SEK 35,862 respectively. According to the indictment, the offences were to be regarded as serious, first, because they related to very large amounts and, second, because they formed part of a criminal activity committed systematically on a large scale.

By decision of 24 May 2007, the Skatteverket had ordered Mr. Åkerberg Fransson to pay, for the 2004 tax year, a tax surcharge of SEK 35,542 in respect of income from his economic activity, of SEK 4,872 in respect of VAT and of SEK 7,138 in respect of employers' contributions. By the same decision it had also imposed for the 2005 tax year a tax surcharge of SEK 54,240 in respect of income from his economic activity, of SEK 3,255 in respect of VAT and of SEK 7,172 in respect of employers' contributions. Interest was payable on those penalties.

Proceedings challenging the penalties were not brought before the administrative courts, the period prescribed for this purpose expiring on 31 December 2010 in relation to the 2004 tax year and on 31 December 2011 in relation to the 2005 tax year. The decision imposing the penalties was

⁸⁶ C-617/10, *Hans Åkerberg Fransson*, par. 12-14

based on the same acts of providing false information as those relied upon by the Public Prosecutor's Office in the criminal proceedings.

Before the court *a quo*, the question arose as to whether the charges brought against Mr Åkerberg Fransson had to be dismissed on the ground that he had already been punished for the same acts in other proceedings, as the prohibition on being punished twice laid down by Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter would have been infringed.

It is in those circumstances that the Haparanda tingsrätt decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"1) Under Swedish law there must be clear support in the [ECHR] or the case-law of the European Court of Human Rights for a national court to be able to disapply national provisions which may be suspected of infringing the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and may also therefore be suspected of infringing Article 50 of the [Charter]. Is such a condition under national law for disapplying national provisions compatible with European Union law and in particular its general principles, including the primacy and direct effect of European Union law?

2) Does the admissibility of a charge of tax offences come under the *ne bis in idem* principle under Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter where a certain financial penalty (tax surcharge) was previously imposed on the defendant in administrative proceedings by reason of the same act of providing false information?

3) Is the answer to Question 2 affected by the fact that there must be coordination of these sanctions in such a way that ordinary courts are able to reduce the penalty in the criminal proceedings because a tax surcharge has also been imposed on the defendant by reason of the same act of providing false information?

4) Under certain circumstances it may be permitted, within the scope of the *ne bis in idem* principle [...], to order further sanctions in fresh proceedings in respect of the same conduct which was examined and led to a decision to impose sanctions on the individual. If Question 2 is answered in the affirmative, are the conditions under the *ne bis in idem* principle for the imposition of several sanctions in separate proceedings satisfied where in the later proceedings there is an examination of the circumstances of the case which is fresh and independent of the earlier proceedings?

5) The Swedish system of imposing tax surcharges and examining liability for tax offences in separate proceedings is motivated by a number of reasons of general interest [...]. If Question 2 is answered in the affirmative, is a system like the Swedish one compatible with the *ne bis in idem* principle when it would be possible to establish a system which would

not come under the *ne bis in idem*, principle without it being necessary to refrain from either imposing tax surcharges or ruling on liability for tax offences by, if liability for tax offences is relevant, transferring the decision on the imposition of tax surcharges from the Skatteverket and, where appropriate, administrative courts to ordinary courts in connection with their examination of the charge of tax offences?"

We will analyze only those elements in the answer of the Court that are relevant for the notion of criminal proceedings. Regarding this aspect, the answer of the court can be inferred from the content of other questions, as the court *a quo* did not request an interpretation of the notion of "criminal proceedings".

Thus, the Court of Justice of the European Union stated the following:

"Questions 2, 3 and 4:

By these questions, to which it is appropriate to give a joint reply, the Haparanda tingsrätt asks the Court, in essence, whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

Application of the *ne bis in idem* principle laid down in Article 50 of the Charter to a prosecution for tax evasion such as that which is the subject of the main proceedings ***presupposes that the measures which have already been adopted against the defendant by means of a decision that has become final are of a criminal nature.***

In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties⁸⁷. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. ***It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.***

⁸⁷ See, to this effect, Case 68/88, *Commission v Greece*, [1989] ECR 2965, paragraph 24 (hereinafter Case C-66/88, *Commission v Greece*), Case C-213/99, *de Andrade*, [2000] ECR I-11083, paragraph 19, and Case C-91/02, *Hannl-Hofstetter*, [2003] ECR I-12077, paragraph 17.

Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur⁸⁸.

It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive.

It follows from the foregoing considerations that the answer to the second, third and fourth questions is that the *ne bis in idem* principle laid down in Article 50 of the Charter does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of VAT, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine."

It is important to note that the decision must be final and binding under the national law of the state whose authorities issued it and it must be assured that the decision confers, in the state concerned, the protection granted in accordance with the *ne bis in idem* principle.

Obviously, the texts make no reference to a decision issued by a judicial authority. Indeed, both courts (Court of Justice of the European Union and the European Court of Human Rights) analyzed the final character of the decision,⁸⁹ but not the type of authority that issued the decision or the type of procedure, acknowledging as final even decisions issued by administrative authorities.

The Member States have different systems of penalties for minor offences and the right to apply penalties for such illegal acts is conferred upon either judicial or administrative authorities. Regardless of the system adopted, these penalties may fall within the meaning of "criminal charge" referred to in art. 6 par. 1 and of "penalty" mentioned in art. 7 of the European Convention on Human Rights and Fundamental Freedoms.

⁸⁸ Case C-66/88, *Commission v. Greece*, paragraph 24, Case C-326/88, *Hansen*, [1990] ECR I-2911, paragraph 17, Case C-167/01, *Inspire Art*, [2003] ECR I-10155, paragraph 62, Case C-230/01, *Penycoed*, [2004] ECR I-937, paragraph 36, as well as Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, [2005] ECR I-3565, paragraph 65.

⁸⁹ C-398/12, ECLI:EU:C:2014:1057

To determine whether a specific administrative penalty is applied for a criminal offence, the European Court of Human Rights uses the so-called Engel Criteria - classification of the offence under domestic law, the nature of the offence or the severity of the possible penalty - which are similar to those considered by the Court of Justice of the European Union in the *Åkerberg Fransson case cited above*. To the extent that, according to these criteria, the minor offence concerned amounts to a "criminal charge" and the sanction applied is a "penalty", all the safeguards provided by the European Convention on Human Rights and Fundamental Freedoms in connection with criminal matters become applicable.

As regards national law, the European Court of Human Rights analyzed in its case law multiple types of minor offences⁹⁰ ruling that the acts sanctioned as minor offences under these laws fall within the scope of "criminal charge" referred to in art. 6 of the Convention, and the safeguards provided in criminal matters, e.g. the presumption of innocence, free assistance by an interpreter, no punishment without law, as well as the *non bis in idem* principle, are fully applicable.

Therefore, for the same act, authorities may apply only once a criminal penalty, as defined by the Convention, irrespective whether that act is classified in the domestic law as a minor offence or a criminal offence and regardless of whether the penalty is applied by a judicial or an administrative authority.

Indeed, in the national judicial practice, the procedure for criminal offences, as laid down by various regulations can be considered equivalent to criminal proceedings under art. 6 of the Convention and the recent judicial practice has applied directly the case law of both the European Court of Human Rights and the Court of Justice of the European Union, establishing that the application of two penalties for the same act is a breach of art. 4 of Protocol 7 of the Convention and only one criminal penalty may be applied.

However, the recent practice of the European court defined a more specific meaning of this notion, which we will consider in relation to the scope of application of the two Directives analyzed in this study.

It is also important to note that an *ad hoc* definition of this notion can be found in recital 16 of Directive 2010/64 and in art. 1 par. 1/3 of the Directive itself:

Recital 16: *"In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for*

⁹⁰ Stipulated by Emergency Ordinance of the Government No. 195/2002 on the use of public roads and Law No. 61/1991 on the application of penalties for the breach of certain community rules or of public peace and order

example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal."

Art. 1 par. 1-3: "(1) *This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.*

(2) The right referred to in paragraph 1 shall apply to persons from the time that 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 until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

(3) Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

Thus, in the Istvan Balogh case,⁹¹ the interpretation of the notion of "criminal proceedings" was discussed and the reasoning of the European Court was based on these Directives, as well as on Framework Decision -2009/315⁹² and Decision 2009/316⁹³.

In that case, by judgment of 13 May 2014, which became final on 8 October 2014, the Landesgericht Eisenstadt (the Regional Court of Eisenstadt, Austria)- sentenced Mr. Balogh, a Hungarian national, to a term of imprisonment for aggravated burglary on a systematic footing and ordered him to pay the costs of the proceedings. The competent Austrian authorities informed the Igazságügyi Minisztérium Nemzetközi Büntetőjogi Osztálya (the International Criminal Law Department of the Ministry of Justice, Hungary) ("the Department") of the content of that judgment, which they then forwarded to the Department at its request.

⁹¹ C-25/15, ECLI:EU:C:2016:423

⁹² on the organization and content of the exchange of information extracted from the criminal record between Member States

⁹³ on the establishment of the European Criminal Records Information System (ECRIS)

The Department transmitted that judgment to the referring court as the court with jurisdiction for the recognition of the validity of that judgment in Hungary, in accordance with the special procedure provided for in the Law on international mutual assistance in criminal matters referred to in paragraph 16 above. That special procedure, which involves neither a new assessment of the facts or of the criminal liability of the convicted person nor a fresh conviction, has as its sole purpose to accord to the judgment of the foreign court the same status it would have had if it had been delivered by a Hungarian court and is essential for that purpose.

Since the judgment in question is written in German, the referring court must, in accordance with the special procedure, make arrangements for its translation into the language of the proceedings, which, in the present case, is Hungarian.

It is apparent, however, from the order for reference that two different judicial practices have developed in Hungary concerning payment of the costs relating to the special procedure at issue in the main proceedings.

On one hand, the view has been taken that Directive 2010/64, which provides that translation is to be free of charge, makes the special provisions of Hungarian law inapplicable, which therefore leaves in place the provision of a general nature laid down in Paragraph 9 of the Law on criminal procedure, according to which an accused person of Hungarian nationality has the right to use his native tongue. It follows that the State is responsible for the costs of translating the foreign decision pursuant to Paragraph 339(1) of that law.

On the other hand, the view has also been taken that the main proceedings, which concluded by a judgment convicting the accused, are separate from the special procedure, which is ancillary in nature and has as its purpose the recognition of the effects of that judgment in Hungary. Consequently, while the accused must be provided with free linguistic assistance in the main proceedings where he does not have a command of the language in which those proceedings are conducted, that does not apply in the context of an ancillary procedure to the translation into the language of that procedure, of which the person concerned has a command, of a judgment handed down by a foreign court as that translation is necessary for the purposes of that procedure, not for the purpose of protecting the rights of the convicted person.

In those circumstances, the Budapest Környéki Törvényszék (Budapest Regional Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

"Article 1(1) of Directive 2010/64/EU reads: "This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest

warrant.” Must this formulation be taken to mean, *inter alia*, that, during a special procedure (Chapter XXIX of the Law on criminal procedure), a court in Hungary must apply this Directive, that is to say, must a special procedure under Hungarian law be regarded as being covered by the expression “criminal proceedings”, or must this expression be interpreted as referring only to procedures which conclude with a final decision concerning the criminal liability of the accused person?”

It is important to note that the European court reformulated the questions submitted by the referring court in the sense that the situation at issue in the main proceedings may come within the scope of Framework Decision 2009/315 and Decision 2009/316- and with regard to the notion of “criminal proceedings”, based on the assumption that “according to the Court’s settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part”,⁹⁴ ruled as follows:

“[...] it is necessary, in order to give a useful answer to the referring court, to take into account not only Directive 2010/64 but also Framework Decision 2009/315 and Decision 2009/316 and to reformulate, in accordance with the foregoing, the question referred. [...]

[...] that right is to apply to the person concerned from the time that he is made aware by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether that person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

37 A special procedure, such as that at issue in the main proceedings, which has as its purpose the recognition of a final judicial decision handed down by a court of another Member State, takes place, by definition, after the final determination of whether the suspected or accused person committed the offence and, where applicable, after the sentencing of that person.-

38 In the second place, it should be noted that, as, *inter alia*, recitals 14, 17 and 22 of Directive 2010/64 state, that directive seeks to ensure, for suspected or accused persons who do not speak or understand the language of the proceedings, the right to interpretation and translation by facilitating the application of that right with a view to ensuring that those persons have a fair trial. Therefore, Article 3(1) and (2) of that directive provide that Member States are to ensure that those persons are, within a

⁹⁴ See, in particular, Judgment of 21 May 2015, *Rosselle*, C-65/14, EU:C:2015:339, paragraph 43

reasonable period of time, provided with a written translation of all documents, including the judgment handed down in their regard, which are essential for the purpose of ensuring that they are able to exercise their rights of defence and safeguarding the fairness of the proceedings.

39 It is apparent from the explanations provided by the Austrian Government at the hearing before the Court that Mr Balogh obtained the translation of the judgment of the Landesgericht Eisenstadt (Regional Court, Eisenstadt) which was served on him in August 2015.- In those circumstances, a new translation of that judgment in the special procedure at issue in the main proceedings, seeking recognition of that judgment in Hungary and the entry of the conviction in the Hungarian criminal records, was not necessary for the purpose of ensuring Mr Balogh's right to a fair hearing or his right to effective judicial protection and was not, therefore, justified in the light of the objectives pursued by Directive 2010/64.

40 It follows from all the foregoing considerations that Directive 2010/64 is not applicable to a special procedure such as that at issue in the main proceedings."

The regulations referred to above and the judgment of the European Court lead to the conclusion that the notion of "criminal proceedings" means the proceedings for the final determination of the question whether that person has committed the offence, including, where applicable, sentencing and the resolution of any appeal, because only these proceedings enforce the protection of the right of defence or of effective jurisdictional safeguarding, unlike ancillary proceedings, e.g. the recognition of a judgment, for instance, for the purpose of registration in the criminal record, as in the case cited above.

3.2. How Directive 2010/64 on the right to interpretation and translation into Romanian language was transposed in the Romanian Law

As shown earlier in this paper, article 1 of the Directive defines the scope and was not required to be transposed in national laws.

Article 2 "Right to interpretation

(1) Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

(2) Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between 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.

(3) The right to interpretation under paragraphs (1) and (2) includes appropriate assistance for persons with hearing or speech impediments.

(4) Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter."

The general right to interpretation enshrined by the provisions of paragraph 1 was transposed by article 12 of the Criminal Procedure Code with the marginal title "Official Language and Right to Assistance by an Interpreter". The text stipulates the following:

"(1) The official language of criminal proceedings is Romanian.

(2) Romanian citizens belonging to national minorities are entitled to use their native tongue in courts, but the procedural documents will be written in Romanian.

(3) The parties and the persons subject to criminal proceedings who do not speak or understand Romanian language will be provided free of charge with the possibility to be informed on the elements of the case, to speak, as well as to make submissions to court through an interpreter. Where assistance of a lawyer is mandatory, the suspected or accused person will be provided free of charge with the possibility to communicate with the lawyer through an interpreter for the purpose of preparing hearings and filing appeals or any other applications related to the case."

(4) Interpreters certified in accordance with the applicable law shall be used in judicial proceedings. Translators certified in accordance with the applicable law are also included in the category of interpreters."

The same thing is provided by art. 128 of the Constitution.

In fact, whenever a suspected/accused person cannot understand or speak Romanian, he is entitled, free of charge, to be assisted by an interpreter. It has been demonstrated, by a considerable number of judgments, that Romanian courts respect this right by appointing an interpreter whenever necessary.

However, there are situations when the suspected/accused person, in spite of understanding and speaking Romanian, being a Romanian citizen of a different ethnic origin, but born and educated in Romania, claims that he does not speak and understand Romanian and requests to be assisted by a certified interpreter. Although this may be true sometimes, there are cases when this requests amounts to a abuse of the right, considering that the person concerned communicated with his lawyer or with other accused persons in Romanian.

Nevertheless, in such situations, in order to fully safeguard this procedural right, the courts appointed an interpreter, in spite of the fact that

it was an obvious abuse of the right. Such requests have never been denied, at least in the four partner courts of appeal ⁹⁵.

These positive rulings were also consistent with the practice of the European court in cases *Luedicke v. Germany*, *Baytar v. Turkey*.

As regards communication between suspected or accused persons and their lawyers, in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications, as provided by art. 2 par. 2 of the Directive, it is transposed, besides art. 12, also in art. 83 letter f of the Criminal Procedure Code with the marginal title "Rights of Accused persons", which stipulates the following:

"In a criminal trial, the accused person has the following rights:

a) the right to deny making any statement during the criminal trial, being informed that such denial will not have any adverse consequence on him and that any statement he makes can be used as evidence against him;

a/1) the right to be informed of the accusation and the legal classification thereof;

b) the right of access to the case materials, subject to the applicable legal provisions;

c) the right to be assisted by legal counsel of choice or, in case of denying such choice, where assistance by a lawyer is mandatory, the right to have a lawyer appointed by the court;

d) the right to propose evidence, subject to the applicable legal provisions, to raise objections and to make submissions;

e) the right to file any applications in connection with the criminal or civil component of the case;

f) the right to be assisted, free of charge, by an interpreter, if he does not understand, cannot express himself properly or cannot communicate in Romanian;

g) the right to use the services of a mediator whenever permitted by law;

h) other rights provided by law."

Relevant judgments delivered by ECHR: *Kamasinski v. Austria* 1991; *Hermi v. Italy* 2005

The right stipulated by art. 3 par. 3 of the Directive is transposed by art. 105 of the Criminal Procedure Code with the marginal title "Hearing through an Interpreter", which stipulates the following: "(1) Whenever the person to be heard does not understand or speak or cannot express himself properly in Romanian, the hearing will be conducted through an

⁹⁵ Court of Appeal of Braşov, Court of Appeal of Constanţa, Court of Appeal of Craiova, Court of Appeal of Suceava

interpreter. The interpreter may be appointed by the judicial authorities or chosen by the parties or by the aggrieved party from among the interpreters certified under the applicable law.

(2) Exceptionally, if a procedural measure needs to be urgently taken or if a certified interpreter is not available, the hearing may be held in the presence of any person who can communicate with the person to be heard. However, in such case, the judicial authority must repeat the hearing through an interpreter as soon as possible.

(3) If the person to be heard is deaf, mute or deaf mute, the hearing will be held with participation of a person able to communicate through the special language. In such cases, communication in writing may be also used.

(4) In exceptional situations, if a person able to communicate through the special language is not available and communication in writing is not possible, the persons referred to at par. (3) above may be heard with the assistance of any person with communication abilities."

The partner Courts of Appeals rarely needed to provide sign language interpreter, but the right has always been respected.

It must be mentioned that, in one particular case, a person accused of multiple thefts, besides being deaf mute, was illiterate and did not know the sign language. Although an interpreter from the Association of Persons with Disabilities was called in, communication with the accused person was impossible. Under the circumstances, a family member who was present in the court room informed the court that he was the only one who could communicate properly with the accused person. That family member was used as "interpreter" and the case was tried with due observance of the right of the accused person, as he was able to understand the proceedings brought against him.

Relevant judgments delivered by ECHR: *Baka v. Romania*, *Kamasinski v. Austria*.

As regards the provision that *Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter*, it has not been transposed into the Romanian law, since it is a general obligation of the court to clarify the facts. This means that the competent authorities, i.e. the courts, check by any adequate means, including by questioning the suspected or accused persons, whether such persons speak and understand the language of the proceedings and whether they need assistance of an interpreter.

In one case⁹⁶, the accused X, aged 28, a Turkish citizen of Arab ethnicity, residing in Romania (Bucharest) for 12 years and employed for 10 years by company T (having passenger transportation as primary business), owned by his father, which also had a business unit in Suceava, on 01.01.2015, while driving his car, accompanied by his female friend, Y (a Romanian citizen), a witness in the case, was stopped in Șcheia, Suceava County, by a traffic police patrol for exceeding the speed limit applicable on that road section (50 km/h).

When police officer Z informed him that, in addition to a fine, he will be suspended the right to drive a vehicle for a period of 90 days, the accused X offered to pay the officer EUR 500 in exchange for dropping all penalties for the minor offence committed (and proposing the officer to meet him at the premises of his father's company in Suceava in order to receive the promised amount).

Two hours later, at the premises of company T (the business unit in Suceava), the accused X is caught in the act by prosecutors while offering EUR 500 as bribe to the denouncing witness Z.

The accused X was taken to the Prosecutor's Office associated to Suceava County Court, where the prosecutor decided to initiate *in rem* prosecution for bribery under the provisions of art. 290 of the Romanian Criminal Code and subsequently decided the continuation of prosecution against X for the same crime.

On the same date, X was heard as both suspected and accused person (being informed with regard to his rights of suspected and accused persons, including the right to benefit, free of charge, from assistance of an interpreter under art. 83 letter f of the Romanian Criminal Procedure Code). The hearings were held in Romanian, in the presence of the legal counsel chosen by the accused, and the accused admitted to having committed the crime of bribery stipulated by art. 290 par. 1 of the Romanian Criminal Code.

The prosecutor on the case, issued an ordinance dated 1 January 2015, placing the accused X under preventive judicial supervision for a period of 60 days and under the interdiction to contact, either directly or indirectly, the witness Z.

However, on 2 October 2017, the accused X, through his female friend, Y, contacted the witness Z, asking him to change his initial declarations made before the prosecutor, as he risked losing the right to reside in Romania if he was convicted of bribery.

The witness Z informed the prosecutor with regard to the accused X's action and the witness Y admitted that she had contacted the witness

⁹⁶ A material prepared by judges from the criminal section of the Court of Appeal of Suceava

Z, as requested by the accused, also stating that she and the accused were high school mates in Bucharest.

Under the circumstances, the prosecutor on the case requested the Suceava County Court, under the provisions of art. 215 par. 7 of the Romanian Criminal Procedure Code, to replace the preventive judicial supervision with the placement in preventive arrest, considering the breach of obligations committed by the accused.

Before the rights and freedoms judge of Suceava County Court, the accused X denied making any statement, being assisted by the same legal counsel of choice.

By Resolution of 12 February 2015, the rights and freedoms judge of Suceava County Court, under the provisions of art. 215 par. 7 of the Romanian Criminal Procedure Code, instructed the replacement of preventive judicial supervision with preventive arrest for a period of 30 days for breach by the accused of the interdiction to contact, either directly or indirectly, the witness Z during the period of judicial supervision.

The accused X filed an appeal against the resolution within the period required by law. To support his appeal, the accused X stated that prosecution is null and void, because he had not been provided with an interpreter in accordance with the provisions of art. 105 of the Criminal Procedure Code and, as he was a Turkish citizen of Arab ethnicity, he did not speak or understand Romanian. (He claimed that he had not understood the accusations brought against him and the obligations he had to comply with during the judicial supervision period.)

Furthermore, he informed the appellate court that he was willing to be heard, but only in the presence of an interpreter of Arab language (his native tongue).

Obviously, considering the actual circumstances of the case, specifically, the fact that he had been living in Romania for 12 years and working with his father's company (having passenger transportation as primary business) for 10 years, as well as the fact that, in the presence of the legal counsel chosen by him, he had initially made declarations in Romanian, the accused understood the language of the proceedings and the appeal was dismissed.

It can be seen that, although no specific mechanism is in place, based on the actual circumstances of each case, the court can assess, in situations like the one presented above, whether the suspected/accused person needs an interpreter or only tries to exercise his rights abusively; in the aforementioned case, the accused claimed that he had not understood his obligations in order to convince the rights and liberties judge that he had not breached such obligations in bad faith and that preventive judicial supervision should not be replaced with preventive arrest.

As regards the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings, as provided by art. 2 par. 5 of the Directive, there is no express provision in this respect in the Romanian law.

However, such challenge is made possible by application of the right to a fair trial enshrined by art. 6 of the European Convention on Human Rights and Fundamental Freedoms, under which the judge must see to it that fair proceedings are ensured, as well as by application of the direct vertical effect of the Directive, as the incomplete transposition may give rise to the liability of the state. In addition to that, the Convention also stipulates the right to effective remedy. Therefore, based on the general mechanism of remedies, as regulated by the Criminal Procedure Code, depending on the phase of the criminal proceedings, the challenge (in the phase of prosecution before the rights and freedoms judge, then before the preliminary chamber judge and the trial court or even appellate court judge) is fully admissible.

It can be also argued that, if the trial court dismisses a challenge and issues a judgment without providing an interpreter for an accused person who does not speak or understand Romania, dismissing the challenge through an interim decision, although art. 421 par. 2 letter b of the Criminal Procedure Code does not consider this situation, it is our opinion that the judgment should be quashed and the case retried, if the accused proves that he does not speak or understand Romanian.

This is because the impossibility to understand the criminal proceedings brought against him and the impossibility to properly and fully exercise the right of defence impair the fairness of the proceedings as a whole and would violate the provisions of the Convention (which are also provisions of the national law), as this is a matter of lawfulness, of enforcement of the law, and any documents of the trial and proceedings are affected by absolute nullity. We maintain this opinion, although art. 281 of the Criminal Procedure Code, which regulates absolute nullity, does not contain a provision to this end; this is because the article does not contain an exhaustive and restrictive list of absolute nullity situations and there are absolute nullity cases that are not mentioned in the aforementioned article, e.g. the violation of the principle that evidence must be obtained and used fairly, provided by art. 101 of the Criminal Procedure Code and with related penalties provided by art. 102 of the Criminal Procedure Code, i.e. exclusion of any evidence obtained illegally and the obligation to exclude any evidence derived from illegally obtained evidence, a materialization of the "fruit of the poisonous tree" doctrine, which we will not discuss here, as it is not relevant for the topic of our study. We will only mention that this

doctrine can be found incorporated in a similar manner in the laws of other Member States, too (e.g. Spain, Italy, UK).

This means that there are also other situations of absolute nullity that are not listed in the aforementioned text, but are regulated by other sections of the Criminal Procedure Code, as in the case already mentioned.

The same solution was adopted in Germany, a fact confirmed by the German expert, as well as by the German colleagues who participated in training workshops. The reasoning behind this solution is presented in the section dedicated to the German system.

The same solution seems appropriate where the quality of translation was poor, preventing the accused person from understanding the proceedings and from properly exercising his right of defence, in particular if it prevented the obtaining of a declaration or the instructing of preventive measures depriving the accused person of his liberty or the trial on the merits of the case.

However, in this situation it must be determined whether the quality of translation was so poor as to impair the fairness of proceedings or was affected only by errors that did not have an impact on the exercise of the right of defence (e.g. errors that are not related to the proper use of terms, the use of synonyms or other terms that do not alter the meaning) and, consequently, the fairness of proceedings, in which case it is obvious that a different solution should be adopted.

Another aspect to be considered in this context is the possibility of replacing the appointed interpreter when rare languages or dialects are involved, for which there are only one or two interpreters in the country (for instance, for certain dialects of mandarin, there is only one interpreter in Romania, while interpreters for other languages, e.g. African dialects, Persian or Quechuan are very few) and sometimes the suspected/accused person may claim that the quality of interpreting or translation was poor only to delay the proceedings.

Moreover, a procedure should exist to objectively assess the quality of interpreting, Romania does not have such procedure in place. Germany, for instance, does have a procedure for this purpose, which is described in the section that discusses the German system.

However, the judge can consider certain objective criteria, like the fact that the interpreting services are provided by students who study the language concerned at the university or by employees of the embassy or consulate of the relevant country, which would support the assumption that the quality of interpreting is appropriate.

Conversely, if the accused speaks for 10 minutes and the interpreter summarizes in one minute what the accused said, it is obvious that the interpreting is deficient and the interpreter should be replaced.

As regards the provision of remote interpreting services using communication technology under art. 2 par. 5 of the Directive, art. 106 par. 2 of the Criminal Procedure Code provides for this possibility, but only for accused persons who are detained. Indeed, in many cases, the presence of an interpreter cannot be secured and the provision of interpreting services by using communication technology would facilitate the proceedings and would also reduce the costs related to transportation, waiting time, etc. Therefore, theoretically, the instruments developed in the context of the European e-Justice (e.g. all courts of appeal in the country have videoconferencing equipment or manuals) should be used. This could also be done via Skype, Viber or other similar applications. However, the partner courts of appeal have not experienced any situation requiring the use of such means so far.

With regard to the right to be provided with written translations of essential documents, stipulated by art. 3 par. 1 of the Directive, the provisions of art. 12 and art. 83 letter f of the Criminal Procedure Code will generally apply.

Furthermore, it must be noted that art. 344 par. 2 of the Criminal Procedure Code stipulates the obligation to make available to the accused person a certified copy of the indictment and, as appropriate, a certified translation thereof, at the place of detention, at the address of residence or at the notified address for service.

Similarly, art. 407 of the Criminal Procedure Code stipulates the obligation to make available the judgment to the accused person in a language that he understands.

Art. 3 par. 2 of the Directive provides that essential documents include any decision depriving a person of his liberty, any charge or indictment, and any judgment, but this list is not restrictive, since par. 3 stipulates that "The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect."

In this respect, it must be noted that an essential document is any document on which the accusation is based and which the accused person wishes to challenge in exercising his right of defence, provided, however, that the document specifically concerns him. If, for instance, multiple persons are accused but only some of them need an interpreter and the case against the latter is not inseparable from that against the other accused persons, obviously, the translation of the documents that are not related to their case is not necessary.

Indeed, par. 4 stipulates that "There shall be no requirement 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."

It must be also noted that, at least in the partner courts, the suspected/accused persons received translations of the essential documents upon request.

For instance, the transcripts of telephone and ambient recordings of conversations were translated upon the request of the accused persons. The conversations were in Hungarian (the accused persons did not speak or understand Romanian, since some of them were Hungarian citizens, while others were Romanian citizens who did not speak Romanian). The recordings were also listened to in court, in a public session, in the presence of an interpreter, considering that the accused persons informed the court that the order of dialogs had been changed, and the notified errors were corrected.

Other documents considered essential by the accused persons were also translated and made available to them. However, it is the judge that determines which documents are essential; the Directive does not specifically mention them and they cannot be established by law, since the importance of a document depends on the type of crime, as well as on the type of proceedings. For instance, upon the request of the accused persons, the field investigation report (in cases of involuntary manslaughter), the flagrant offence report, the forensic report, the declarations of aggrieved persons and witnesses were translated as early as in the prosecution phase, considering that all those documents were relevant for the exercise of the right of defence.

Relevant judgments delivered by ECHR: X v. Austria, 1978

As regards the right of the suspected/accused person to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings, stipulated by art. 3 par. 5 of the Directive, please refer to the above discussion concerning art. 2 par. 5, as the situation is identical.

The provisions of art. 3 par. 6 of the Directive on the European arrest warrant were transposed by Law No. 302/2004, as republished. Art. 99 of this law stipulates the following:

"(1) Within 48 hours of receipt of a European arrest warrant, the prosecutor shall check whether the European arrest warrant is accompanied by a translation into Romanian or into English or French. If the warrant is not translated in any of the aforementioned languages, the prosecutor's office shall request the issuing judicial authority to provide a translation. If the European arrest warrant is translated into English or French, the prosecutor on the case shall instruct the urgent translation

thereof⁹⁷. (2) The prosecutor shall check whether the European arrest warrant contains the information specified by art. 86 par. (1). If the European arrest warrant does not contain such information or is inaccurate, as well as if the provisions of art. 98 par. (2) letter i) item (iv) are applicable, the prosecutor shall request the issuing authority to provide, within not more than 10 days, as the case may be, either the required information or a copy of the default judgment, translated in a language that the convicted person can understand. The failure of the issuing judicial authority to transmit the default judgment will have no effect on the arrest of the person concerned or on notification to the court under art. 101 and art. 102."⁹⁸

Similarly, art. 100 par. 2 of the same law stipulates the following: "Persons who are arrested must be promptly informed, in a language that they understand, of the reasons for their arrest and of the content of the European arrest warrant. Where the provisions of art. 98 par. (2) letter i) item (iv) are applicable and the conviction was transmitted by the issuing authority, the prosecutor shall instruct the notification of conviction to the person concerned. The person concerned will be informed with regard to the consequences of notification of conviction under the law of the issuing state."

Art. 103: "The judge shall check first the identity of the concerned person and assure that such person has been provided with a copy of the European arrest warrant and, if applicable, of the default judgment, in a language that he can understand. If transmitted by the issuing authority, the judge will deliver the default judgment to the person concerned. (2) If applicable, upon the request of the person concerned, the judge may defer the case only once, for not more than 5 days, and shall request the issuing authority to transmit a copy of the default judgment in a language that the person concerned understands. The failure of the issuing authority to transmit the default judgment will have no effect on the continuation of the execution of the European arrest warrant and on the transfer of the person concerned.

According to art. 104 par. 3: "An arrested person who does not understand or speak Romanian is entitled to have an interpreter appointed by the court free of charge."

Therefore, all these procedural rights are also safeguarded in proceedings for the execution of a European arrest warrant and no case of violation of these rights is known in the practice of Romanian courts.

⁹⁷ Paragraph (1) of art. 99 was amended by paragraph 27 of art. I of LAW No. 300 of 15 November 2013, published in the Official Gazette of Romania No. 772 on 11 December 2013

⁹⁸ *Ibidem, supra* 96

As regards any waiver of the right to translation of documents referred to in this Article, it should be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily, according to art. 3 par. 8 of the Directive. This provision has not been transposed into the Romanian law. Therefore, the usual procedure for waiving a right will be applied. However, it is important to note that the procedure refers to waiving the exercise of a right, not the right itself, like, for instance, in case of the waiver of the right of appeal under art. 414 of the Criminal Procedure Code.

In the questionnaires distributed to them most practitioners answered that this waiver is reversible, i.e., the suspected/accused person may reverse his decision if, during the proceedings, he realizes that he does not understand the proceedings sufficiently or that he cannot exercise effectively his right of defence. We agree to this opinion.

Art. 4 of the Directive, which stipulates that "Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings," was transposed into the Romanian law by art. 273 of the Criminal Procedure Code, with the marginal title "Amounts Payable to Witnesses, Experts and Interpreters", which stipulates the following: "(1) The witnesses, experts and interpreters called by the prosecution or by the court are entitled to compensation for travel, accommodation, meals and other costs incurred in connection with such call.

(2) The witnesses, experts and interpreters who are employed are entitled to be remunerated by their employers for the period of absence from work determined by the call by the prosecution or the court.

(3) A witness who is not employed, but obtains income from work is entitled to receive compensation.

(4) Experts and interpreters are entitled to remuneration for the task assigned, in the situations and subject to the conditions provided by the applicable laws.

(5) The amounts referred to at par. (1), (3) and (4) above will be paid based on the decision of the authority that initiated the call and before which the witness, expert or interpreter appeared, from the proceeding cost funds allotted for this purpose.

As regards the provisions of art. 5 of the Directive concerning the quality of translation and interpreting, it is important to note that the Romanian system has several deficiencies:

Firstly, there is a problem related to the way translators and interpreters are certified under Law No. 76/2016. The law no longer requires that interpreters pass an examination, but certification is granted

based on the review of the file prepared according to the following provisions:

According to art. 3 of the law: "Certification as an interpreter and translator authorized to provide translation services to the authorities mentioned at art. 1 may be acquired, upon request, by any person who simultaneously fulfills the following conditions:

a) is a citizen of Romania, of a member State of the European Union, of the European Economic Area or of the Swiss Confederation;

b) *** Repealed

c) holds a bachelor's degree or equivalent diploma attesting specialization in the foreign language(s) for which certification is requested or attesting graduation from a higher education institution in the foreign language for which certification is requested or holds a baccalaureate or equivalent diploma attesting graduation from a high school in the foreign language or language of national minorities for which certification is requested or is certified by the Ministry of Culture and Religious Denominations as a translator from Romanian into the foreign language for which certification is requested and vice versa, specializing in law;

d) *** Repealed

e) is medically fit to work;

f) has a clean criminal record."

In order to be certified as a translator and interpreter, a person must meet all the requirements above simultaneously.

Due to these extremely permissive conditions, the acquiring of certification is rather easy, raising questions with regard to the quality of legal interpretation/translation services, which would require good knowledge of legal terms. This is not the case for interpreters of Hungarian, German or Turkish who are members of the relevant ethnic minorities born in Romania and speaking both languages as native speakers. Knowledge of the legal language should be an essential condition for certification, and it could be objectively verified only by passing an examination.

There were situations where certain departments of state authorities in charge with translating official documents produced translations of such a poor quality that the documents needed to be retranslated and republished on the websites of those institutions.

In addition to that, certified translators and interpreters have the obligation to keep confidential the information that comes into their possession, as well as the aspects related to the relation between the accused person and his legal counsel, as provided by art. 5 par. 3 of the Directive, art. 89 and art. 109 of the Criminal Procedure Code and art. 10 correlated with art. 62 of Law No. 254/2013 on serving sentences. The disclosure of such information may be classified either as disclosure of

professional secrets, as defined by art. 277 of the Criminal Code, or as perjury, as defined by art. 273 of the Criminal Code, or disclosure of business secrets or non-public information, as defined by art. 304 of the Criminal Code.

The requirement of art. 5 par. 2 of the Directive was fulfilled by the Ministry of Justice by establishing a list of certified translators/interpreters, available on the website of the said Ministry, at: <http://old.just.ro/MinisterulJusti%C8%9Biei/Listapersoanelorautorizate/Interpretisitraducatoriautorizati/tabid/129/Default.aspx>.

The training obligation stipulated by art. 6 of the Directive is fulfilled in Romania, in respect of judges, by the National Judicial Institute, which organizes continuing education or decentralized training seminars and courses in criminal procedure law (which is relevant for the procedural rights of suspected/accused persons), communication, foreign languages or improvement of legal language. (For instance, training courses in legal English, French and Spanish are delivered either by the National Judicial Institute or in partnership with EJTN or other institutions and are available on the website of the Institute.)

Justice auditors also benefit from foreign language courses during the two years of initial training.

However, the National Judicial Institute has neither the obligation nor the legal possibility to deliver such training courses for interpreters/and translators. Translators and interpreters are responsible for their own training by virtue of the obligation of all persons to improve their professional skills in order to be competitive in the labor market⁹⁹.

The debates that took place during the training sessions held as part of the project revealed that the way in which the analyzed Directive was transposed is affected by the following shortcomings, which could be eliminated by amending the current regulations or by a teleologic interpretation of the legal provisions, in line with the facts mentioned in the first chapter with regard to the obligation of compliant interpretation of the EU laws:

- the existence of a mechanism to check whether a person understands the language of the criminal proceedings and defining certain criteria for this purpose;
- the right to challenge the decision of a competent authority establishing that assistance by an interpreter is not necessary, as well as the quality of translation, which is not expressly provided and may result in inconsistent practices;

⁹⁹ Usually, they either work as independent professionals or are employed by companies specializing in the provision of translation/interpreting services.

- the possibility to use videoconferencing if the physical presence of an interpreter is not strictly necessary, considering that only the courts of appeal have the necessary equipment, as well as the costs involved;
- the translation and interpreting services should be of sufficient quality to secure a fair trial, but no mechanism is in place to check the actual quality of translation/interpretation;
- the need to provide translators for rare languages or dialects, considering that the actual exercise of this right is hindered by the difficulty in identifying speakers of such languages and dialects (e.g. Swedish, Albanian, Arab dialects, various languages spoken in the Russian Federation, Mandarin). In some cases, the judicial authorities had to use speakers of international languages or of a language widely used in the countries of origin of the prosecuted persons (e.g. Arab countries, countries of the former Soviet Union) in order to ensure proper communication with accused persons and to achieve the purpose of prosecution within reasonable limits for a fair trial. This raises questions as to the extent to which the purpose of the two directives is actually achieved in situations where judicial documents are translated in a different language than the native tongue of the person concerned and whether providing information by electronic means would be acceptable in order to secure the dispatch of proceedings and effective communication;
- the possibility to restrict the right of suspected or accused persons to request assistance by an interpreter in situations where they do not actually need such assistance because they speak and understand the language of the criminal proceedings, and how the judicial authorities could assure that the person concerned understands the language of the proceedings and whether, from a legal point of view, a mechanism of this kind should be regulated by domestic law or could remain a matter of best practice, as well as defining criteria to determine the abuse of these procedural rights and a set of additional evidence to prove such abuse;
- defining the essential documents required to be translated according to the Directive and in application of art. 6 par. 3 letter e of the European Convention on Human Rights and Fundamental Freedoms;
- the need to establish special registers to keep record of the use of translators and interpreters, as required by art. 7 of the Directive.

3.2.1. Case study I
A material by Cristina Crăciunoiu,
Judge at the Court of Appeal of Craiova

By Indictment No. X/P/2014 issued by the Prosecutor's Office attached to the Court of Craiova, B.M.Z, was accused of possession of goods subject to customs duties, being aware that they had been smuggled, under art. 270 par. 3 of Law No. 86/2006.

Essentially, the indictment stated that, on 10 July 2014, around 09.00 p.m., the accused was found holding on the back seat of an Opel Astra car, in a bag, 500 packs of Royal Slims cigarettes with the specification "For export only-tobacco factory Sarajevo" printed on them, without the fiscal marks required by the applicable regulations, being aware that the cigarettes had been smuggled.

In support of the facts described above, the indictment proposed the following evidence: declarations of the suspected/accused persons, declarations of witnesses, official inspection report, notification by the National Tax Administration Agency (ANAF) - Craiova General Regional Directorate of Public Finances - Craiova Customs Department, notification by the Personal Income Tax Assessment Service (CIPF) of the Tax Department, documents, proof of delivery of goods.

In the judicial investigative hearing phase, on the trial date of 5 May 2015, witnesses B.C.M and B.S.I. were heard in accordance with the provisions of art. 381 of the Criminal Procedure Code and their statements were documented and filed.

On the trial date of 2 June 2015, it was determined that witness T.V. could not be heard and, as a result, in accordance with the provisions of art. 381 par. 7 of the Criminal Procedure Code, the court instructed the reading of the declarations made by the said witness during prosecution.

The accused B.M.Z. failed to appear before the court and the reports of execution of the warrants of apprehension showed that the accused could not be found at his domicile and the current residence was unknown.

Notification No. 2835710/12.05.2015 issued by the Immigration Service of Dolj County showed that the accused was registered as residing in the Commune of Işalniţa, Dolj County.

The accused had been heard during prosecution and had been informed on the case against him and on the start of prosecution. Furthermore, the accused had been informed with regard to his procedural rights and obligations, including the obligation to notify in writing, within 3 days, any change of address.

ANAF - Craiova General Regional Directorate of Public Finances - Craiova Customs Department, as plaintiff claiming damages, claimed the amount of RON 4,754.

After reviewing all evidence produced during prosecution and judicial investigative hearings, the trial court determined the following facts:

On 10 July 2014, around 09:00 p.m. an Opel Astra car with plate number TM XXX was stopped in traffic by a police patrol on Dacia Boulevard in Craiova. The police officers searched the car and found that B.M.Z. had on the back seat, in a bag, 500 packs of Royal Slims cigarettes with the specification "For export only-tobacco factory Sarajevo" printed on them, brought from Sarajevo, Bosnia and Herzegovina, without the fiscal marks required by the applicable regulations, being aware that the cigarettes had been smuggled.

According to Notification No. CVV /2014 issued by ANAF - Craiova General Regional Directorate of Public Finances - Craiova Customs Department, the loss caused to the state budget, as calculated on 10 July 2014, amounted to RON 4,754, including RON 608 customs duties, RON 3,022 excise taxes and RON 1,124 VAT.

Heard during prosecution, the accused B.M.Z. admitted to his acts and declared that he had bought the cigarettes in Bucharest.

Witness T.V. confirmed that the police officers had found in the bag of the accused 500 packs of cigarettes, which the accused had admitted to have bought in Bucharest at the price of EUR 6 per carton being aware that they had been smuggled and lacked the Romanian fiscal stamp.

Witnesses B.C.M. and B.S.I. stated that the accused was traveling with them in their car when the police stopped them and found the cigarettes.

At law, it was determined that the act committed by the accused B.M.Z, who, on 10 July 2014, around 09:00 p.m., was found having on the back seat of the Opel Astra car with plate number TM XXX, in a bag, 500 packs of Royal Slims cigarettes with the specification "For export only-tobacco factory Sarajevo" printed on them, without the fiscal marks required by the applicable regulations, being aware that the cigarettes had been smuggled, has the elements of the crime of possession of goods subject to customs duties, being aware that they were smuggled, under art. 270 par. 3 of Law No. 86/2006.

According to this legal classification, the court took into account the judicial mitigating factor stipulated by art. 75 par. 2 letter b) of the Criminal Code (the relatively small number of cigarettes held by the accused and the low value of the loss caused) and sentenced the accused to 1 year and 4 months in prison, as primary punishment, also applying the complementary penalty of suspension of the rights stipulated by art. 66

letters a and b of the Criminal Code for a period of 2 years after serving the primary penalty.

The judgment was appealed only with regard to the civil component – within the legal term - the plaintiff claiming damages, i.e. the Romania, through ANAF - CRAIOVA GENERAL REGIONAL DIRECTORATE OF PUBLIC FINANCES - CRAIOVA CUSTOMS DEPARTMENT, which requested the admission of its claim as filed and the ordering of the accused to pay RON 4,754 plus interests and penalties calculated from the date when the loss was caused until full payment of the debt, in accordance with the provisions of art. 119 and art. 120 of the Fiscal Procedure Code.

The accused B.M.Z. was personally present on the trial of the appeal and was heard in the presence of the court-appointed legal counsel and his declaration was documented and filed.

By **Criminal Judgment No. 1640/2015**, the Court of Appeal of Craiova – Criminal and Juvenile Section, **admitted the appeal** filed by the plaintiff claiming damages, i.e. Romania through ANAF, partly annulled the appealed judgment, with regard to the civil component, and, after retrying the case, ordered the accused B.M.Z. to also pay interests and penalties in connection with the debt of RON 4,754, calculated in accordance with art. 119 and art. 120 of the Fiscal Procedure Code, until full payment of the debt, and maintained the other provisions of the appealed criminal judgment.

By a subsequent petition filed with the Court of Craiova, B.M.Z., who was serving the sentence in the Prison of Dr. Tr. Severin, challenged the service of the sentence of 1 year and 4 months in prison.

In support of his petition, the petitioner stated that he had not appeared before the court, because he had been hospitalized at the Hospital in Galati for certain health problems (knee surgery) and that he had not been aware of the trial.

The petitioner was requested to provide clarifications and he essentially stated that he maintained his petition and requested the retrial of the case, because he had not been duly summoned during the criminal trial.

The court ordered the attachment of Case No. ... of the Court of Craiova.

On the public session of 14 April 2016, the petitioner B.M.Z. was heard in the presence of his chosen legal counsel and requested the retrial of Case No. ..., in which he was convicted, because he had not been duly summoned.

By Criminal Judgment No. 1459 /2016, the Court of Craiova, in accordance with art. 469 par. 4 of the Criminal Procedure Code, dismissed the petition for retrial filed by **B.M.Z.**

The trial court determined that the convict, Beyhatun Mehmet Zafer, had been summoned for all trial dates and summons had been served at the address he had notified to prosecutors, as well as posted at the court.

Furthermore, the court determined that, appearing before the court upon the trial of the appeal, the petitioner was also heard by the judicial supervision court and declared that he had been aware of the trial, as well as of the judgment delivered by the trial court, and agreed to pay the damages claimed by the plaintiff.

The court determined that the convicted petitioner Beyhatun Mehmet Zafer had been aware of the criminal proceedings starting with the prosecution phase, as he had been heard as suspected and accused person by prosecutors on 11 July 2014, as well as accused and respondent, on 11 December 2015, by the Court of Appeal of Craiova.

B.M.Z. appealed this judgment as illegal and groundless. *In support of the appeal, he stated that he had not had knowledge of the criminal trial, which had taken place in his absence, and that during the criminal proceedings he had not been assisted by an interpreter, being unable to understand the documents of the case, which violated his right of defence stipulated by art. 6 of ECHR.*

During the trial of the appeal, the convicted appellant was assisted by an interpreter and by a lawyer appointed by the court.

The court dismissed the appeal filed by B.M.Z. as unsubstantiated and determined that the convicted petitioner had not been tried in absence and the provisions of art. 466 et seq. of the Criminal Procedure Code do not apply.

With regard to the claims concerning the exercise of the right of defence or the absence of assistance by an interpreter, the Court determined that those aspects were irrelevant for the petition for retrial, as they were not legal criteria considered in establishing whether a person was tried in absence or not.

Indeed, art. 105 of the Criminal Procedure Code and art. 12 par. 2 of the Criminal Procedure Code stipulate the right of persons to be assisted by an interpreter during hearings if they do not speak and understand Romanian or are unable to properly express themselves in Romanian.

According to these provisions, during the trial of the appeal filed by the plaintiff claiming damages, the convict was heard directly by the court on 11 December 2015, when he stated that he was aware of the judgment delivered by the trial court, that he agreed to pay the established damages and that he understood Romanian, he was able to write and read in Romanian and he did not want to be assisted by a translator.

The fact that the right of defence of the convicted appellant was not violated by the absence of an interpreter is demonstrated by his decision to

exercise the right provided by art. 105 of the Criminal Procedure Code only upon trial of his petition for retrial during the appeal. Moreover, before the trial court, he provided verbal explanations with regard to the legal classification of the petition, its legal grounds and the reasons for which he considered himself to be a person tried in absence, which excludes any doubt concerning his ability to understand or to properly express himself in Romanian.

3.2.2. Case study II

A material prepared by judges from the Court of Appeal of Suceava

The indictment of the Prosecutor's Office attached to the Court of Rădăuți, C.S., a Turkish citizen, was accused of violation of the regulations on weapons and ammunition, as provided by art. 342 par. 2 of the Criminal Code, and of aggravated smuggling, as provided by art. 271 of Law No. 86/2006 on the Customs Code of Romania, both subject to application of art. 8 par. 1 and art. 38 par. 1 of the Criminal Code.

The indictment states that, on 29 September 2016, C.S., a Turkish citizen employed as a driver by M, a shipping company based in Istanbul, departed from Istanbul, on a route from Turkey to Bulgaria, Romania, Ukraine and Poland, driving a truck with a shipment of automotive components, electric home appliances, as well as 1,210 AirMaster air rifles, various models, caliber 4.5 and 5.5, class C22 and C23, with invoice series A No. 741376. At the Turkish border, the customs officers sealed the trailer (loaded with the aforementioned goods). On 1 October 2016, C.S. entered Romania at the Giurgiu border crossing point without notifying the Romanian authorities (the border police) with regard to the quantity of weapons carried and without requesting a transit approval, as required by Law No. 295/2004 on weapons and ammunition. He crossed the entire territory of Romania and, on 3 October 2016, after crossing the border at Siret, he was sent back by the Ukrainian authorities for carrying weapons without complying with the applicable regulations.

On 4 October 2016, C.S. was heard as both suspect and accused and admitted to his acts, being informed on his rights and obligations. The hearing was held with assistance from a Turkish citizen residing in Suceava, as no certified interpreter of Turkish was available.

During the preliminary hearings, C.S. claimed, among other things, that the prosecution documents were illegal, as his right of defence was violated during prosecution, because his right to be assisted by an interpreter was not respected and he was a Turkish citizen who did not speak or understand Romanian. To remedy this situation, the accused requested the returning of the case to the Prosecutor's Office attached to

the Court of Rădăuți to repeat prosecution in compliance with the applicable legal provisions.

The preliminary hearing judge from the Court of Rădăuți, by Interim Decision No. 317 of 24 March 2017, dismissed the objection as unsubstantiated (and instructed the beginning of trial of the case).

In support of this decision, the judge stated that, according to art. 105 of the Criminal Procedure Code, whenever the person to be heard does not understand or speak or cannot express himself properly in Romanian, the hearing will be conducted through an interpreter. The interpreter may be appointed by the judicial authorities or chosen by the parties or by the aggrieved party from among the interpreters certified under the applicable law.

According to the same article, exceptionally, if a procedural measure needs to be urgently taken or if a certified interpreter is not available, the hearing may be held in the presence of any person who can communicate with the person to be heard. However, in such case, the judicial authority must repeat the hearing through an interpreter as soon as possible.

The accused C.S., a Turkish citizen, does not speak Romanian and, in the absence of a translator, cannot communicate with the authorities and cannot provide explanations in connection with the case against him.

According to the prosecution documents, on 4 October 2016, an unsuccessful attempt was made to identify a Turkish language interpreter in Suceava County. However, the authorities identified K.S. holder of a permit of residence in Romania and speaker of Turkish, and the accused agreed for that person to assist him as interpreter. This is attested by the minutes drafted on that occasion (tab 57 in the prosecution file).

The accused was informed, through the aforementioned Turkish speaking person, with regard to the case against him and his procedural rights. He was also heard as both suspected and accused person, in the same manner and declared that he did not want to hire a lawyer. Considering that no preventive measure was instructed, the court did not appoint a lawyer.

The preliminary hearing judge determines that the informative minutes and the declarations of the accused contain mentions made by the accused personally and translated by K.S. and that the prosecutors acted in accordance with the provisions of art. 105 of the Criminal Procedure Code.

It is true that several procedures were conducted on the same day in connection with the accused C.S., but this does not mean that his rights were not respected and that he did not have the necessary time to prepare his defence.

The accused C.S. challenged the interim decision within the term provided by law, claimed that he did not benefit from the provisions of art. 12 of the Civil Procedure Code, in the sense that he did not have an interpreter appointed (he claimed that the translation from Turkish of his declarations was deficient and liable to distort his statements) and he did not benefit from proper assistance by a lawyer and, as a consequence, his right to a fair trial was seriously violated.

By Interim Decision of 03 May 2017 the preliminary hearing judge at Suceava County Court, based on art. 347 of the Criminal Procedure Code, admitted the challenge filed by the accused C.S. against Interim Decision No. 317 of 24 March 2017 issued by the preliminary hearing judge at the Court of Rădăuți.

Interim Decision No. 317 of 24 March 2017 issued by the preliminary hearing judge in Case No. 6347/285/2016/a1 of the Court of Rădăuți was annulled in full and, upon retrial, the indictment of the Prosecutor's Office attached to the Court of Rădăuți was declared illegal as a result of failure to comply with the provisions of art. 327 of the Criminal Procedure Code, with reference to art. 105 par. 2, last thesis, of the Criminal Procedure Code.

It was also instructed that, in accordance with the provisions of art. 347 par. 3 of the Criminal Procedure Code, correlated with art. 345 par. 3 of the Criminal Procedure Code, within 5 days of notification of the interim decision, the prosecutor from the Prosecutor's Office attached to the Court of Rădăuți should inform the preliminary hearing judge from Suceava County Court whether he would maintain the indictment or request the returning of the indictment to the Prosecutor's Office.

To reach this decision, the preliminary hearing judge from the judicial supervision court determined, with regard to indictment, that prosecution was incomplete, considering that the indictment had been prematurely sent to the court, without observing the provisions of art. 105, par. 2, last thesis, of the Criminal Procedure Code.

It was noted, in this respect, that art. 105 of the Criminal Procedure Code with the marginal title "Hearing through an Interpreter" stipulates the following: "(1) Whenever the person to be heard does not understand or speak or cannot express himself properly in Romanian, the hearing will be conducted through an interpreter. The interpreter may be appointed by the judicial authorities or chosen by the parties or by the aggrieved party from among the interpreters certified under the applicable law; (2) Exceptionally, if a procedural measure needs to be urgently taken or if a certified interpreter is not available, the hearing may be held in the presence of any person who can communicate with the person to be heard. However, in such case, the judicial authority must repeat the hearing through an interpreter as soon as possible."

In the case at hand, it is noted that the accused C.S., a Turkish citizen, does not speak Romanian and, in the absence of a translator, cannot communicate with the authorities and could not provide explanations in connection with the case against him.

It is noted that, from 1 to 3 October 2016, the accused had transited the territory of Romania in breach of the applicable laws, from the Giurgiu border crossing point to Siret, illegally holding in the truck 1,210 air rifles and accessories. He crossed the entire territory of Romania and, on 3 October 2016, after crossing the border at Siret, he was sent back by the Ukrainian authorities for carrying weapons without complying with the applicable regulations.

On 04 October 2016, C.S. was heard as suspect and admitted to his acts. On that occasion, he was informed with regard to his rights and obligations as a suspected person.

On 04 October 2016, C.S. was heard as accused and admitted to his acts. On that occasion, he was informed with regard to his rights and obligations as an accused person.

According to the prosecution documents, on 04 October 2016, an unsuccessful attempt was made to identify a Turkish language interpreter in Suceava County. However, the authorities identified K.S., holder of a permit of residence in Romania and speaker of Turkish (both speaking and writing), in whose presence the user was heard, as he agreed for that person to assist him as interpreter (tab 57 of the prosecution file).

According to the documents prepared, the accused was informed, through the aforementioned Turkish speaking person, with regard to the case against him and his procedural rights. He was also heard as both suspected and accused person, in the same manner and declared that he did not want to hire a lawyer. Considering that no preventive measure was instructed, the court did not appoint a lawyer.

While with regard to the declarations of the declarations made by the accused K.S. on 04 October 2016, it is determined that the procedural rights of the accused were duly respected, as the prosecutor complied with the provisions of art. 105, par. 1, thesis I, of the Criminal Procedure Code. However, it is further determined that the same prosecutor failed to respect the right of the accused to be assisted by a qualified interpreter. In this respect, the prosecutor is criticized for the lack of initiative in observing the provisions of art. 105, par. 2, last thesis, of the Criminal Procedure Code, i.e.: "However, in such case, the judicial authority must repeat the hearing through an interpreter as soon as possible."

It must be noted, in this respect, that, to guarantee the right of defence and a fair trial, it is not sufficient for the prosecutor to only conduct an initial search for a person able to communicate with the accused, without making all efforts to make available an interpreter to an accused person that

does not speak and understand Romanian. As shown above, the prosecutor's office was criticized for failing to do all reasonable efforts in order to identify a qualified person to assist the accused in the exercise of his rights. Thus, the prosecutor's office cannot remain passive, since, according to the provisions of art. 105 par. 2, last thesis, it has the obligation to resume the hearing as soon as practicable. The Code makes no reference to the availability of an interpreter in a specific county where the criminal act is supposed to have been committed and efforts must be made to find such person wherever in the country.

In the case at hand, the prosecutor's office should have acted in such a manner as to hear the accused person in the presence of an interpreter and it would have been sufficient to have at least minutes on file showing that an attempt was made to contact the accused person through his chosen legal counsel in order to inform him with regard to this procedural right and, if the accused did not request a rehearing, prosecutor would have been complete.

A fact claimed by the accused before the judge of the trial court, as well as in the challenge, through his legal counsel, was the poor quality of translation. This cannot be ignored, considering that the hearing of the accused continued to fail complying with the applicable legal provisions. In this respect, the preliminary hearing judge from the judicial supervision court refers to the provisions of art. 2 par. 8 of Directive 2010/64 EU on the right to interpretation and translation in criminal proceedings: "Interpretation provided under this Article shall 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." These provisions are directly applicable under the Romanian law since 27 October 2013.

The preliminary hearing judge from the judicial supervision court noted that, in the case at hand, the prosecutor would have to act in such a manner as to ensure the proper exercise by the accused person of his procedural rights, that is, to hear the accused through an interpreter, to the extent that the accused would appear before the prosecutor. It is an obligation of the prosecutor to make this procedure available to the accused person.

Considering the circumstances described above, the indictment was not prepared in accordance with the applicable regulations and the prosecutor will have to either comply with the provisions of art. 105, par. 1, thesis I, of the Criminal Procedure Code or to request for the case to be returned to the prosecutor's office.

On 03 May 2017, the Prosecutor's Office attached to the Court of Rădăuți maintained the indictment against the accused C.S., stating that the accused had been heard in accordance with the provisions of art. 105, par. 2,

second thesis, of the Criminal Procedure Code and that the provisions of art. 238, art.114 and art. 123 of the Criminal Procedure Code had been also observed.

By the interim decision of Suceava County Court, based on art. 346 par. (3) letter a ruled the returning of the case against the accused C.S. to the Prosecutor's Office attached to the Court of Rădăuți, considering that prosecution was incomplete, as the indictment had not been properly issued according to the applicable regulations, in the sense that the rights of the accused person, Turkish citizen, stipulated by art. 105, par. 2, last thesis, of the Criminal Procedure Code, had not been respected.

3.3. Transposition of Directive 2012/13 EU on the right to information in criminal proceedings

First of all, it is important to note that the Directive applies from the moment when a person is informed by the competent authorities of a Member State that he is suspected or accused of a crime to the moment when proceedings are completed, that is, until a final decision is reached as to whether the suspected or accused person actually committed the crime, including, if applicable, until judgment is delivered and a ruling is made on an appeal.

According to art. 2, paragraph 2, where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

Art. 3 of the Directive stipulates the right to be informed with regard to the rights. Thus, "Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- a. the right of access to a lawyer;
- b. any entitlement to free legal advice and the conditions for obtaining such advice;
- c. the right to be informed of the accusation, in accordance with Article 6;
- d. the right to interpretation and translation;
- e. the right to remain silent.

First, we note that the article provide a general obligation to inform the suspected/accused person with regard to all the specific rights that he has. The provision of such information must be documented.

The first of these rights, stipulated at letter a, can be found in the Romanian law in the provisions of art. 83 letter c, art. 89 and art. 90 of the Criminal Procedure Code, which have already been partly quoted in the analysis of Directive 2010/64 and will not be restated here.

Essential are the provisions of art. 89 of the Criminal Procedure Code: "A suspected or accused person has the right to be assisted by one or more lawyers during prosecution, preliminary hearings and trial and judicial authorities shall inform him with regard to this right. Legal assistance is ensured whenever at least one of the lawyers is present.

(2) A detained or arrested person is entitled to contact his lawyer, being guaranteed the confidentiality of communication, provided that the necessary visual supervision, guarding and security measures are implemented, but without listening to or recording their conversation. Any evidence obtained in breach of this paragraph shall be excluded.

This text illustrates the importance paid by the legislator to harmonizing the criminal procedure law with the European provisions referred to in the first chapter, with particular emphasis on respecting and safeguarding the right of defence, so that recognition be not theoretical, but actual and effective.

In addition to that, the text establishes a cause of absolute nullity that is not among those listed in art. 281 of the Civil Procedure Code, whose content is similar to the previously analyzed art. 101 of the Civil Procedure Code¹⁰⁰ and with regard to which we refer to the relevant section. This demonstrates once more that the list of causes of absolute nullity in art. 281 of the Civil Procedure Code is not restrictive.

It is important to note that Romanian courts pay particular attention to the right of defence, in accordance with the provisions of the Criminal Procedure Code, which came into force on 1 February 2014, as well as with the decisions of the European Court of Human Rights, of which we mention only the reference ones: *Dallos v. Hungary*, *Sacramati v. Italy*, *Ocalan v. Turkey*.

Furthermore, the right of defence was raised to the status of principle of criminal trial. We will not detail the procedural aspects and the essence of this right, as this goes beyond the scope of this study, but will only deal with the specific features of this right from the viewpoint of the analyzed Directive. We will only mention, however, that the formulation of this right in the Criminal Procedure Code has certain elements that lead to the idea of adversary proceedings - e.g. the inclusion of the right to remain silent in this principle.

The right provided by letter b can be found in the general regulation in art. 10 of the Criminal Procedure Code, as well as in art. 90 of the Code,

¹⁰⁰ See above, for details, the analysis of Directive 2010/64.

which establishes the situations in which assistance by a lawyer is mandatory.

It is also worth noting that the right of defence has a complex content, in the sense that it includes all the means enshrined by law for the purpose of defending the interests of the parties and of the main subjects involved in the proceedings. The doctrine¹⁰¹ argued that these means consist in *procedural rights* granted to the parties in the proceedings (e.g. the right of suspected/accused persons to be promptly informed on the case against them, the right to remain silent, the right to be assisted by a lawyer, etc.), *procedural safeguards*, which are means by which the parties can fully exercise their recognized procedural rights (e.g. the legal obligation of judicial authorities to inform the parties with regard to their procedural rights and to assist them in exercising such rights), as well as the ensuring of proper quality *legal assistance*, which is the professional assistance provided by a lawyer, i.e. a person authorized to use his legal knowledge and judicial experience in order to provide lawful defence to the parties¹⁰². Essentially, the provision of legal assistance through a lawyer is a procedural safeguard of the procedural rights granted to the parties and the main subjects in judicial proceedings. However, due to its particularly important role in the right of defence, it is defined separately from other safeguards.

As regards the right stipulated by letter c, i.e. the right of the suspected/accused person to be informed on the case against him, according to art. 6, it means that the suspected/accused person has the right to be informed with regard to the criminal act that he is suspected/accused of. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence; to ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed; at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person; suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.

Note that the text enshrines procedural rights of the parties and main subjects in the proceedings, i.e. the right to have sufficient time and

¹⁰¹ C. Ghigheci, "Principiile procesului penal", Universul Juridic Publishing House, Bucharest, 2014, p. 144

¹⁰² Gr. Theodoru, *op. cit.*, pp. 87-88, *apud* C. Ghigheci, *op. cit.*, p. 144

support to prepare the defence - par. (2); the right of suspected persons to be informed promptly and before any hearing with regard to the criminal act they are suspected to have committed and the legal classification thereof and the right to be promptly informed with regard to the case against them and the legal classification thereof, as well as the procedural safeguards of such rights: the obligation of judicial authorities to inform suspected and accused persons, before any hearing, with regard to their right to remain silent - par. (4); the obligation of judicial authorities to ensure the full and effective exercise of the right of defence by the parties and the main subjects in the proceedings, throughout the criminal proceedings - par. (5) and, finally, the ensuring of legal assistance by a lawyer - par. (1). At the same time, a limitation of the right of defence is introduced, in the sense that it must be exercised in good faith, for the purpose for which it is recognized by law - par. (6)¹⁰³.

The recitals of the directive, the legal provisions that transpose it, as well as the case law of the European Court of Human Rights and the Court of Justice of the European Union lead to the idea that the "*cause*" and "*nature*" of the accusation against the accused person refer to the acts he is accused of and to the legal classification of such acts, respectively, as well as to the existing aggravating circumstances applicable in the case¹⁰⁴. Information with regard to the legal classification of the acts also involves the obligation of judicial authorities to inform the accused person with regard to *any change of legal classification* during the proceedings. Thus, the European court determined that art. 6 par. 3 letter a) and art. 6 par. 3 letter b) were violated by changing, during deliberation, the legal classification of the criminal offence that the plaintiff had been accused of, from attempted extortion of funds to abetment of extortion, of which he had been eventually convicted; ECHR established that conspiracy determined that abetment had not been referred to in the earlier phases of the proceedings and there was no evidence that the appeal judges who tried the appeal or the prosecutor had considered abetment during the debates¹⁰⁵. Our law safeguards this right of the accused in case of change of legal classification.

The doctrine states that, according to the case law of ECHR, information must be provided *at the time when a person is accused*, according to the criteria established upon determining the criminal nature of a case, as the Court considers that, in order to comply with these

¹⁰³ C. Ghigheci, *op. cit.*, p. 144

¹⁰⁴ ECHR, judgment in case *De Salvador Torres v. Spain* of 24 October 1996, *apud* D. Bogdan, M. Selegean, *op. cit.*, p. 160, *apud* C. Ghigheci, *op. cit.*, p. 161

¹⁰⁵ ECHR, judgment in case *Mattei v. France* of 19 December 2006, *apud* O. Predescu, M. Udriou, *op. cit.*, p. 397, *apud* C. Ghigheci, *op. cit.*, p. 161

provisions, it is sufficient to inform the accused at the date of his arrest, even if prosecution started earlier and the accused was informed to some extent on the accusations against him¹⁰⁶. It is also stated that the moment when the state has the obligation to promptly inform the accused seems to be determined based on other criteria than the reasonable duration of criminal proceedings, as the Court determined that, although *in personam* had started long before notifying the accused and several acts of prosecution had been conducted, the obligation of the state arose only at the time of *issuing the indictment*¹⁰⁷.

Art. 307 of the Criminal Procedure Code stipulates the obligation to inform the suspect before the first hearing, providing that *minutes* must be drafted in this respect. Conversely, art. 108 par. (1) and par. (3) of the Civil Procedure Code suggests that, before the first hearing, the suspected or accused person must be informed *in writing*, with confirmation by signature, with regard to the criminal offense he is suspected of, the legal classification thereof and his procedural rights and obligations, while according to the Directive, such information must be provided promptly¹⁰⁸ upon accusing a person of having committed a criminal offence.

Some authors¹⁰⁹ argue that our law is unclear as to the moment when a suspected or accused person should be informed with regard to the criminal offence that he is accused of having committed and the legal classification of the offence. Although the case law of the European Court suggests that the information referred to in art. 6 par. 3 letter a) of the Convention should be provided *at the time of indictment*, the Criminal Procedure Code establishes the obligation to provide such information with regard to the criminal offence and its legal classification, *as soon as the person becomes a suspect, as soon as the person is accused and upon sending the indictment to court*, which superfluously triplicates the information referred to in art. 6 par. 3 letter a) of the European Convention.

We are of the view that, although valuable due to the pragmatism and lucidity of its reasoning, this opinion fails to consider the text of the directive that was transposed into the national law, which states that "information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence". We believe that this is the reason why the legislator introduced the obligation to promptly inform the person

¹⁰⁶ ECHR, judgment in case *Crescente v. Italy* of December 2004, *apud* R. Chiriță, *op. cit.*, p. 338, *apud* C. Ghigheci, *op. cit.*, p. 161

¹⁰⁷ ECHR, judgment in case *Padin Gestoso v. Spain* of 8 December 1998, *apud* R. Chiriță, *op. cit.*, p. 338, *apud* C. Ghigheci, *op. cit.*, p. 161

¹⁰⁸ See, by opposition, C. Ghigheci, *op. cit.*, p. 161

¹⁰⁹ C. Ghigheci, *op. cit.*, p. 161

concerned, as soon as he becomes a suspect, then, as soon as he is accused and at the time of indictment, as well as the fact that, during prosecution, the legal classification of the offence may change or new charges may be brought against that person.

As a novelty for the Romanian criminal courts, especially in the preliminary hearing phase of the proceedings, we would like to refer to an interesting case from the perspective of the analyzed directives, in which a petition with a preliminary question was submitted to the Court of Justice of the European Union: the petition was submitted during the trial of a challenge¹¹⁰ filed by the accused against an interim decision that declared legal the indictment and the prosecution documents and ordered the opening of the trial, under art. 276 of the Treaty on the Functioning of the European Union.

The subject matter of the petition is related to Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012. The accused submitted the following questions:

1. Should art. 6 paragraph 1 of the Directive be interpreted as providing that suspected or accused persons mean only persons who are officially and expressly notified of the existence of a case against them or also persons implicitly informed with regard to the existence of a case against them?

2. In case of continuing criminal offences, which consist of multiple acts committed at different points in time, all forming the same criminal offence, does art. 6 par. 3 of the Directive require the provision of detailed information on each of those acts, with indication of each specific act and of the date when it was committed?

In support of his petition, the accused stated that the conditions provided by art. 267 of TFUE and the case law of CJEU for submitting a preliminary question to the Court of Justice of the European Union are fulfilled.

The accused referred to the fact that, according to art. 267 of the Treaty on the Functioning of the European Union, the provisions of the Treaty prevail over any other provisions of domestic law, in relation to the provisions of art. 148 of the Constitution, and that art. 267 of the Treaty stipulate the obligation of the national courts to submit a preliminary question whenever such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law (as in the case at hand, where a challenge was filed in the preliminary hearing phase), that court or tribunal shall bring the matter before the Court. He also stated that the provisions of the Treaty referred to above are not inadmissible.

¹¹⁰ Interim Criminal Decision No. 56/CP/2017 of the Court of Appeal of Braşov

The preliminary hearing judge from the Court of Appeal of Braşov noted that the domestic court with which the petition to notify CJUE was filed is a "filter" that checks the fulfillment of the conditions provided by the case law of the European Court, i.e. in case CILFIT & Lanificio de Gavardo Spa v. the Ministry of Health.

The preliminary hearing judge, considering the legal provisions referred to in the preliminary questions, the jurisdiction of the preliminary chamber, the claims and objections of the accused in the proceedings and the content of the questions, determined that the petition filed by the accused for raising the preliminary questions above before CJEU is inadmissible.

In order to notify CJEU, all three conditions for the petition to be admissible and for the domestic court to submit the questions to CJEU must be simultaneously fulfilled.

Thus, according to the aforementioned decision, when a question concerning the Community law¹¹¹ is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court must refer the question to the Court of Justice of the European Union, excepting the following situations:

1. The question is irrelevant;
2. The provision of the Community law has already been interpreted by the Court;
3. The fact that the Community law is properly applied is so obvious that no reasonable doubt exists - the *acte clair* theory.

The Court of Justice also stressed that the existence of such possibility must be assessed considering the particular characteristics of Community law, the specific difficulties posed by its interpretation and the risk of case law conflicts within the Community.

The preliminary chamber judge determined that, in order to notify the Court of Justice, all three conditions had to be fulfilled simultaneously. The failure to fulfil one condition, as in the case at hand, results in dismissing the petition as inadmissible.

With regard to the *first preliminary question* submitted by the accused, concerning art. 6 paragraph 1 of Directive 2012/13/EU, the preliminary chamber judge determines that there is no reasonable doubt as to the application of the aforementioned Directive, since its provisions are clear and do not require raising a question before the Court. The failure to

¹¹¹ Although the current proper term is "European law", the term "Community law" was maintained, as the reasoning was taken from the ruling of the Court of Justice of the European Union. The terms were corrected prior to the effective date of the Treaty of Lisbon.

fulfill this condition for notifying the Court of Justice renders the petition of the accused inadmissible.

According to art. 6 par. 1 of Directive 2012/13/EU, Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

The claims of the accused in his petition for notifying the Court are grounded, in the sense that, according to the provisions of art. 267 TFEU, the provisions of the Treaty prevail over the law of Member States. Nevertheless, in the case at hand, no judicial authority involved denied this right of the accused.

The preliminary chamber judge finds that these provisions are to be applied by judicial authorities and were actually applied in the case at hand, in the sense that, at the beginning of *in personam* prosecution (continuation of prosecution), these provisions were applied to the accused, as he was informed directly, expressly and in detail with regard to the accusation brought against him and on the legal classification of the criminal offences that he was accused of having committed. Therefore, as early as at that time, the accused was able to properly and effectively exercise his right of defence, as he had been informed in detail, officially and expressly with regard to the accusation and the legal classification of the criminal offence.

Obviously, a person is considered informed with regard to an accusation when such information is provided officially and expressly, in a clearly defined procedural framework, as it actually happened in this case. When he became a suspect, in addition to the aspects mentioned above with regard to the accusation the accused was informed on his procedural rights and was free to exercise them.

Moreover, the accusation was communicated to him again, at the end of prosecution, after the indictment was sent to court, when the accused, according to the procedural provisions, received a copy of the indictment, having sufficient time to review it and to prepare his defence before the preliminary hearing judge.

Following the requests of the accused, the indictment was corrected, in the sense that the prosecutor explained in detail the accusation and the legal provisions allegedly violated by the accused, as instructed by the preliminary hearing judge from the trial court.

Therefore, at the time when the trial began, the accused had official, explicit and detailed knowledge of the facts, as well as of the legal classification and there is no doubt that he was able to effectively exercise his right of defence.

The second question refers to art. 6 par. 3 of the same Directive, which stipulates the following: "Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person."

Again, with regard to this question, the preliminary chamber judge determined that there was no doubt as to the application of the provisions of the Directive, since, as shown above in the discussion on the first question, the accused knew in detail the accusation brought against him, its nature and legal classification and the form of criminal participation.

The accused was indicted for official misconduct - the act of a public servant who obtains, either for himself or for another person, an undue benefit - a criminal offence provided by art. 13² of Law No. 78/2000 correlated with art. 297 par. 1 with application of art. 35 par. 1 and art. 5 of the Criminal Code. In the indictment and, later, in the ordinance for remedying the irregularities, the facts were specified and explained, as well as each act of the continuing criminal offence, the content of each act and the period in which it had been committed.

Therefore, in the case at hand, the accusation was presented in detail and specifically defined, together with the acts committed and their extent in time, and, as a consequence, there is no doubt regarding the application of the provisions of the Directive referred to. The safeguards of the domestic law concerning the provision of information to accused persons are in line with the Directive. Therefore, no reason exists to raise the second preliminary question before the Court.

During the criminal proceedings, by the time of completion of the preliminary chamber phase, the accused benefited from the application of the provisions of art. 6 par. 1 and par. 3 of the Directive referred to and in connection with which the submitting of a preliminary question to CJEU was requested.

The judge from the domestic court is required to interpret the national law applicable in the case, while respecting the safeguards provided by the European law, taking into consideration the prevalence of the EU law over the domestic law.

In the case at hand, it was determined that the safeguards provided by the two paragraphs of the Directive referred to by the accused were duly observed and there was no doubt concerning their interpretation and application. Therefore, as one of the three requirements mentioned above was not fulfilled, the submission of the preliminary questions of the accused to the Court was not necessary.

Taking into account the strictness of the obligation to provide information with regard to the nature and cause of the accusation, the

more important it is to inform in detail the persons who are detained or arrested on the reasons of detention or arrest, including the criminal offence they are suspected or accused of having committed.

The right to be informed on the reasons of arrest and the right to challenge the arrest transpose not only the provisions of art. 6 of the Directive, but also of art. 5, par. 2 and par. 4 of the European Convention on Human Rights and their joining in the same text of law by the domestic legislator was probably determined by the fact that the right of a person to be informed with regard to the reasons of the arrest had been connected often by ECHR with the right of the person to challenge the arrest, as it was emphasized that "anyone entitled to take proceedings to have the lawfulness of his detention speedily decided cannot make effective use of that right unless he is promptly and adequately informed of the facts and legal authority relied on to deprive him of his liberty"¹¹². However, the court has not always connected the two safeguards, since the information on the reasons of detention is not provided for the sole purpose of allowing the arrested person to challenge the arrest, but is an *autonomous safeguard*. First of all, the person wants to know why he was arrested and only afterwards whether any remedy is available against the arrest and whether he will use it or not.

The information referred to by this text must be *provided by the authority that instructs the measure* depriving the person of his liberty and must refer to *both factual and legal grounds* of the measure. The provisions of art. 5 par. 2 of the European Convention on Human Rights concerning the right to be informed was interpreted in the sense that it does not require for the reasons for the arrest to be communicated in writing or otherwise in a particular form and, as regards the extent of information, it was stated that it is not required, at the time of the arrest, to provide the arrested person with a complete list of all charges against him¹¹³.

As regards the right to interpretation and written translation provided by art. 3 par. 1 letter d, it was discussed in the analysis of the transposition of the Directive on this right. Please, refer to the explanations offered in that analysis.

The right to remain silent, stipulated by art. 3 par. 1 letter e of the Directive is transposed into art. 10 par. (4) of the Criminal Procedure Code, which states that "judicial authorities must inform suspected and accused

¹¹² ECHR, judgment in case *X v. United Kingdom* of 5 November 1981, *apud* D. Bogdan, M. Selegean, *op. cit.*, p. 70, *apud* C. Ghigheci, *op. cit.*, p. 132

¹¹³ EHR Commission, decision in case *X v. Germany* of 13 December 1978, *apud* C. Birsan, *op. cit.*, p. 333, *apud* C. Ghigheci, *op. cit.*, p. 132

persons, before any hearing, with regard to their right to deny making any declaration".

This text, as well as those of art. 83, art. 99 par. (2) and art. 118 of the Criminal Procedure Code, enshrine a right that has long been discussed in the specialized literature, but is expressly stipulated in certain domestic laws and is also mentioned in certain decisions of ECHR. It is the right to remain silent and the privilege against self-incrimination.

This right was enshrined for the first time by Amendment V, in the context of the efforts made by Puritans in England to abolish coerced interrogation at the same time when the American colonies were established¹¹⁴.

The European Court has constantly ruled that, although not specifically mentioned in art. 6 of the European Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under art. 6; this right is closely related to the *presumption of innocence* mentioned in art. 6 par. 2 of the Convention¹¹⁵. From this perspective, certain authors¹¹⁶ expressed a legitimate opinion that, apparently, it was a mistake to enshrine it in the domestic law by the article concerning the right of defence instead of the one concerning the presumption of innocence.

Furthermore, the Romanian Criminal Procedure Code also consecrates the privilege against self-incrimination of suspected or accused persons, in art. 99 par. (2), which stipulates that such person is presumed innocent, without any obligation to prove his innocence, and that he enjoys the privilege against self-incrimination. This time, the privilege against self-incrimination is connected with the presumption of innocence, although the right to remain silent is provided by art. 10 on the right of defence.

For ECHR, the purpose of the privilege against self-incrimination is to protect suspected or accused persons against inherent abuses committed by authorities in order to obtain incriminating evidence, as well as to ensure proper ruling on cases, by avoiding any possible judicial

¹¹⁴ F.E. Inbau, *Should We Abolish the Privilege Against Self-Incrimination*, in *The Journal of Criminal Law and Criminology*, Vol. 89, No. 4/1999, p. 1387, *apud* V. Pușcașu, *op. cit.*, p. 177, *apud* C. Ghigheci, *op. cit.* p. 163

¹¹⁵ ECHR, judgment in case *John Murray v. United Kingdom* of 8 February 1996; judgment in case *Saunders v. United Kingdom* of 18 December 1996; judgment in case *Serves v. France* of 20 October 1997; judgment in case *Heany et McGuinness v. Ireland* of 21 December 2000, *apud* C. Bîrsan, *op. cit.*, p. 528, *apud* C. Ghigheci, *op. cit.* p. 163

¹¹⁶ C. Ghigheci, *op. cit.* p. 163

errors that may occur as a result of coercing the suspected or accused person to incriminate himself¹¹⁷.

The European Court ruled that it is incompatible with the requirements of the Convention to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. However, these immunities cannot prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The Court considered that, whether the drawing of adverse inferences from an accused's silence infringes art. 6 is a matter to be determined *in the light of all the circumstances of the case*, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.¹¹⁸ If the theory of the right to remain silent (or of person's free will and action) were adopted, no adverse inference could ever be drawn from the exercise of this right by an accused person.

However, the Constitutional Court of Spain introduced an interesting theory,¹¹⁹ arguing that, unlike a witness, a suspected/accused person has not only the right to remain silent, in order to avoid self-incrimination, but also the right not to say the truth, either in full or in part, including the right to lie, as a component of the broader concept of exercise of the right of defence, as lying is part of the privilege against self-incrimination.

Without aiming to analyze the right to lie and its consequences in criminal proceedings, we consider it important to note, based on certain rulings, that this right cannot and should not influence the process of judicial individualization of criminal treatment in the sense of increasing the severity of penalty, because the exercise of a right cannot be turned into a reason to increase the severity of penalty, if the accused person is found guilty. The only way in which the exercise of the right of defence by lying could influence the judgment is the one described above, in the sense that it could be inferred, from other evidence, that the suspected/accused person committed the criminal offence that he is accused, i.e. only the determination that the offence exists and has the essential characteristics of typicalness, unlawfulness and liability.

¹¹⁷ C. Bîrsan, *Convenția europeană a drepturilor omului, Comentariu pe articole*, Vol. I, All Beck Publishing House, Bucharest, 2005, p. 527, *apud* C. Ghigheci, *op. cit.*, p. 165

¹¹⁸ ECHR, judgment in case *John Murray v. United Kingdom* of 8 February 1996, *apud* C. Bîrsan, *op. cit.*, p. 528, *apud* C. Ghigheci, *op. cit.*, p. 165

¹¹⁹ Judgment No. 68/2001 of 17 March 2001

In fact, this solution is enshrined by law in Germany, where the legal system allows for a judgment of this kind to be quashed and retried on grounds that the exercise of the right of defence was used by the judicial authority against the accused person¹²⁰.

As regards the provisions of art. 4 of the Directive, concerning the Letter of Rights to be handed to arrested persons, they were transposed into art. 209 par. 5-9, 210, 218 par. 4, 225 par. 8 of the Criminal Procedure Code and art. 90 of Law No. 302/2004, as republished.

In fact, the model of Letter of Rights in the Annex to the Directive was transposed into the Romanian law with the title "Indicative Model of Letter of Rights" and is attached hereto.

Art. 7 of the Directive, which regulates the right of access to the materials of the case, was transposed into art. 94 and art. 95 of the Criminal Procedure Code and is a component of the complex right of defence.

Indeed, the exercise of actual, specific and effective defence cannot be conceived in the absence of access to the materials of the case. The right to refer to the case file may be exercised at any time during the criminal proceedings and such right cannot be restricted or exercised abusively. This right requires that the right of defence is exercised in good faith and has certain limits in the prosecution phase, when the prosecutor may restrict the access to the case file, if this could have an adverse effect on prosecution. Such restriction may be imposed for up to 10 days after the initiation of judicial proceedings.

The exercise of this right to refer to the materials of the case can be considered as part of the right of an accused person "to have sufficient time and support to prepare the defence", stipulated by art. 10 of the Criminal Procedure Code, as a component of the right of defence, and is an expression¹²¹ of the principle of equality of arms between defence and prosecution, considering that the latter knows in detail the materials of the case, as a result of having prosecuted the case, while the suspected or accused person has no knowledge of their content.

The right stipulated by art. 8 of the Directive concerning the fact that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or

¹²⁰ This opinion was offered by German expert Fernando Sanchez Hermosilla during the training sessions; it was also shared by expert Marjan Bitanga, professor at the University of Zadar, Croatia, who stated that it would violate not only the right of defence of an accused person, but the right to a fair trial. We believe that this opinion is shared by many practitioners.

¹²¹ C. Ghigheci, *op. cit.*, p. 155

refusal of the competent authorities to provide information, is transposed into art. 95 of the Criminal Procedure Code.

As regards the professional training referred to in art. 9 of the Directive, as we have already explained, it is ensured by the programs of the National Judicial Institute, which provides continuing professional training as part of the continuing and decentralized training components.

The debates that took place during the training sessions revealed that the main practical issues arising from the transposition of the directive are rather related to administrative aspects that can be corrected by amending the existing regulations rather than to the merits of the protected rights (which can be remedied by a teleologic interpretation of the legal provisions). Such issues include:

- the right to have access to the materials of the case during prosecution where the entire prosecution was conducted *in rem* and, within a very short period, it was instructed that prosecution continue *in personam*, the criminal action was initiated and the court was notified;

- translating and making available the document in several languages and assuring that the arrested person keeps one copy of the document;

- determining the limits of application and, at the same time, the extent to which the right to be informed applies in exceptional remedies, in case of remedies exercised serving the sentence or if a criminal case is reopened, considering the possibility for a person to be arrested for the first time in order to serve the sentence, after having been tried in absence;

- the way of challenging a decision to refuse access to the materials of the case in the situations mentioned in art. 7 par. 4 of the Directive on the right to information (including before the highest court);

- how to provide effective access to the materials of the case for an accused person who is in another country than the one where the criminal proceedings are conducted, including the access to evidence, i.e. documents, pictures, and audio and video recordings, in order to assure that the right of accused persons to information, as stipulated by Directive 2012/13/EU, is duly respected.

CHAPTER IV

WORKSHOPS

4.1. Workshop I – Directives 2010/64/EU and 2012/13/EU of the European Parliament and the Council of 20 October 2010 and 22 May 2012

Judge Ciprian Coadă – Constanța Court of Appeal (Criminal Section and for Criminal Procedures for Juvenile and Family)

Defendant XY is an Estonian citizen born in the former Soviet Union, currently resident in Finland where he has been living since 2000 with his wife and family.

Following some leads regarding a possible drug transaction, on 15 September 2013, the defendant was found by the organized crime officers of BCCO on the beach of Vama Veche locality, in Constanta County (Romania); on the body search, six sachets of fragments of vegetal substance with the appearance and smell of cannabis and two sachets of powder, which appears to be cocaine, are found in his possession. In the defendant's car an electronic scale is found, which the defendant admitted as belonging to him.

The facts and the defendant's sayings that he is a drug user and that the drugs found in his possession are intended for his consumption, are documented in the fact report; the laboratory tests performed on 20 September 2013 confirm the substances as high-risk and very high-risk drugs. When the defendant is taken in custody by BCCO officers the communication is in English, with the help of an English-language interpreter, namely a BCCO judicial police officer, as the defendant said he knew the English language and he signed the fact report in Romanian, without raising any objections.

The defendant is heard as a suspect on 1 November 2013 on the charge of illegal possession of high-risk and very high-risk drugs for his own consumption according to the provisions of paragraphs 1 and 2, Article 4 of Law no. 143/2000 and the prosecution against him is commenced on 22 November 2013.

On 11 November 2013, the prosecutor orders the start of criminal action against the defendant, for the crime referred to in paragraphs 1, 2 of article 4 of Law no. 143/2000, and the defendant is heard for that crime.

On the same date, a 30-day order is issued to prevent the defendant leaving the country, a measure based, inter alia, on the risk of the defendant could attempt to avoid prosecution and hinder the truth, since at the time he was taken into custody he had tried to destroy part of the evidence by throwing into the sea the cocaine powder sachet found in his possession.

It does not appear, from the documents on file, that the defendant XY lodged any complaint with a competent court against the prosecutor's order, according to the law in force at that time.

On 30 November 2013, the defendant is caught at the Borş customs point in Bihor county while attempting to leave Romania, and as a result the prosecutor is notified and the court replaces the obligation to not leave the country with a 30-day preventive arrest, pursuant to par.1 a and a¹ of article 148 of the 1968 Criminal Procedure Code, taking into account the additional argument of new information on file that the defendant XY had been convicted three times for minor criminal offenses related to drug possession and trafficking in Estonia and Finland.

On this occasion, the defendant agrees to testify to the judge in the presence of a defender of his choice, stating that he is a cannabis and not a cocaine consumer.

The court's decision of preventive arrest remains final due to a lack of a second appeal.

When heard by the prosecutor, both before and after the start of criminal proceedings, the defendant does not want to be assisted by an interpreter for the Russian language – a language he knew and for which a sworn interpreter could be provided; therefore, in the absence of a sworn translator for Estonian, an unsworn Finnish translator is provided, in the person of a registrar of the criminal investigation body, who graduated a higher education institution with a majoring in foreign languages, a Swedish, Danish and Finnish speaker, with a PhD in the field and who, before becoming a registrar with DIICOT, worked as authorized guide for a Romanian-Swedish travel agency, a person who is very familiar with the Scandinavian languages. To prove the above, the bachelor's degree, a professional certificate, the doctoral degree and a recommendation by the interpreter from the previous working place are submitted on the case file. At the time of the court hearing on the preventive arrest, the defendant agrees for the hearing to be conducted in the presence of the Finnish interpreter, since no authorized translator of Finnish or Estonian could be provided.

During the criminal prosecution with the defendant in preventive arrest, the laboratory tests completed on 15 December 2013 reveal traces of cocaine on the electronic scale found in the defendant's car, and the medical tests carried out on the same date on defendant's blood sample

taken shortly after the arrest did not indicate the defendant as a consumer of cannabis or cocaine. In addition, two witnesses whose identity is not revealed indicate the defendant as a drug dealer.

Based on their testimony and the new scientific evidence provided in the case, the prosecutor orders the change of legal classification of the facts retained in the charge of the defendant, within the meaning of paragraphs 1 and 2, Article 2 of Law no. 143/2000, by an ordinance of 17 December 2013, based on the fact that the number of drug sachets, the existence of an electronic scale found inside the car used by the defendant and the circumstance that the defendant is not even a drug consumer, in conjunction with the testimony of the witnesses of protected identity, indicate the defendant as drug dealer. In order to come to this conclusion, the prosecutor also puts forward as distinct exhibit the defendant's statement made at the time of settling the proposal of preventive arrest, which shows that he is not even a cocaine user.

The legal classification is changed and the prosecutor decides to give up a new hearing.

On the same date 17 December 2013, a second defender of the defendant, who is not part of the UNBR's traditional structure, requests access to the entire criminal investigation file, but the request is dismissed by the prosecutor on the ground that the defender does not meet the requirements of the Lawyer Profession Law no.5/1995.

On 18 December 2013, the defendant is presented with the criminal investigation material and this is when he gets acquainted with the new more serious accusation against him, without making any new demands or evidence; the defendant is assisted, on this occasion, by a lawyer chosen from the traditional structure and the initial Finnish interpreter.

On the same occasion, in the report presenting the criminal investigation material, the prosecutor mentions that the defendant, being informed of the facts and the legal framing, regrets and recognizes the facts.

On 19 December 2013, while in preventive custody, the defendant is sent to trial by the prosecution and the court instructs on maintaining the preventive custody, as a result of verifications as required by article 300¹ of the Criminal Procedure Code 1968.

On the first trial date in full procedure, 8 January 2014, the court finds the regularity of the referral, according to article 300 of the Criminal Procedure Code, when the defendant, assisted by the chosen defender and the same Finnish interpreter, did not file any demands or raise any exceptions against the legality of documents contained in the criminal prosecution file and the indictment.

Furthermore, the defendant asks the court to postpone the case in order to allow the preparation of his defence and to provide the services of

a second defender, whom he offers to pay, but this new defender must know the Finnish or Estonian language, as the defendant says he is not familiar with the legal terminology. In addition, the defendant agrees to a Russian-speaking lawyer.

On the following day in court, 15 January 2014, given the impossibility of the court to provide the defendant with a Finnish or Estonian speaking defender, the defendant, in the presence of his lawyer, refuses to make a statement in front of the court, a position that is maintained until the end of the trial. In addition, the court dismisses the defendant's request for a Russian-speaking lawyer, as the defendant is considered to already have a lawyer who communicates through the interpreter.

In the investigation conducted on 22 January 2014, two witnesses of the prosecution are heard in the presence of the Finnish interpreter appointed in the criminal investigation stage, and on the trial days 29 January 2014, 5 February 2014, 12 February 2014 and 19 February 2014, the remaining witnesses indicated in the indictment are also heard, in the presence of a new sworn Finnish translator provider of interpretation services, in the first instance as well as during the appeal.

In first instance, the defendant, through his chosen defender, puts forward a series of procedural irregularities, in particular requesting the court to send the case back to the prosecutor and to start the prosecution all over again, claiming that his right to defence was not ensured, and as an alternative, he requests to be released from custody for lack of evidence, once the core evidence was removed according to national law rules and the Directives 2010/64/EU and 2012/13/EU of the European Parliament and the Council of 20 October 2010 and 22 May 2012, as follows:

- ✓ the change of legal classification in the criminal prosecution stage, aiming for a more serious criminal charge than the original one, was not brought to his attention, as required by the information note imposed by Article 6 of Directive of 22 May 2012 on the right to information within the criminal proceedings, the defendant not being heard about the more serious accusation and therefore unable to formulate the new defence upon presentation of the criminal investigation material;

- ✓ the evidence produced during the criminal investigation phase, the basis of change in the legal classification, was not brought to his attention, and he was not informed about the possibility to have access to the entire criminal investigation file, while in preventive custody;

- ✓ the access request formulated by the defendant through the lawyer chosen from outside the traditional structure was

groundlessly rejected by the prosecutor, which further prevented the defendant from formulating appropriate defence;

✓ the recognition of the facts by the defendant at the time of the presentation of the criminal investigation material is due to a serious error because it was expressed taking into account the initial legal classification of the facts, as the defendant was not previously notified by the prosecutor on the change of legal classification and therefore he was not able to get information on entire criminal investigation documents;

✓ the translation provided during the criminal prosecution was poor, both at the time that he was head by the prosecutor (as a suspect and a defendant) and at the time of the court hearing on the matter of the preventive arrest, the defendant being misled by a translation mistake about the answer to the court's question whether or not he is a cocaine consumer; the defendant is, in fact, both cannabis and cocaine consumer;

✓ the documents in the criminal investigation file were not translated, with the exception of the indictment that was communicated at the place of detention; furthermore, the proposal for preventive arrest and the preventive arrest warrant issued by the judge were provided to the defendant in a translated copy; the summary statement mentioned in the fact report was recorded with the help of an English interpreter working for the judicial body that performed the search and in respect of whom it is easy to have reasonable suspicions of lack of impartiality.

✓ the statements made by the witnesses heard during the criminal prosecution, along with those made on the trial dates January 22 2014 and January 29 2014, are hit by absolute nullity as they were made in the absence of an authorized translator, as required by the provisions of immediate application of paragraph 4, article 12 of the New Criminal Procedure Code, a text of law which, along with the provisions of article 2 of Law no. 178/1997, requires the courts of law, the prosecutor's offices attached to the courts and the criminal investigation bodies to use, in judicial proceedings, only translators authorized according to the law, who are persons certified in the profession and authorized by the Ministry of Justice; in the defence's opinion, this could have been overcome in the trial stage if the court had provided a lawyer who knew Finnish, Estonian or at least Russian, but all requests in this respect were dismissed by the court, although the defendant is not familiar with the legal terminology;

✓ the impossibility to raise these exceptions and demands came from the fact that the notification of the court and part of the

judge's investigation occurred under the former Criminal Procedure Code, with the defence being unable to put forward the procedural irregularities in the pre-trial chamber; this new procedural stage provisioned by the new Criminal Procedure Code could not be implemented, as the new procedural law came into effect after the trial's start date;

✓ the defendant brings the additional argument of the direct effect of Directive 2010/64/EU of 20 October 2010, whose transposition deadline expired on 27 October 2013, as well as of the more favourable and prevailing provisions of Directive 2012/13/EU of 22 May 2012, for which the transposition deadline has not expired yet, but which establish additional safeguards to those provided by the internal legislation.

The first instance, rejecting the defendant's arguments, sentences him to imprisonment; against that ruling the defendant lodged an appeal, reiterating in the form of written reasons the criticism of unlawfulness raised in front of the first instance.

How will the court of first instance respond to the criticisms formulated by the defendant?

As proven by the succession of the procedural documents in the case, the notification of the court about the indictment was issued on December 19 2013, before the entry into force of the new Criminal Procedure Code (1 February 2014), which did not prevent the defendant from raising the objection of irregularity in respect of several criminal prosecution documents, as early as the first day of appearance in court, on the occasion of the verifications provided by article 300 of the 1968's Procedure Code, the procedure of the pre-trial chamber, provisioned by the new law applicable only after the entry into force of this law and only when the investigation carried out by the judge did not start under the old law, according to article 6 of Law no. 255 of 2013 on the implementation of the New Criminal Procedure Code.

Under the circumstances, taking into account the regime of absolute and relative nullity provided by the former law and by the interim provisions in article 4 of Law nr. 255/2013 on the implementation of the new Criminal Procedure Code, the defendant's possibility to put forward before the court the alleged injuries suffered during the criminal investigation stage fall under the provisions provided by article 197 of the 1968's Criminal Procedure Code, in which the nullity could have functioned, but also under the new transitional provisions in article 6 of Law no. 255/2013, according to which the nullity of any act performed before the entry into force of the new law may be put forward only under the terms of the current Criminal Procedure Code.

In the case, none of the alleged procedural irregularities put forward during the debates at the first instance fall within the category of absolute nullity, as provisioned by paragraph 2, article 197 of 1968's Criminal Procedure Code or article 281 of the current Criminal Procedure Code, with the only exception in which the defendant's legal counsel in the prosecution stage would have been compulsory, according to the law, such a procedural sanction being possible if the person in custody had not been assisted by the defender, as it is suggested by the lack of „actual” defence due to the prosecutor's refusal to allow the access of a lawyer to the file.

In respect of the evidence obtained in the case, the old provisions of paragraph 2, article 64 of 1968's Criminal Procedure Code and the new provisions of paragraph 2, article 102 of the Criminal Procedure Code stipulate, basically, that the evidence illegally obtained cannot be used in criminal proceedings, but such an action cannot operate independently of the legal regime of nullity which, in the absence of other specific procedural rules, are also applicable in the matter of evidence.

In this case, the alleged irregularities of procedure occurred in the prosecution stage and resulted from the non-observance of the right to defence, in the course of acts of criminal prosecution; these irregularities had to be put forward under the former procedural law, when the judicial investigation had begun, being sanctioned by relative nullity, according to paragraph 1, article 197 of the 1968 Criminal Procedure Code.

The documents of criminal prosecution that could have been sanctioned with relative nullity include: the omission to inform the defendant on a change in the legal classification of the offense from a less serious to a more serious offence; the failure to bring to the prosecutor's attention the evidence on which this new legal classification was based; the prosecutor's rejection of the request to access the criminal prosecution file formulated by the lawyer from outside the traditional structure of the bar; poor translation as the defendant and witnesses were heard in the absence of authorized interpreters; the failure to translate the file in its entirety and some essential criminal investigation documents, with certain provisions from the two Directives being put forward in the support of these theses.

Among the pieces of evidence that have allegedly been obtained in unlawful manner are the defendant's statements made during the criminal prosecution in front of the prosecutor and in front of the court, as a result of translation and interpretation deficiencies, statements that contain the defendant's claims at the time of arrest, documented by the police in a report regarding the facts drawn up with the help of an occasional English interpreter, and the witness testimony during the prosecution and trial, on 22 January 2014.

From the perspective of injuries arising from the non-observance of provisions from Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012, it is noted that the implementation deadline in the internal law is 2 June 2014, so that the prosecutor's failure to comply with certain requirements regarding the right to information on the charges and the right to access the case files, established by article 6 and 7 of the Directive, cannot be directly put forward by the defendant, as the prosecution in this case took place earlier than 2 June 2014.

Unquestionably, the defendant could put forward an injury from the category of those mentioned from the perspective of internal law and the requirements provided by article 6 of the Convention, but the important matter in this case is to what extent the defendant could prevail himself in court of the outcome of several provisions in the Directive for which the deadline has not run out.

It is obvious that an injury resulting from the prosecutor's omission to inform the defendant of the change in the legal classification of the acts and to ensure the access to the entire criminal prosecution file could easily have been used in the first instance, but not by any means, but by complying with those requirements provided by the national legislation, requiring the relative nullity to be put forward within a certain period and by observing the norms in force on the date of the facts and from the time that the nullity has been withheld.

In terms of injuries resulting from non-compliance with provisions of Directive 2010/64/UE of the European Parliament and the Council of 20 October 2010, it should be noted that these provisions were due to be passed in the domestic internal law on 27 October 2013, therefore in the absence of a full transposition in this respect the provision regarding certain rights of the person suspect or accused enjoy a direct effect and can be put forward with the national authorities.

In this case, the defendant sustained in front of the first instance, both in debates and in the appeal, that during the criminal prosecution and during the trial in the first instance his rights provided by article 2 and 3 from the Directive were not respected and the judicial bodies did not take any measures to ensure that the interpretation and translation meet the quality standards required by paragraph 8 of article 2 and paragraph 9 of article 3 in the Directive.

While it is formally found that the defendant was not provided with an Estonian or Finnish authorized translator, during the hearing that took place in the criminal prosecution and the trial, that the witnesses proposed for the prosecution have been heard in similar circumstances and that the criminal prosecution body did not give full effect to the provisions of article 2 and 3 of the Directive, these deficiencies cannot lead to the exclusion of

the evidence in the case and cannot cause the return of the case to the prosecutor.

If non-compliance with the provisions of any Directive can only be sanctioned under the rules of national law, it is noted that neither in the criminal investigation stage nor before the first instance, in the course of the verifications taking place under the provisions of Article 300 of the 1968 Criminal Procedure Code, the defendant did not put forward any alleged injuries brought to him, and agreed that both him and the witnesses to be heard through unauthorized interpreters or English and Finnish interpreters, whose linguistic skills in the case had never been challenged during the judicial procedures.

Moreover, the fact that the defendant was not provided with a defender who knew Russian, Estonian or Finnish, that would compensate for his lack of knowledge of legal terminology, is not likely to cause any harm, as the right to legal counsel according to paragraph 3, letter c) of Article 6 of the Convention does not include such a provision; in this kind of situation the defendant communicated with his lawyer through the interpreter, under the conditions provided for in paragraph 3, letter e) of article 6 of the Convention.

The European Court of Human Rights in its case law stated that the defendant's right to be defended by a selected lawyer, established by paragraph 3, letter c) of article 6 of the Convention, must not be considered as an absolute right. In designating the defence lawyer, the courts must take into account the wish of the person accused, but these may be disregarded when there are relevant and sufficient reasons for the interest of the act of justice (Lagerblom against Sweden, Ruling of 15 February 2000)

In other words, neither paragraph 3, letter e) of article 6 of the European Convention of Human Rights, nor paragraph 1, article 2 of Directive 2010/64/EU of the European Parliament and the Council, provide for the obligation to ensure the services of an authorized translator for the person who does not understand or does not speak the language used in the hearing, but an interpreter, the provisions of paragraph 8, article 2 of the Directive requiring only the obligation of the states to ensure a sufficient quality of the interpretation services to ensure the fairness of the proceedings, in particular by making sure that the suspected or accused persons know the case and are able to exercise their right to defence.

The defence tending to take a speculative approach is proven in this case by the fact that the defendant did not even intend to use, during the hearings, including in the session with witnesses, the right provided to him by paragraph 5, article 2 of Directive 2010/64/EU, which would have allowed him to claim that the interpretation was not of a sufficient quality to guarantee the fairness of the proceedings, the defence challenging the

quality of the interpretation only on the occasion of the debates at first instance and, subsequently, in the appeal.

Furthermore, paragraph 3, letter a) of articles 6 of the Convention guarantees to the accused person the right to be informed, in the shortest time possible, of the nature and cause of the charge against them, in a language that the accused person can understand.

This means any language that can assure the communication to the suspect or accused, and not necessarily the native language or any other language he speaks currently, an idea underlined by the ECHR, or in the form of a compromise solution, in the support of the reasonable settlement term of the cause, as a component of the right to a fair trial, in the case of *Sandel v. Macedonia* (Ruling no. 27 of May 2010).

Although the defendant has not been heard in this capacity since the prosecutor changed the legal classification of the offense, and the ordinance of 17 December 2013, the initial ordinance allowing for the start of the criminal proceedings, the proposal to make the preventive arrest measure, the preventive arrest warrant and the entire criminal prosecution file have not been translated to him, these deficiencies do not fall within the scope of the nullity cases that would have allowed the return of the case to the prosecutor, under paragraph 2 of article 300, the article 332 of 1968's Criminal Procedure Code.

Considering that the defendant did not put forward these procedural irregularities when the criminal investigation material was presented or at the first trial date in full procedure on 8 January 2014, the alleged nullities were covered, under the terms of paragraph 2, article 197 of 1968's Criminal Procedure Code, a possible injury could not be put forward under article 282 of the 1968's Criminal procedure code and article 6 of Law no. 255/2013, and the return of the case to the prosecutor could not be done by resorting to the procedural provisions of the old law, now repealed.

The fact that the entire criminal prosecution file has not been translated to the benefit of the defendant cannot be held as argument of alleged injury brought to the defendant's right to defence, as long as the provisions of article 3 of Directive 2010/64/EU don't guarantee for the persons suspected or accused of committing crimes the right to the translation of the entire file, but only the right to translation of essential documents, which include the rulings of imprisonment, the indictment and the court ruling, leaving with the competent authorities the possibility to decide, and possibly to the request of those concerned, on whether translation of other documents is needed.

One other argument is provided, stemming from the provisions of paragraph 3, letter e) of article 6 of the Convention, which, according to the Strasbourg court case law, do not require a written translation of all documentary evidence or all official evidence found in the file (*Baka*

against Romania, Ruling of 16 July 2009; Pala v. France, Ruling of 30 January 2007; Kamasinsky v. Austria, Ruling of 19 December 1989).

The argument based on the fact that the request to study the file lodged by the defender selected outside the traditional bar was rejected by the prosecutor cannot be held, provided that in the reasoning of this request the prosecutor took into account that, according to the Decision in the interest of Law no. 27/2007 of the High Court of Cassation and Justice, the legal assistance granted in the criminal proceedings to a defendant or accused person by someone who did not acquire the quality of a lawyer under the conditions of Law no. 51/1995, revised and supplemented by Law no. 255/2004, is equivalent to lack of defence.

For that matter, during the criminal prosecution, the defendant was assisted by a defender chosen from the traditional structure, who was present at the time that the criminal investigation material was presented, assisted by the Finnish interpreter, during which the defendant was informed on the facts, according to the new legal classification, facts that he acknowledged and regretted.

The lack of impartiality of the unauthorized English interpreter present at the time of arrest and which the defendant challenged only in front of the court of first instance, could not lead to the removal of the fact report drawn up on that occasion as evidence, as long as the defendant agreed to be questioned in the presence of this interpreter and did not specify what was the harm caused by the lack of impartiality of the judicial police officer.

Furthermore, as the Strasbourg Court has pointed out in its case-law, the fact that the interpreter is part of the judicial body which participated in the criminal investigation that is the subject matter of criticism, does not in itself constitute a proof that the judicial procedure is unfair, especially when the suspect or the accused person agreed to be heard in the presence of that interpreter, without challenging the quality of the interpretation (*Diallo v. Sweden*, Ruling of 5 January 2010).

The provisions of paragraph 4, article 12 of the New Criminal Procedure Code put forward, retroactively, by the defendant, cannot be held as grounds for removing the evidence obtained in the absence of an authorized translator, because such a punishment cannot be inflicted under article 2 of Law no. 178/1997, which requires the courts, the prosecutor's offices and criminal investigation bodies that to use, within judicial proceedings, only authorized interpreters and translators, according to the law, a capacity that goes only to persons certified in the profession and authorized by the Ministry of Justice.

This legal provisions set out an obligation of diligence for the judicial bodies and not an obligation of outcome, and that conclusion is supported by the new provisions in paragraph 2, article 105 of the Criminal

Procedure Code which exceptionally allow, in the situation when an urgent procedural measure is required, or where an authorized interpreter cannot be provided, that a person's hearing take place in the presence of any person that can communicate with the person subject to hearing, but with the obligation from the judicial body to resume the hearing through an interpreter as soon as possible.

While these legal provisions were not in force on the date of some procedural acts in this case, they represent the transposition in criminal procedures of the provisions regarding the implementation of article 225 and paragraph 4 of article 150 of the Civil Procedure Code, in force on 15 February 2013, allowing unauthorized translators to be used in court proceedings, where there is no authorized translator for the respective language.

Taking into account the above arguments for legal interpretation, the pleas for appeal raised had to be removed, the decision ruled in the first instance being legal and sound.

4.2. Workshop II

Judge Cristina Crăciunoiu, Craiova Court of Appeal

By the ruling of 18 May 2016 issued by the pre-trial chamber judge from Court O., the court's referral, the evidence management and the way that the criminal prosecution was conducted against the defendants: GI – police agent, and CV – police officer, with the indictment issued by the Prosecutor's office of Court O., were found legal.

The exceptions raised by the defendants GI and CV were dismissed as groundless and the trial started, as instructed.

For the purpose of this ruling, the judge in pretrial chamber of the Court of Olt found that by the indictment of 7 March 2016, the Prosecutor's Office attached to the Court of Olt ordered the arraignment against the defendant GI under judicial control, for the crime of undue influence, as provided by paragraph 1 article 291 of the New Criminal Code, in application of articles 6 and 7, letter c) of Law no. 78/2000; and against the defendant CV for forgery in official documents, pursuant to paragraph 1 and 2, article 320 of the New Criminal Code, two charges of misuse of authority, pursuant to paragraph 1, article 297 of the New Criminal Code and one charge of counterfeiting, provided by article 323 of the New Criminal Code, with all of the charges covered by paragraph 1, article 38 of the New Criminal Code.

The defendant CV formulated requests and raised exceptions that were documented in the case file on 6 April 2016 in these requests and exception the defendant requested the nullity of the entire prosecution case against him conducted by the Prosecutor's Office attached to the

Court O., and the exclusion of evidence introduced in violation of the law with the consequence of returning the case to the prosecutor.

The core argument was that in the ordinance of 23 June 2015, issued in file X/P/2014 of D.NA., with regard to him and BG, the prosecutor instructed the case to be „classified” under the aspect of committing bribery, provided by article 6 and 7 of Law no. 78/2000, related to paragraph 1, article 289 of the Criminal Code (page 69 of the criminal prosecution file) and the severance of causes and discharge of the authority to settle the case in terms of committing bribery, undue influence and buying influence.

To issue this solution, the National Anticorruption Directorate (DNA) of the Craiova Territorial Unit retained that the „evidence in the case did not confirm that police officers CV and BG had either directly or indirectly claimed, and received, the amount of 5000 lei or other undue benefits when conducting the control activity finalized with the conclusion of a report of findings at „S” company.

In addition, the Craiova Territorial Unit of the National Anticorruption Directorate retained in the reasoning of the mentioned ordinance that: “the informers themselves said that they were not offered the amount of 5000 lei as a bribe, moreover, no discussions occurred in this regard”.

In addition, they argued in the case, contrary to the classification measure ordered by the above-mentioned ordinance, the prosecutor continued the prosecution for „bribery”, pursuant to paragraph 1, article 289 of the Criminal Code covered by article 6 and 7 of Law no. 78/2000, instructed the criminal offence to be classified only in point 2 of the indictment, in blatant violation of legal provisions regarding the effects of acts and measures ordered by the high-ranking prosecutor and by prosecutors, in general.

The defendant argued that in this case the prosecution was abusive, the case prosecutor continuing the prosecution against him in an occult way, for facts made known to him in the violation of the law, beyond the deadlines provided by the law, thus violating the right to an appropriate defence and a fair trial.

In addition, he claimed that, in the new file resulting after the severance of causes, the prosecutor from the Prosecutor’s Office ”O” drawn up the fact report of 14 December 2015 in the preamble of which he mentioned him as a suspect, although on that date he was not a suspect, as until that time he had been prosecuted for bribery only, a crime that was classified by the National Anticorruption Directorate Craiova” and even in relation with the National Anticorruption Directorate Craiova he was not a suspect, as he had been heard exclusively as a witness in the file X/P.2014.

Moreover, the defendant claimed that the prosecution against him was illegally started by the prosecutor from the Prosecutor's Office attached to the Court „O" on 14 December 2015 for a criminal offence of forgery in official documents, without any previous denunciation in the file resulted after the severance, any complaint against him or any ex officio referral, as required by articles 289 to 292 on the notification of criminal prosecution bodies), and he did not have any capacity in the new case file, after the classification solution issued by the National Anticorruption Directorate, therefore the criminal prosecution triggered and continued against him in this manner was nullified.

The defendant also showed that a day after the fact report was drawn up (15 December 2015) he was asked to make a statement as a suspect, but his lawyer was denied to see the file; more than that, he wasn't allowed to study the file or photocopy documents from the file, as explained in the letter submitted to the case prosecutor by his lawyer, therefore he refused to make any statements under the circumstances.

The defendant pointed out that initially he had been a witness in the case and subsequently he became a suspect and a defendant, a situation in which, according to article 188 of the Criminal Procedure Code, he requested his statement to be excluded as evidence against him, on the basis of the right of the witnesses not to incriminate themselves.

Hence, by the report of 21 January 2016, the case prosecutor brought to his attention the fact that the ordinance of 11 January 2016 instructed the extension of the criminal prosecution against him for another 3 crimes, namely for 2 criminal offences of misuse of authority, pursuant to paragraph 1, article 297 of the Criminal Procedure Code and for 1 criminal offence of forgery, provided by article 323 of the New Criminal Code, in application of paragraph 1, article 38 of the New Criminal Code (meaning he was suspect) and by Ordinance of 21 January 2016 the prosecution against him was started for all 3 crimes, that is to say he was a defendant in the file).

Thus, on the same day (21 January 2016) he was informed by the prosecutor that the criminal prosecution against him was started, in other words he was informed that on 21 January 2016 he had been a person suspected for 3 crimes even since 11 January 2016 (10 days before) and that for all these 3 crimes, to which the above-mentioned crime of forgery was added, he was now held as a defendant.

The defendant argued that it was clear that by acting in this way the prosecutor violated his rights provided by article 108 of the Criminal Procedure Code on the communication of rights and obligations, as well as those provided by articles 307 and 311 of the Criminal Procedure Code, as long as the legislator did not just formally insert the obligations of the criminal prosecution body, the fulfilment of all these obligations in the same

day (on 21 January 2016 he found out that he had been declared a suspect 10 days before and at the same time that he was a defendant), aspect that attracted the nullity of the procedural acts carried out purely formally and avoidance of finality pursued by the law.

The judge in pre-trial chamber of Court "O" examined the criticism brought by the defendant CV according to the procedure provided by articles 345 and 346 of the Criminal Procedure Code and found it groundless, for the following reasons:

It has been established that the exceptions put forward by the defendant CV, as detailed above, which essentially aim at the nullity of the entire criminal prosecution conducted by the case prosecutor from the Prosecutor's Office attached to the Court Olt, as a result of the unlawfulness of evidence management in the case, the unlawfulness of the referral of the criminal investigation bodies (complaint or denunciation) and the right to defence, were groundless and are to be rejected.

Reviewing the documents and works in the file, it was found that indeed, by Ordinance of June 23, 2015, issued in file no X/P/2014, the National Anticorruption Directorate ordered the „classification" of the case against the defendant CV and the police officer BG for bribery, provisioned by article 6 and 7 of Law no. 78/2000 related to paragraph 1, article 289 of the Criminal Code (page 69 of the criminal prosecution file), the severance of causes and discharge of the competence to settle the case for bribery, undue influence and buying influence (pages 29 – 31 of the prosecution file), and the case was therefore submitted to the Prosecutor's Office attached to the Court „O".

The case was recorded at the Prosecutor's Office attached to the Court Olt under no. Y/P/2015, and by the ordinance with same number of 1 July 2015 the commencement the criminal prosecution was ordered, for giving bribery, pursuant to paragraph 1 of the Civil Code, article 289 with the application of article 6 and 7 letters [...] of the Civil Procedure Code of Law nr. 78/2000; taking bribery, as provisioned by paragraph 1 of the Civil Code, article 290 with the application of article 6 of Law 78/2000, misuse of influence pursuant to the provisions of paragraph 1 of the Civil Code, article 291 with the application of article 7, letter c) of Law 78/2000 and buying influence as pursuant to the provisions of paragraph 1 of the Civil Code, article 292 in application of article 6 of Law nr. 78/2000.

The ordinance issued on 4 November 2015 ordered the extension of the criminal prosecution for forgery, pursuant to the provisions of paragraphs 1 and 2 of article 320 of the Criminal Code, retaining that, from the evidence presented during the criminal prosecution, other facts resulted as related to those for which the commencement of the criminal prosecution was ordered, and the ordinance with the same number and the same date ordered the continuance of the criminal prosecution against the

suspects GI and CV for misuse of influence pursuant to the provisions of paragraph 1, article 291 of the Criminal Code against the defendant GI, and for forgery pursuant to the provisions paragraphs 1 and 2, article 320 of the Criminal Code against defendant CV; on 11 January 2016, the extension of the criminal prosecution against the suspect CV, for misuse of authority pursuant to the provisions of paragraph 1, article 297 of the Criminal Code and use of forgery pursuant to the provisions of article 323 of the Criminal Code was ordered, paragraph 1, article 38 of the Criminal Code being applied in the case.

Examining the documents and the papers on file, the pre-trial judge considered that the prosecution body was legally notified through the denunciation, by the informer GMS who, as administrator of „S” company, denounced the acts committed by the police officers CV and BL and by the police officer GI, the latter as defendants in this case.

Hence, it was retained that in this case there is an act of referral of the criminal prosecution body, the outcome of a severance of causes that was declined by the National Anticorruption Directorate in the favour of the Prosecutor's Office attached to the Court „O”, which instructed, by means of an ordinance, the extension of the criminal prosecution for all the facts ensuing from the evidence.

During the investigation and the criminal prosecution, the prosecutor informed the petitioner CV that he was a suspect and defendant, with a fact report drawn up in the case.

It appears from the documents of the prosecution that the defendant CV presented himself accompanied by his lawyer, understanding to use his right to not make any statement, according to article 83 of the Criminal Procedure Code, and his right to legal counsel and defence.

In addition, the evidence was managed according to legal requirements, without violence, threats or torture against the persons heard in the case, in compliance with the provisions of paragraphs 1, 2 and 3 of article 101 of the Criminal Procedure Code, situation in which it was considered that it was not necessary to exclude certain evidence, or the fact report drawn up by the defendant.

Therefore, the judge in pre-trial chamber found no irregularities in the referral, the court being legally notified about the case and, more than that, the evidence was legally managed and the acts of prosecution were carried out in compliance with the legal provisions, therefore, it was not required to exclude any evidence or to sanction the acts of prosecution, according to article 280-282 of the Criminal Procedure Code, a reason why, under paragraph (2), article 346 of the Criminal Procedure Code, the court's referral with the indictment no. Y/P/2015, issued by the

Prosecutor's office attached to the Court „O” was assessed as legal and the case in respect of defendants GI and CV was opened.

The defendants GI and CV filed their appeals against this ruling.

The defendant CV, in the grounds to appeal, criticized the ruling of the Court „O” under the aspect of legality and soundness, by invoking the nullity of the entire prosecution and requesting, at the same time, the exclusion of all evidence presented in the case, in breach of the law, for the same reasons as in the requests and exceptions submitted to the pre-trial chamber judge in the first instance.

As regards the request to exclude the evidence, the defendant showed that the statement he made as a witness in the file that was originally handled by the National Anticorruption Directorate could not be used against him in the file of the Prosecutor's Office attached to the Court „O”.

Examining the reasons put forward by the defendants thus challenged, the pre-trial chamber judge from Craiova Court of Appeal retained that GI's appeal was groundless, but the CV defendant's appeal was partly founded for the following legal and factual considerations:

As regards the appeal formulated by the defendant CV, the pre-trial chamber judge, examining mainly the criticisms on the nullity of the acts of prosecution, shows that the primary referral in the case is the denunciation formulated by GMS on 4 July 2014, denouncing offences by several police officers, including CV.

On 23 June 2015, through the ordinance that ordered the classification, the National Anticorruption Directorate analysed exclusively the crimes under its competence according to the provisions of GEO 43/2002 and Law no. 78/2000, but without a solution of classification regarding all the facts claimed by the informer.

Therefore, in compliance with the law, in the ordinance issued on 1 July 2015, the Prosecutor's Office attached to the Court „O” ordered the commencement of the prosecution *in rem* for facts of 3 July 2014 allegedly committed by GI, BL and CV, but this ordinance did not create the framework for re-checking the facts already analysed by the National Anticorruption Directorate (this prosecutor's office verified only if the police officers received or claimed, directly or indirectly, any amounts of money – the crime of bribery represented the object of classification ordered on 23 June 2015 and not the alleged facts of misuse of authority, forgery or use of forgery).

For these facts, the referral act is the ordinance for the extension of the prosecution *in rem* of 4 November 2015 and the ordinance for the extension of the prosecution *in personam* of 11 January 2016, acts legally drawn up under the terms of article 311 of the Criminal Procedure Code. The extension of the prosecution against other facts or other persons is

ordered based on the information gathered by the criminal investigation bodies to that date, and there was no need to have a denunciation for each fact discovered after the start of prosecution *in rem* or *in personam*.

As regards the breach of the defendant's right to defence, as a result of the rejection of his application of December 16, 2015 for releasing photocopies of the file (address of December 18, 2015 attached to page 17 of file 449/104/2016/a2), the pre-trial chamber judge from the Court of Appeal retains that under paragraph 4, article 94 of the Criminal Procedure Code, there is the possibility to restrict access to the file in the prosecution stage, on a motivated basis within 10 days after the start of criminal prosecution.

In analysing the response, it is noted that this is justified by reasons that relate to the proper conduct of the prosecution (in order not to reveal to the defendant evidence that could have been influenced), the arguments presented by the prosecutor's office being similar to those retained in the ordinance on the judicial control against the same defendant, ordinance maintained by the court of rights and freedoms.

While there is no mention in this response of the fact that the restriction of the access to file is temporary, it is obvious that such a measure could not have been ordered for more than 10 days, as the maximum period provided by the law, according to paragraph 4, par. 94 of final thesis of criminal procedure code.

Therefore, as long as there is no evidence suggesting that the restriction of the access to file would have been extended beyond what is allowed by the law (in the case there is no information that a new request, after the original request that was rejected, would have received a similar solution), a violation of the right to defence such as the one presented by the defendant in its appeal cannot be retained.

However, the defendant's request to dismiss the statement he made as a witness on 10 June 2015 in file no. X/P/2014 of DNA from the evidence is grounded.

According to article 118 of the Criminal Procedure Code, „the witness testimony made by a person who, in the same case ... acquired subsequently the capacity of suspect or defendant, cannot be used against that person. The judicial bodies have the obligation to mention the previous procedural classification when such testimony is received”.

This provision of the Criminal Procedure Code, seeking to protect the right of the witness not to incriminate themselves, establishes a genuine interdiction for the judicial bodies to use such evidence to the detriment of the witnesses, interdiction that can only be punished by the exclusion of evidence.

In the case, it is noted that the statement made by CV on 10 June 2015 as a witness in another file, handled by another prosecutor's office,

was used to his detriment in the current file, serving to establish the factual situation and to remove the defence formulated in the case (please refer in this respect to paragraphs 2 and 3, page 13 of the indictment and paragraphs 1 and 2, page 14 of the same document).

Or, in the Criminal Procedure Code, article 118 is precisely intended to provide the effective protection of the right recognized to defendants in the criminal proceedings not to contribute to their own accusation (obligation underlined also by the requirement to inform the defendant about their right to remain silent and the lack of any consequences that may arise from its exercise) and the prosecutor's office infringed a legal provision by acting in this manner.

After assessing that the evidence in the criminal proceedings was used in obvious contradiction with the provisions of article 118 of the Criminal Procedure Code, the pre-trial chamber judge from the Court of Appeal admitted the appeal formulated by the defendant CV, disallowed the conclusion that was challenged and by re-judging, he ordered the exclusion of the evidence consisting in the testimony CV made as a witness on June 10, 2015, in the National Anticorruption Directorate file no. X/P/2014.

4.3. Workshop III. Practice of the High Court of Cassation and Justice

Judicial practices: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU on the right to information in criminal proceedings

Judge Damian Marius Mitea

Constanța Court of Appeal

By the indictment of 2 July 2015, the arraignment procedure was instructed against 13 natural persons and 11 legal entities, with the accusations aimed in particular to tax evasion, money laundering and offences incriminated by the Company Law nr. 31/1990. Thus, the accusations concerned mainly economic crimes.

The case was filed in first instance pending with the Court of Appeal of Constanța, as one of the defendants was a lawyer.

Taking into account the procedural provisions in force, the case has gone through two procedural stages – the pre-trial chamber and the trial itself. The pre-trial chamber verifies the competence and the lawfulness of the court's referral, as well as the lawfulness of evidence and actions conducted by the criminal investigation bodies.

If the pretrial chamber judge, after verifying the legality of the court's referral, the way that the evidence was presented and the execution of the documents of criminal prosecution, has grounds to order the start of

the trial, the judicial procedure shall be transferred to the next procedural stage, namely the trial itself.

In this case, 7 defendants were South Korean citizens who could not speak or understand the Romanian language, therefore the judge had to provide an interpreter for the defendants from the onset of the judicial proceedings.

The obligation to ensure the right to interpretation and translation derives from both national and European Union law, in this case Directive 2010/64/EU/20 October 2010 on the right to interpretation and translation in criminal proceedings.

Hence, par. 3, article 12 of the Criminal Procedure Code requires that *procedural parties and subjects who don't speak or understand Romanian language, or cannot express themselves, are provided, free of charge, with the possibility to get acquainted with the pieces of the file, to speak, as well as to put conclusions in court, with the help of an interpreter. Where legal assistance is mandatory, the suspect or the defendant is provided, free of charge, with the opportunity to communicate with the lawyer through an interpreter, for the purpose of preparing the hearing, lodging an appeal or any other request to settle the case.*

Paragraph 1, f), article 83 of the Criminal Procedure Code provides for *the defendant's right to an interpreter when he or she does not understand, speak, or cannot communicate, in the Romanian language.*

The following are provided by paragraphs 1 and 2, article 105 of the Criminal Procedure Code, as a general provision in the matter of hearing: *Whenever a person who is heard does not understand, speak or communicate well in the Romanian language, the hearing is conducted through an interpreter. The interpreter may be appointed by the judicial bodies or selected by the parties or the injured person, among the authorized interpreters, according to the law; exceptionally, when it is required to take an urgent procedural measure or if an authorized interpreter cannot be provided, the hearing can take place in the presence of any person who can communicate with the person that is heard, but with the obligation from the judicial body to resume the hearing through an interpreter as soon as possible.*

Also, Directive 2010/64/EU/20 October 2010 contains explicit provisions on the obligation of the judicial bodies to ensure the observance of the right to interpretation and translation, as provided in paragraph 1, articles 2 and 3, provisions analysed in the seminars held under this project.

The ECHR caselaw, providing a broad interpretation of the right to an interpreter free of charge, should also be considered when the accused does not understand the language used in the pretorium. For example, in case *Luedicke, Belkacem and Koc v. Germany* (1978), the Court stated

that 6 paragraph 3, letter e) of the Convention applies to „all procedural documents commenced against him and which he must understand in order to be given a fair trial”, listing among the elements requiring an interpretation or a translation at the expense of the State the indictment, the reasons for the arrest and the hearing of the ruling itself, part of these documents being also listed in Directive 2010/64/EU/20 October 2010.

In the case under discussion, the judge faced difficulties in identifying an interpreter for Korean language, given the limited number of authorized interpreters for this language which in our geographical area falls into the category of rare languages.

According to the database of the Ministry of Justice, the institution which authorizes the interpreters and translators for judicial proceedings, there are 9 authorized interpreters for Korean language. Although this number might seem sufficient, actually the judge in the case could not identify an authorized interpreter for Korean language, who could be present at the times set in the case (the interpreters who were contacted put forward different reasons for being unable to go to court, related to age, health, distance, absence from the country).

Therefore, it was impossible for the judge to provide an authorized interpreter for Korean language, and that required the identification of another way of ensuring the right to interpretation and translation. The defendants declared that they were speaking English, so the judge provided an English interpreter and the indictment was communicated to the South Korean defendants translated in English. It should be noted that the defendants accepted the interpretation and translation in English language; the same situation was seen in the criminal prosecution stage.

After the pretrial chamber and the start of the trial, the right to interpretation was ensured by an English interpreter as well; however, when two South Korean citizens were heard, an interpreter for Korean language was present, given the fact that the two defendants declared that they did not know the English language sufficiently well, therefore to ensure the quality of the translation and the correct understanding of the statements made by the two defendants, the interpreter of Korean language was provided, but that interpreter was not authorized by the Ministry of Justice, but an employee of the Embassy of the South Korean Republic. In addition, the presence of the same interpreter of Korean language was provided in the debates, due to the importance of this procedure in the exercise of the defendant's right to defence.

This was the way in which the judge actually ensured that the right to interpretation and translation was observed, as complying with the standards required by the national and European legislation.

Both the national legislation and the Directive 2010/64/EU/20 October 2010 require the right to interpretation and translation in a

language that is understood by the accused person, regardless of whether it is their mother tongue, the language of the state of origin or another foreign language known by the person accused; it is essential, however, that the person accused understands the language in which the translation is provided. The conclusion according to the national and European legislation is that the right to interpretation and translation is aimed at ensuring, for the person accused, the possibility to be provided the translation services in a language they understand, without limiting the obligation of the judicial bodies to interpretation/translation in the mother tongue, as it was the case with the Korean language.

In the above-mentioned case, the judicial procedure raised a number of issues related to the observance of the accused person's right to information, deriving from the obligation of the criminal investigators to inform the accused person about the criminal offences that they are suspected to have committed or on the legal classification.

The provisions on criminal procedure include obligations for judicial bodies to inform the suspected person about the facts in respect of which the prosecution and legal classification are made; to this end, we have the following provisions:

Paragraph 3, article 10 of the Criminal Procedure Code: *„The suspect has the right to be informed immediately and before being heard about the facts in respect of which the prosecution and legal classification are made. The defendant has the right to be informed about the facts in respect of which the criminal proceedings have been initiated against him and the legal classification thereof”* – a general provision that is applicable in any stage of the criminal proceedings.

Article 83, a¹ of the Criminal Procedure Code: *„In the trial, the defendant has the right to information about the facts in respect of which they are investigated and the legal classification thereof.”*

Article 307 of the Criminal Procedure Code: *The person who becomes a suspected person shall be informed, before the first hearing, about the fact that they are suspects in a case, about the facts suspected, the classification according to the law and the procedural rights provided for in article 83, with a fact report being concluded to this purpose.”*

Paragraph 3, article 311 of the Criminal Procedure Code: *„The judicial body that ordered the extension of the criminal prosecution or the change of legal classification is obliged to inform the suspect about the new facts in respect of which the extension was ordered”. Note: By Ruling nr. 49/28 February 2017 of the Constitutional Court the exception of the unconstitutionality was allowed, for the provisions of paragraph 3, article 311 of the criminal procedure code and it was assessed that the legislative*

solution excluding the obligation to inform the suspect/defendant about the change of legal classification is unconstitutional. It has been held by the Constitutional Court that the legislative solution in paragraph 3, article 311 of the criminal procedure code according to which the judicial body who ordered the change of legal classification is not obliged to inform the accused person regarding this situation, is an infringement of the constitutional provisions in paragraph 3, article 21 on the right to a fair trial, and article 24 on the right to defence, as well as the provisions of paragraph 3, letter a), article 6 of the Convention for the protection of human rights and fundamental freedoms, on the right of the accused to be informed, within the shortest time possible, of the nature and cause of the charges against him. *As a result of this decision, the criminal investigation bodies have the obligation to immediately inform the accused person about the change of legal classification.*

The right to information in criminal proceedings, as regulated by Directive 2012/13/EU, provides a wider range of rights to accused persons, at least in terms of prompt information about any change in the information related to the criminal charge (paragraph 4, article 6) and in terms of providing swiftly and with all the necessary details the information necessary to ensure the fairness of procedures and the effective exercise of the right to defence (paragraph 1, article 6).

a) Lack of description of the criminal charge, namely the business incompatible with the position

In the current case, for the defendant PC, indictment retained that, as an employee in an position of execution at the public finance general directorate (DGFP) in Mangalia, having the interdiction to conduct business that are not compatible with the public office, PC he started to use as a cover the activity of a company providing accounting services which was managed by his wife, where he also had other employees, a company providing accounting services for companies targeted by this investigation, namely SC K SRL, SC KM SRL SC K J SRL and SC S SRL. Prosecutors stated that, based on his job description, PC he had to verify the activity of these companies, as well as others who were operating in his area of competence, in no way to provide them with the accounting services, all the more since this activity was aimed at ensuring the circumstances for taxpayers served by the above-mentioned public servant to evade taxes to the state budget. The accusation assessed that the defendant committed the crime provided for by article 12, a) of Law nr. 78/2000.

According to the pretrial judge, the prosecution does not provide certainty and clarity as to what actions could make up the material element of the criminal offence deducted from the judgment. According to the decision text, "the phrase "the act shown in the referral" cannot mean only the simple reference to a certain crime mentioned in the succession of the

defendant's activity, but the detailed description of the facts in a way that could lead to legal consequences, namely investing the court, procedural safeguards meant to ensure the finding of truth, the right to defence of the person on trial, and particularly the right to a fair trial.

Essential here is that all the elements that are relevant in terms of the criminal proceedings are shown, namely the content of a crime, to prevent any doubts about the subject matter of the judgment without putting the defendant in position not to be able to defend themselves.

Paragraph 3, letter a) of art. 6 in the Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the right of the accused to detailed information, not only regarding the cause of prosecution, namely the material facts of the charge against them, but also about the nature of the accusation, namely the legal classification of the facts.

From this perspective, in case *Mattoccia v. Italy*, the European Court found that the information contained in the accusation concerning the essential details about the place and time of the criminal offence were vague and contradictory, violating the right to a fair trial, which should have guaranteed the complainant's opportunity and possibility to defend in a concrete and effective manner.

In its case-law, the Strasbourg Court explained what is meant by "charge" and the "nature of the accusation", brought against a person, in the decision of 24 October 1996 on the case of *De T. Torres v. Spain*, showing that these refer to the material facts of the charge on which the prosecution is based, their legal classification, as well as the existent aggravating circumstances and the information, in detail, about the facts and their legal classification should not be, in any case, subsequent to the arraignment. In decision of 25 July 2000 in *Mattoccia v. Italy*, in cases *Mattei v. France* of 19 December 2006, *Pelissier and Sassy v. France* of 23 March 1999 and *Dallos v. Hungary* of 1 March 2001, the Court also considered that precise and complete information about the facts called down on the accused and the legal classification are the essential requirement for the fairness of the judicial proceedings, and it is considered that this should also be done through the indictment, which must not be imprecise when it comes to core matters, and to this end the place and date of the crime were given, concluding that the irregularities in the indictment regarding the facts of which a person is accused and the legal classifications would lead to the impossibility to prepare the defence on the charges brought against the defendant."

Hence, the pretrial judge considered that the indictment did not meet the requirements of the provisions of art. 328 of the Criminal Procedure Code regarding the description of the facts retained in the defendant's charge.

In the prosecutor's appeal, the High Court of Cassation and Justice disallowed the reasoning of the first instance, considering that the facts are broadly described in the indictment, in a clear and comprehensible manner, with all the elements necessary for establishing the subject matter of the judgment.

I consider the solution of the High Court of Cassation and Justice as prone to criticism, given that a generic description of an allegedly criminal offence was considered sufficient, with common references to an allegedly criminal activity, but without specifying the content of the trading operations allegedly performed, the time when these operations were performed, the number of material acts, provided that only the period between 2011 and 2014 is indicated, for several companies, but without details about each company with which the trading operations occurred, and that were incompatible with the office.

We should consider that the right to information presupposes the possibility for the accused person to be specifically informed on the criminal charges, with the explanatory memorandum of Directive 2012/13/EU mentioning that a sufficiently detailed description of the facts should be provided, of the time and place, regarding the crimes of which the person accused is suspected.

In the case *Mattoccia v. Italy* ECHR held that the person accused must be informed in detail about the nature and charges brought against them.

To the same effect, article 6 paragraph 1 of Directive 2012/13/EU provides for the obligation to promptly provide the details necessary to ensure the fairness of the proceedings and effective exercise of the right to defence.

I consider that the fact base provided by the prosecutor does not comply with the standard required by the Directive 2012/13/EU, so that the assessment of the pretrial chamber in the first instance should have been retained as grounded.

b) The failure to notify the change of legal classification

In the case of defendant D.D.S., the prosecution initially retained the offence of participation in tax evasion, but on 29 June 2015 the legal classification was changed to retain the crime of complicity to tax evasion and the prosecution was ordered taking into account the new legal classification, but the prosecutor failed to inform the defendant about the change of legal classification of the charge.

The pretrial judge considered that by changing the initial legal classification, new accusations were practically retained in the defendant's charge, new facts in respect of which the criminal proceedings had not been extended, but this reasoning has not been retained by the High Court of Cassation and Justice, which considered that the prosecutor only re-

interpreted the same facts and changed the legal classification, but did not bring any further charges to the defendant.

Starting from the final assessment of the High Court of Cassation and Justice, it is found that in the case remains the change of legal classification which was not brought to the attention of the defendant, the defendant being under arraignment for a legal classification that was not brought to his attention, an aspect which has not been analysed by ICCJ.

While the national legislation provisions did not provide for the obligation to notify the change of legal classification for the defendant, at that time (the situation has changed, as a result of the Decision nr. 49/28 February 2017 of the Constitutional Court, which allowed the exception of unconstitutionality of provisions of paragraph 3, art. 3 of the Criminal Procedure Code and it was found that the legislative solution which excludes the obligation to inform the suspect/defendant about the change of legal classification is unconstitutional), the transposition deadline of Directive 2012/13/EU (2 February 2014) was passed at the time of the prosecution, therefore it would have been necessary to take into account its provisions, namely the right of the person accused to information about the charges, in accordance with art. 6, including the changes made to the legal classification of the facts. By virtue of the directly vertical (upward) effect of the directives, the individuals can directly call upon the European rules in front of the national and European courts, without the Member State to necessarily take over, in its internal legal system, the European rule in question.

The direct vertical effect of the directives is pinned upon the nature of the rule, which must be clear, precise and unconditional; the directive must be transposed in due time and in a right manner by the State Member, without any damage to the person who calls upon the direct vertical effect of the directive.

This aspect of the obligation to notify the defendant change of legal classification was not taken into account by the pretrial chamber judge from the judicial control court, although it concerned with the exercise of the right to defence and the right to a fair trial.

c) The failure to notify about the criminal charges

In the case of other two defendants (SJ and BV), both the pretrial chamber judge at the first instance, and the High Court of Cassation and Justice found that the prosecutor ordered the prosecution for criminal charges that were not the subject matter of the prosecution, these were not brought to the knowledge of the defendants. It was considered that in this way the defendants' right to defence was prevented, the defendants being brought to trial, without being completely informed about the criminal charge and without having the possibility to formulate the defence taking

into account the new facts retained in their charge, which led to the illegality of the indictment.

In fact, as regards defendant SJ, it was found that by ordinance nr. 1907/P014 of 15 January 2015 of the Prosecutor's Office attached to Constanta Court, under paragraph 3, art. 305 of the Criminal Procedure Code, the initiation of the criminal prosecution *in personam* was ordered against the defendant SJ for the crimes of *omission, in whole or in part, of the recording, in the accounting documents or in other legal documents, of the trade operations or the income, a fact provisioned by paragraph 1, art. 9 in Law nr. 241/2005 and the avoidance to perform the financial, fiscal or customs verifications, by the absent, fictitious or inaccurate declaration of the main or secondary offices of the persons verified, as provisioned by paragraph 1, letter f) of art. 9 of Law nr. 241/2005 and the acquisition, possession or use of property, knowing that these were assets from crimes, fact provisioned by paragraph 1, letter c), art. 29 of Law nr. 656/2002.*

Ordinance of 1 May 2015, of the Prosecutor's Office attached to the Court of Appeal Constanta ordered the extension of research for other offences provided by paragraph 1, letter b) of art. 272 of Law nr. 31/1990 and paragraph 1, art. 10 of the Accounting Law nr. 82/1991 and the continuation of the criminal prosecution *in personam* against the defendant SJ.

The start of criminal action against the defendant SJ was ordered at the same time, for the following crimes: paragraph 1, letter b) art. 272 of Law nr. 31/1990 – *using, in bad faith, the company assets or loans, for a purpose contrary to its interests or for his own benefit, or in order to favour another company in which he has direct or indirect interests*, meaning that financial verifications revealed a cash shortage in the amount of 628,713 lei, and in accordance with the provisions of paragraph 1, art. 10 of Law nr. 82/1991, as updated, the responsibility goes to the administrator of the company SC S SRL, named SJ, administrator of the company until 1 July 2013, for the amount of 27,400 lei; *paragraph 1, letter c), art. 23 of Law nr. 656/2002 as updated – the offence of money laundering and tax evasion, provided by art. 9 letter b) of Law nr. 241/2005*, regarding the fictitious payment in account 232 „Advances - tangible assets” in amount of 350,000 lei.

In the ordinance of 13 May 2015 of the Prosecutor's Office attached to Constanta Court of Appeal, under paragraph 1, art. 309, paragraph 1, art. 311 of the Criminal Procedure Code, only the legal classification for two offences was changed, namely: *the use of the company loan for a personal interest – paragraph 1, letter b) art. 272 of Company Law nr. 31/1990 as updated, corroborated with paragraph 1, art. 10 of Accounting Law nr. 82/1991*, consisting in the fact that on the occasion of financial

verifications a cash shortage was revealed at company SC S SRL, where he was administrator until July 1, 2013, and it was calculated as a loss in amount of 27,499 lei and *money laundering provisioned by paragraph 1, letter b), art. 29 of Law nr. 656/2002 as updated*, in relation with SC S SRL, respectively hiding/concealing the true nature of the origin of goods, consisting in the fact that he has made fictitious payments in account 232 „Advances – tangible assets” in amount of 350,000 lei, meaning he registered two sale-purchase pre-agreements, a situation in which, according to the provisions of paragraph 1, art. 10 of the Accounting Law nr. 82/1991, as revised, the liability goes to the administrator

In the ordinance of 29 June 2015 the Prosecutor's Office attached to Constanta Court of Appeal, under art. 311 of the Criminal Procedure Code, ordered the extension of the investigations and the change of legal classification in the sense that the defendant SJ will be investigated under the aspect of committing the offences of *participation to aggravated forgery – two material acts (25 April 2013), as per paragraph 1, art. 52 of Criminal Code related to art. 322 of Criminal Code referred to art. 35 of Criminal Code, the use of a company loan for individual purposes – paragraph 1, letter b), art. 272 of Company Law nr. 31/1990 as updated, corroborated with paragraph 1, art. 10 of the Accounting Law nr. 82/1991 as updated, and money laundering as per paragraph 1, letter b), art. 29 of Law nr. 656/2002 updated*

The prosecution against the defendant SJ was ordered in the indictment, for the same offences mentioned in ordinance of 29 June 2015, namely for participation in aggravated forgery – two material acts (25 April 2013) paragraph 1, art. 52 of the Criminal Code related to art. 322 of Criminal Code referred to art. 35 of Criminal Code, the use of the company loan for individual purposes – paragraph 1, letter b), art. 272 of the Company Law nr. 31/1990 as updated, corroborated with paragraph 1, art. 10 of the Accounting Law nr. 82/1991 as updated, and money laundering as per paragraph 1, letter b), art. 29 of Law nr. 656/2002 as updated.

With respect to the participation to aggravated forgery – two material acts (25 April 2013) as per paragraph 1, art. 52 of the Criminal Code related to art. 322 of the Criminal Code referred to art. 35 of the Criminal Code, the pretrial judge found that the defendant SJ has been judged without the act being described anywhere in the initiating documents, namely the extension of the criminal prosecution, the beginning of criminal proceedings or the change of legal classification, this being a new criminal charge.

In the case of defendant BV, “by the ordinance of 13 May 2015, the Prosecutor's Office attached to the Constanta Court of Appeal, under paragraph 1, art. 309, paragraph 1, art. 33 of the Criminal Procedure Code, ordered the commencement of the criminal prosecution *in personam* and

the beginning of the criminal proceedings for the criminal offence of tax evasion – art. 9, letter c) of Law 241/2005 – within the meaning that in capacity as administrator of SC V SRL, he recorded non-deductible expenses in the accounting, in amount of 158,800 lei, causing a prejudice of 51,548 lei consisting of: income tax 20,619 lei plus value added tax in respect of the tax allowance in amount of 30,929 lei cannot be granted.

As resulting from the indictment, the defendant BV was prosecuted for the criminal offence of aggravated tax evasion, as per the provisions of art. 9, letter c) of Law 241/2005 with the application of art. 35 of the Criminal Code (two material acts) for the facts committed between 2012 and 2014, while in office as administrator of SC V SRL for recording non-deductible expenses in the accounting books.

Specifically, it is retained that a 100,000 lei contract for prospective services of the real estate market was concluded with SC E SRL in violation of the provisions of paragraph 4, letter m) art. 21 of Law no. 571/2003 of the Criminal Procedure Code, as well as the provisions in point 48 of the Methodological Norms for the implementation of the Fiscal Code, as approved by GEO no. 44/2014, and the loss resulted in amount of 32,258 lei consisted in: income tax in amount of 12,903 lei and value added tax for which a discount of 19,355 lei cannot be granted.

Furthermore, it is noted that a contract for the real estate prospection services was concluded with the company SC L SRL, in value of 59,800 lei, also in breach of the provisions of paragraph 4, letter m) art. 21 of Law no. 571/2003 of the Criminal Procedure Code and point 48 of the Methodological Guidelines for the implementation of the Fiscal Code, as approved by GEO no. 44/2014, with a loss of 19,290 lei.

It was not only the fact that the prosecution started without taking into consideration the fact that the tax evasion in this case was an aggravated offence, but more than that, the description of the criminal acts in ordinance of 13 May 2015 does not mention that fact that more than one criminal fact was involved, and, moreover, the indictment refers to two separate material acts, concerning two different service contracts (one with SC Euro Style Intermed SRL, the second with SC Litoral Intermed SRL), but without describing these contracts in a previous section; with respect to SC Litoral Intermed SRL, the company is mentioned in the indictment for the first time”.

In the case, the violation of the provisions regarding the right to information of the accused person, who was sent to court without being completely informed about all the facts that constitute the criminal charge, triggered the illegality of the indictment and the return of the case to the prosecutor.

d) Lack of information about the criminal charge; development of the criminal prosecution in the defendant's absence

The pretrial chamber judge held that the criminal prosecution bodies knew that the defendant JS, a South Korean citizen, no longer lived in Romania and knew his residence from Republic of Korea, where his summoning was ordered in February 26, 2015. It appears from the documents attached to the file of Constanta Court of Appeal on February 26, 2015, the criminal prosecution bodies ordered the summoning of the defendant JS at his address in the Republic of Korea. However, while it was clear from the fact reports drawn up at the time that the warrants were implemented that the defendant JS was abroad, and that his residence in the Republic of Korea was known, the criminal prosecution bodies didn't wait for the evidence of fulfilling the summoning procedure, but presented the evidence and ordered the prosecution of the defendant.

Given the fact that the prosecution was carried out in the defendant's absence, in breach of the summoning provisions, the defendant could not be heard and was not given the opportunity to formulate the defence and to submit the necessary evidence, the right to information in the trial was not observed and, consequently, the right to a fair trial was violated.

The assessment of the pretrial chamber judge at the first instance was confirmed by the High Court of Cassation and Justice.

It is seen in the case that prosecution did not fulfil their obligation to inform the defendant about the facts of the criminal prosecution and their legal classification, both obligations imposed by the provisions of the national law as well as by the Directive 2012/13/EU.

From the point of view of the Directive 2012/13/EU, it is found that in the criminal prosecution stage all the rights of the person accused were violated and the person was prosecuted without being informed that he was the subject of a criminal investigation, with the consequence of the impossibility to exercise the procedural rights related to the capacity of suspect/defendant (the right to be informed about the charges, the right to be assisted by a lawyer, the right to remain silent, the right to interpretation and translation, the right to have access to the case file).

The procedural remedy provided by the national legislation and applied by the judge in the case was to return the case to the prosecutor, as a guarantee for the observance of the rights of the person accused, in the spirit of the regulation of the art. 8 of Directive 2012/13/EU.

e) Violation of the right to information about the charges, in the meaning of paragraph 1, article 6 of Directive 2012/13/EU.

Paragraph 1 art. 6 of Directive 2012/13/EU requires the *prompt* information of the person accused by the judicial bodies, whereas

paragraph 3, art. 10 of the Criminal Procedure Code provides for the obligation to *immediately* inform the person accused about the fact for which the prosecution is carried out and the legal classification thereof.

While the terminology used in the two legal norms is different, the meaning is the same and involves the notification in the shortest time possible, as soon as possible. In ECHR practice, the meaning of these terms is that information must be provided as soon as possible during the proceedings and at the latest before the first official questioning of the person suspected or accused by the police or by other competent authority.

The national legislation does not define the notion „immediately“, and for this reason it is the role of the judicial practice to set its precise meaning, taking into consideration the ECHR practice as well, but also the exact circumstances of the case, which depend on the objective possibilities to notify the accusation in the shortest delay and the conduct of the judicial bodies in the time interval from the commencement of the criminal prosecution to the information of the person accused.

In the case, the pretrial chamber found that the criminal investigation was started on 5 November 2014 and the charges were brought to the knowledge of the defendants P.S. and P.Sg. on 28 January 2015 and 21 January 2015 respectively; the pretrial chamber judge considered that the defendants were informed after approximately three months after the beginning of the criminal investigation, although the steps required for information and summoning would have taken a shorter period of time, and between becoming a suspect and the moment they were informed new evidence was brought in the case, which triggered the exclusion of the pieces of evidence presented between the start time of the criminal prosecution and the time that the persons were informed about their capacity as a suspect and the nature and the cause of the charges brought against them.

The pretrial chamber judge from the High Court of Cassation and Justice did not confirm this decision, establishing that only on *15 January 2015* the beginning of the prosecution was ordered *in personam* against the defendants P.S and P.Sg. and on 5 November 2014 the prosecution *in rem* began. In their turn, the pretrial chamber judge from the High Court of Cassation and Justice considered that by informing on the criminal charges on *21 January 2015* and *28 January 2015*, the obligation was observed as required to *immediately* inform the person accused for the acts for which the criminal prosecution is carried out and its legal classification.

As long as it is retained that the criminal prosecution *in personam* was started on 15 January 2015 and the defendants were informed on 21 January 2015 and 28 January 2015, respectively, the time lapse between the two procedural acts follows the requirement of immediately, promptly

informing the person accused; the period was short but it was enough for the accused persons to be summoned and to present in front of the judicial bodies; during this interval, no essential procedural activates have been carried out with any interest in terms of the right to defence and the right to a fair trial.

It should be added that the time of the trial to be considered in order to establish the right to observe the obligation to promptly inform the person accused is the start of the prosecution *in personam*, according to national legal provisions and the provisions of Directive 2012/13/EU. In this respect, paragraph 3, article 10 of the Criminal Procedure Code refers to the right of the suspect to information about the facts in respect of which the prosecution is carried out and about the legal classification thereof, and in the same meaning we also have the provisions of the Directive, which constantly refer to the person suspected. Or, according to the Criminal Procedure Code (paragraph 3, article 305), a person becomes a suspect only when the prosecution is continued against them, in other words after the start of the prosecution *in personam*.

While the pretrial chamber decision was denied, from the perspective of the right of a person accused to be immediately informed about the charges, it is important to underline the benchmarks considered by the judge of the case, which relate to time aspects as well as aspects related to the procedural conduct of the criminal investigation bodies between the start of the criminal prosecution until the time when the charges are presented.

A period of 3 months, between the start date of the criminal prosecution and the information date of the person accused about the facts for which they are accused and about the legal classification, was considered as being in contradiction with the obligation to immediately inform the person accused. The conduct of the prosecution bodies was important in this respect; in the interval under discussion the prosecutors presented essential evidence for the case, namely a forensic report of the facts, establishing the damages imputable to the defendants, the hearing of three witnesses, and a defendant home search.

I consider that the assessment of the obligation to promptly inform the person accused must take into account the short time actually elapsed between the start of the criminal prosecution and the information date of the person accused, but the deployment of the trial is an equally important aspect, including procedural acts and the evidence presented in that time interval. The conclusions largely depend on the way that the judicial procedure is carried out, as in some situations the obligation to promptly inform the person accused is breached by a few days only, if in which this period essential evidence is produced that could influence on the fairness of the trial and the effective exercise of the right to defence.

The case, which raised other problems related to the lawfulness of criminal prosecution but these problems are outside the scope of the two directives, was eventually ordered back to the prosecutor for three defendants, whereas the rest of the defendants were sent to trial.

CHAPTER V

THE RIGHT TO INFORMATION AND THE RIGHT TO TRANSLATION AND INTERPRETATION - CROATIAN PERSPECTIVE

I. INTRODUCTORY NOTES

Linguistic communication is *conditio sine qua non* in the everyday living of people as social unit, and it is also reflected in court proceedings. *Prima facie*, the language of communication in criminal proceedings seems to be uncontestable and it is a matter of course not only for those who do not have legal studies, but sometimes also for legal experts. Therefore, we need to stress from the beginning the significance of the aspects that we approach herein.

Methodologically, it is best if we acquire such awareness in real rather than hypothetical circumstances: in our first real-life example, we present the tragic case that occurred in 2015 in Spain, where a Dutch 15-year old girl, while vacationing, performed the so-called bungee jumping from the Cabezón de la Sal bridge. This is a jump from a bridge or from a similar structure (for example, viaduct or a high crane) with the jumper's legs tied to one of the two ends of an elastic rope, while the other end of the rope is tied to the structure from which the jump is performed. The elastic cord is meant to decelerate and stop the jumper's fall in the air; then the jumper is released from the rope and the adventure is ended safely. Nevertheless, in the case of the young Dutch girl, the instructor was Spanish and did not speak English well; in fact, they did communicate in English. After he tied the elastic rope to her legs, before he tied the other end of the rope to the bridge structure, the Spanish instructor, intending to warn the girl, told the Dutch girl "No jump!". But she understood it as "Now jump!" Because of how she understood the instructor's order, the girl jumped from the bridge when the elastic rope was not tied to the bridge and, thus, she died.

Of course, one may say that such a tragic end would not have been possible if the Spanish instructor had said "Don't jump!" or any other similar English linguistic form that would have meant the interdiction to jump. The second example related to the personal professional practice of the undersigned judge, co-author of this Guide, and it illustrates the importance of communication, respectively of understanding in criminal proceedings. For example, the defendant in a criminal proceedings case

was charged with the attempted murder of her husband because she had stabbed him with a knife after a fight. As proof that she had not committed this crime, the defendant submitted to the court the minutes issued by the Canadian Tribunal Queen's Bench, Calgary, which also included facts regarding the attempted murder. These minutes, which were translated in Croatian by a sworn translator for English, included the victim's statement: "...my wife stabbed me after I choked her." In other words, the statement translated as such suggested that the defendant had stabbed him because the victim had choked her before, and the stabbing had been self-defence, i.e. an action taken in case of necessary defence. In accordance with the Croatian material criminal legislation, necessary defence excludes the illegality of the act. Nevertheless, the court requested that the sworn translator who had performed the aforementioned translation submit the minutes and, thus, obtained the original of such minutes.

However, in these minutes, the victim's statement said: "she stabbed me, but not after I choked her as she swears". In other words, in its very contents, the translation was contrary to the contents of the original document.¹²² This is a translation error noted by the court of law and not by the victim (who, in fact, had spent an important part of his life in Canada), nor by his representative. This should be emphasized as an unproblematic access to issues of translation and interpretation both by the sworn translator and by the parties and their legal representatives who, by the nature of their position in the proceedings, should be particularly proactive in relation to the administration of the evidence in the court hearing.

We believe that each of these two real events confirms the fact that the aspects relating to translation and interpretation are an extremely important step of the criminal proceedings, because of the repercussions they may have.

For a defendant to understand his or her procedural position and to be aware of the meaning of his or her rights and obligations, he or she needs to understand the language of the judicial proceedings. Usually, the problem does not occur in the cases where the judicial proceedings are conducted in the defendant's mother tongue; the trouble starts to appear when the judicial proceedings use a language unknown to the defendant, i.e. he or she does not comprehend, does not speak or does not understand it or understands and/or speaks it insufficiently for an efficient defence. Moreover, the problem of communication, respectively of linguistic understanding, is especially acute in the conditions of the

¹²² This case launches a full series of essential questions regarding the quality of the translation as such, but also the responsibility of the sworn translators who work permanently with the court in this sense. We will discuss these aspects in additional detail when the time is right, as a continuation to the present paper.

globalization and of the strong migration movements. This means we are witnessing migration waves moving from African and Asian countries to European Union countries.

The population included in the aforementioned migrations also includes those people who will be defendants in the criminal proceedings in front of the courts of law of the Member States of the European Union. The European Union is also a single market of labour, with an emphasis on the migration of the workforce of the active population between these countries, as well as between these countries and third countries. Some people in these migrations are also potential defendants in the criminal proceedings conducted by some of the Member States of the European Union. Moreover, pensioners in the Member States of the European Union opt more and more often to establish outside the territory of their country of origin, for economic reasons (lower living costs) or for medical need, or based on a combination of the two. The aforementioned facts are also confirmed by Eurostat data, according to which every year approximately 11 million new criminal files are opened in the national courts of the European Union states. This number also includes foreign citizens (in and out of the European Union) who do not understand and do not speak the language of the court before which the proceedings are conducted. At the same time, in accordance with the Statistical Report drafted for the year 2016 by the Ministry of Justice of the Republic of Croatia, a total number of 54,269 new criminal proceedings were initiated in front of the criminal courts of the Republic of Croatia.

Although the mentioned report does not show the number of foreign citizens who are charged in these proceedings, a realistic expectation relates to a tendency of increase of the number of foreign citizens who are defendants in such proceedings, all these in the context of the initially mentioned migration movements that also include the Republic of Croatia, but also in the context of the continuous growth of the number of tourist visits of foreign citizens in the Republic of Croatia. When we talk about the number of launched criminal proceedings, we need to consider the necessity to weigh crime as social phenomenon, since various states identify different behaviours as crimes. Thus, some states see this phenomenon as a single conduct, while some legislation distinguish punitive behaviours in this concept. With regard to the Republic of Croatia, the division of the acts of punishment is provided (crimes, offences and economic crimes), and the initially mentioned number of the newly initiated criminal proceedings must be understood as part of the overall number of punitive behaviours in the Republic of Croatia.

The defendant's information in contemporary criminal proceedings is one of the essential aspects of the proceedings' functionality and fairness. In actual fact, the largest part of the population never participates,

throughout their lifetime, to any judicial criminal proceedings, as defendants, as witnesses or in any other quality. This is fully in line with the fact that the criminal law is *ultima ratio societatis*, respectively the end means by which social community reacts to an individual's specific behavior that is a criminal action, thus being a threat for the other individuals or for the community in general.

Nevertheless, a specific and smaller part of society's members does breach social rules in a criminal way and are, thus, prosecuted as defendants. From among such defendants, an even smaller part repeats a criminal action; therefore, it is only repeat – defendants who have some empiric perspective of the criminal proceedings and of the rules in which they occur. To the other defendants, i.e. those who participate for the first time in criminal proceedings, these are unknown. Thus, contemporary society that rightfully proclaims its civilizing achievements, has the obligation to inform the defendants with regard to specific and to the most important and essential aspects of the criminal proceedings¹²³, so that the defendant should be placed as individual on an equal (as possible) position with the omnipotent state that prosecutes him or her because of a criminal action.

II. INTERNATIONAL LEGAL FRAMEWORK REGARDING THE RIGHT TO INTERPRETATION AND/OR TRANSLATION AND THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

The problems of understanding, respectively of linguistic communication, as well as the problems of information of the defendant in the criminal proceedings are not new and for an illustration of this assertion we will show the most important international instruments dealing with this problem¹²⁴. For this purpose, we will try to indicate in all the documents the provisions that, in our opinion, are key-provisions with regard to the texts of the directives, when the right to translation/ interpretation and the right to information are involved. We know that, methodologically, the extraction of relatively small fragments of the texts from their total body is not the most fortunate solution, but, at the same time, we believe that the judges who will have access to this guide know well the contents of the related documentation.

¹²³ The texts of both directives speak about the so-called minimum rights.

¹²⁴ The international sources to which we are referring are only a part of those we think are significant, on the hand, being those that are the most frequently used in the Member States of the European Union, on the other hand. These sources are presented chronologically, according to the time of their adoption and are not the final number of documents regarding this topic.

1. The Universal Declaration of Human Rights, adopted and proclaimed in the United Nations' General Assembly by Resolution no. 217 / III of 10 December 1948.

Among other reasons, this legal source is significant because it is adopted in the Organization of the United Nations as global world organization; therefore, it has a wide-scale binding nature. Article 11, paragraph 1 of the Universal Declaration of Human Rights provides that everyone charged with a criminal action has the right to be presumed innocent until proved guilty in accordance with the law, in a public trial at which he or she has had all the guarantees necessary for his or her defence. The understanding of the language and of the alphabet in which the trial is performed is definitely one of the key-guarantees necessary for defence. To this end, article 9 stipulates the right of the arrested person to be informed at the time of the arrest with regard to the reasons of the arrest, and he or she must be informed promptly as to the charges against him or her.

2. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Article 5 of this Convention provides the right to freedom and security, it emphasizes that any arrested person must be informed in the shortest time possible, in a language that he or she understands, of the reasons of the arrests and of the charges against him or her. Moreover, in defining the so-called minimum rights of the person charged, in article 6, paragraph 3, point a of the same Convention, with the title "Right to a fair trial", it is provided that everyone charged with a criminal offence must be informed as soon as possible and in a language that they understand, in detail, of the nature and reasons of the charges against them. Furthermore, article 6, paragraph 3, point c of the Convention provides that the defendant may defend himself in person or through legal assistance of his choice. However, where he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. Article 6, paragraph 3, point e of the Convention also provides the defendant's right to the free assistance of an interpreter if he cannot understand or speak the language used in court.

Obviously, the right to interpretation is stipulated in these two provisions of the convention with regard to two different procedural circumstances: regarding a person deprived of freedom, i.e. arrested or detained, as part of the right to freedom and security, and regarding a person who is charged, as part of the right to a fair trial. Nevertheless, these are rights from Conventions that do not exclude each other, but are complementary. For example, the right to free interpretation in article 6 of

the Convention should also be applied when the person arrested in the sense of article 5 of the Convention is involved.

3. The Framework Convention for the Protection of National Minorities, adopted by the Council of Europe on 10 November 1995.

Article 10 of the Framework Convention provides that the states parties to the Convention undertake to recognize that every member of a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing. Moreover, every defendant belonging to a national minority is guaranteed the right to be informed promptly, in a language he or she understands, of the reasons for his or her arrest, as well as of the nature and cause of the charge against him or her, and to defend himself or herself in this language, and, where necessary, with a translator's free assistance.

4. The International Covenant on Civil and Political Rights of 16 December 1966, Resolution number 2200 A/XXI

Article 14 of the International Covenant, with regarding to the use of languages in judicial proceedings, provides the scope of the defendant's so-called minimum rights, and one of them is the same right to use his or her language, as already presented in the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, it is stipulated that the defendant has the right to be informed promptly, in detail and in a language he or she understands, of the nature and reasons of the charges against him or her and that he or she benefits from an interpreter's free assistance, if he or she does not understand or does not speak the language used in court.

5. The United Nations Convention on the Rights of the Child, of 20 November 1989, Resolution number 44/25

In drafting the rights of the child suspected or charged with the breach of the criminal law, the Convention emphasizes, among other rights, the need to ensure the free assistance of a translator / interpreter, if the child does not understand the language of the proceedings. Likewise, any child suspected of or charged with the breach of the criminal law, in the context of the aforementioned minimum rights, has the right to be informed of the charges against him or her and, as applicable, to benefit, through the parent or guardian, from legal and other kind of assistance, when preparing and stating his or her defence.

6. The United National International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990

The international convention is important owing to the recognition of the problems of migrant workers and members of their families in the state of work. Article 18 provides the right of migrant workers and of their families that, when charged criminally, they should be informed promptly, in detail and in the language that they understand, of the reasons and nature of the charges against them. To this end, they also have the right to the free services of an interpreter, if they do not understand or do not speak the language used in the court of the proceedings.

7. The European Charter for Regional or Minority Languages, adopted by the Council of Europe in 1992

The Charter approaches the languages spoken traditionally in the countries that signed the Charter, languages that are different from the official language of the signatory state. The languages spoken by the members of the linguistic minority in a state are discussed. Essentially, the standards for the official recognition and use of these languages are provided.

8. United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006

In article 13, the Convention regulates the right of this category of individuals to access to the judicial system. This approach means the right of persons with disabilities to participate to judicial proceedings in a manner equal with the participation of the other persons; it includes procedural and other adjustments that allow and enable the actual participation of persons with disabilities to judicial procedures. Thus, persons with disabilities have all the rights included in the constitutional and legal conventions of a country, which are adjusted to their specific needs by the text of the present Convention.

9. The Charter of Fundamental Rights of the European Union (7 December 2000, 2007/C 303/01)

The Charter is a modern codification that includes a third generation of fundamental rights, such as the right to data protection, environmental protection, etc. The manner in which the Charter (hereinafter called CFR) approaches the right to interpretation/translation and the right to information in criminal proceedings will be described in other sections, farther in this paper.

The submitted summary is relevant not only owing to the fact that it generates awareness of the importance of the rights we are discussing, but also because it clarifies them from different perspectives: in a case, as fundamental human rights, in the second case as child rights, then rights of migrant workers and of their families, next rights of persons with disabilities, rights of the members of national minorities... Obviously, this is

multi-layer phenomenology, which should be thus not only perceived, but also lead to solutions in the judicial practice. This is particularly important when we consider that the sources of the conventions on rights are very well rated on the international scales of the sources of rights and may often provide the most appropriate solutions, precisely for the practical solution to a specific dilemma.

The described framework of the Conventions is the widest normative framework regarding the right to interpretation and translation and the right to information in criminal proceedings. With regard to the Member States of the European Union, by considering also the sources of the aforementioned conventions, the most important source of rights to this end is given by directives (Engl. directive; Germ. Richtlinie; Fr. directive), as part of the secondary legislation of the EU. We are talking about 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 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. Both directives are components of the EU Plan of consolidation of the suspects' and defendants' procedural rights in criminal proceedings.¹²⁵ The purpose and goal of the plan are given by the consolidation of the suspects' and defendants' procedural rights in criminal proceedings in the Member States of the EU and the reinforcement of mutual trust among the same Member States, in their mutual legal systems on criminal matters. This plan also includes other directives regarding the defendants' precisely defined procedural rights.¹²⁶

European Union Directives are to be understood first of all as legal instrument available to European Union institutions for the application of the EU policies in the legal system of each Member State. Moreover, this implementation in national legislations achieves one of the main objectives of EU policy – the harmonization, i.e. the synchronization of national legislation in the European Union. Thus, the transposition of directives in national legislation should occur based on legally mandatory rules. To the extent where, at the transposition in the national legislation, a state has normative solutions contrary to the directive's solution, the state is required to remove them from its legislation. Directives as such have the so-called vertical direct effects; therefore, they may assign rights directly to individuals in relation to the state, but they do not have the so-called horizontal direct effects, subsequently the individuals mentioned in the text

¹²⁵ Council Resolution of 30 November 2009, SL 2009 C 295

¹²⁶ For example, the defendant's right to legal assistance in criminal proceedings, with regard to procedural guarantees for children – charged in criminal proceedings, etc.

of the directive do not acquire specific rights in relation to another individual.

A particular aspect of the European Union directives is the necessity to explain them through the text of the preamble. The preamble of the directives describes and explain the reasons of their adoption, which is especially important for the application of the directives' solutions in the national legislation and practice. More precisely, the bodies that will apply a directive based on the preamble are likely to understand the targeted objectives, i.e. from a teleological viewpoint, to apply purposefully their national regulation in an actual case. Before the directives are rightfully enforced and applied, they need to be published in the official journal of the Member State. In the Republic of Croatia, it is called the Official Gazette. According to the complexity of a matter in a directive, various terms were set starting from the date of the publication of the directive to its application (*vacatio legis*).¹²⁷ We are, however, aware that each national legislation has its own specific aspects that derive from the historical and cultural context of each Member State.

By individual directives, the European Union identifies the purpose and the results sought in a specific field of social life. Therefore, each Member State is free to transpose directives in its national legislation in a manner that fits best its specific traits. As part of the so-called secondary legislation of the European Union, after they are adopted, the directives must be transposed in the internal legislation of each Member State of the European Union (unlike, for example, the regulations that, after adoption, are applied directly). The directives acquired this status in the European Union's legal system pursuant to article 288 of the Treaty on the Functioning of the European Union (consolidated version of the Treaty on the Functioning of the European Union 216/C 202/01). This provision of the treaty provides that the directives are mandatory in relation to the states to which they refer, depending on the results to be obtained, and the choice of the form and method of obtaining the result is left to the national bodies. In practice, however, there are cases of non-observance by some Member States, regarding the transposition of the directives in the national legislation, on specific terms. In the opinion of the Court of Justice of the European Union, the failure to transpose or the inadequate transposition of

¹²⁷ Usually, the two-year term is discussed, but it can be even longer with regard to more urgent matters. This is the case of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 which entered into force on the twentieth day after its publication in the Official Journal of the European Union, i.e. on 23 April 2014, but the Member States were required to align their national legislation with the Directive's solutions by 22 May 2017. This meant a three-year term for the transposition of the Directive's provisions.

the directive in the national legislation may also have direct consequences. More precisely, this aspect relates to three situations:

- a) where the directive is not transposed in the national legislation or is transposed inadequately,
- b) where the provisions of the directive are not unconditionally and sufficiently clear and precise and
- c) where the provisions of the directive offer specific rights to individuals.

In the described cases, individuals may refer to the content of the directive against a Member State, before the court of law. However, individuals cannot invoke the content of the directive by filing an action against another individual, if the directive is not transposed. In some situations, the European Union may grant damages to individuals with regard to the non-transposition or postponement of the transposition of a directive.¹²⁸ In accordance with the current state of things, the basic issue is the delay of the transposition of directives in the national legislations of the Member States of the European Union.

When we discuss directives, we also need to consider the institute of the previous proceedings, in the sense of article 267 of the Treaty on European Union (210/C 83/01). Providing the competence of the Court of Justice of the European Union, the Treaty on European Union regulates by the aforementioned article the decision-making on the preliminary questions that relate to:

- a) the interpretation of the treaty
- b) the validity and interpretation of the acts of the institutions, bodies, offices, or agencies of the European Union.

When a national court of law doubts with regard to the aforementioned aspects, they can and, in some cases, they must go before the Court of Justice of the European Union and request the adequate interpretations. This means that, if such a problem appears in front of a national court, against whose decision there is no remedy at law, the court is required to submit a preliminary ruling to the Court of Justice of the European Union. Such a solution is provided at article 18, paragraph 3 and 4 of the Code of Criminal Procedure of the Republic of Croatia. In the context of the directives we are discussing, it is relevant that, starting from 1 December 2014, national courts are also able to refer to the Court of Justice of the European Union preliminary rulings on criminal matters. These rulings are expected, accurately, to be raised precisely in relation to the interpretation of some requirements of the directives.

¹²⁸ Judgments in cases C-6/90 and C-9/90 Francovich and Bonifaci, of 19 November 1991.

In the normative system of the European Union, the Directive on the right to interpretation and translation in criminal proceedings and the Directive on the right to information in criminal proceedings should rely first of all on the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (hereinafter called: ECHR) and on the Charter of Fundamental Rights of the European Union (hereinafter called: CFR). This is owed to the fact that the two documents discussed are most closely and directly linked with the matter in the mentioned in the aforementioned directives. ECHR and CFR are mandatory acts for all the Member States of the European Union. When the list of rights included in ECHR is discussed, the content of the directives should be correlated with article 6 of ECHR, i.e. with the right to a fair trial.

In the current, contemporary setting, the right to a fair trial is a fundamental principal of criminal proceedings. Therefore, the statistical data regarding the number of violations confirmed by the practice of the European Court of Human Rights and which relates to the breach of this convention right in relation to other breaches in the same convention are not surprising.¹²⁹ The fair trial principle is an extremely complex one, which multiple reflections. Some of these include the defendant's right to a judgment within a reasonable term, his or her right to an independent and impartial court according to the law, etc. But in the approach of the directives, we will focus on the list of the so-called minimum rights of the defendant charged with a criminal offense. This is a list of five so-called minimum rights, including the following:

- the defendant's right to prompt and detailed information, in a language understood by him or her, on the nature and reasons of the charges against him or her;
- the defendant's right to the free services of an interpreter, where he or she does not understand or does not speak the language of the court proceedings.

These two rights included in the circle of the so-called minimum rights in criminal proceedings have been the object of the examination and rulings in a number of cases before the European Court of Human Rights (hereinafter called: ECtHR), of whose judgments we have shown the ones most characteristic to the requirements of this paper. At the same time, article 47 of the CFR, called Right to an effective remedy and to a fair trial, reshaped the principle of a fair trial, while, in relation to the right to

¹²⁹ Regarding the sentences against the Republic of Croatia, the European Court of Human Right found, in approximately 90% of its judgments, the breach of this very right. Second is positioned the breach of the right to freedom and security of article 5 of ECHR, while all the other breaches are represented in a minor share

interpretation/ translation and the right to information in criminal proceedings, article 52, paragraph 3 provides the following:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

Regarding the relation between the mentioned documents, we must also note that both directives regulate especially the right to interpretation / translation and the right to information in criminal proceedings, with respect to the arrested persons. Thus, they are correlated with article 5 of ECHR and with the right to freedom and security mentioned in it. Since freedom is one of the highest (if not THE highest) of the values protected by ECHR, this matter is also specifically regulated in the directives. Such a regulation also applies to the execution of the European arrest warrant, as an extremely effective instrument of judicial cooperation of the European Union Member States. Since this issue will be examined in more detail in the continuation of the text in the Guide, here we only need to note that, for the relation between the directive and the ECHR, CFR applies *mutatis mutandis* which is mentioned in article 6 of ECHR.

It is clear from the key provisions of ECHR and CFR that the contents of these two legal acts are interconnected and complete each other in a profound and essential manner. Moreover, CFR, as a chronologically newer document, which avoids the exhaustive repetition of the normative solution of ECHR, shows explicitly that, with regard to the aspects without solution in this document, the ECHR provisions and related ECtHR practice apply. Regarding the right to interpretation and translation and the right to information in criminal proceedings, in the context of the aforementioned international documents, the directives indicated in the introductory part must also be inserted. Thus, all the mentioned legal sources should be interpreted and applied by the holistic and teleological method – as a single legal source that applies that applies to the purpose of the adoption of these documents.

III. PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

To illustrate the aforementioned statements, we will describe hereinafter, in their most important segments, individual decisions of ECtHR with regard to the application of the ECHR, regarding the rights in the Directive on the right to interpretation / translation and the Directive on the right to information in criminal proceedings, rights that are also included as minimum rights in the ECHR and CFR catalogue of rights. The practice of the court with regard to these aspects is extremely wide; however, the

purpose of this part of the Guide, by the presentation of the most important parts of the ECtHR rulings, is to illustrate the court's most important positions that continue to be relevant.

a) In the judgment *Brozicek v. Italy* § 41 (application 10964/82, 1989), and in the judgment *Tabai v. France* (application number 73805/01, 2004), ECtHR emphasizes the importance and significance of the defendant's right to information and interpretation/translation in the following operative part:

"if it has been proven or there are reasons to suspect that the defendant known insufficiently the language in which the information is transmitted to him, the authorities are required to ensure interpretation / translation." This idea is to be seen as a starting point for the continuation of the examination of the related rights.

b) Judgments *Kamasinski v. Austria* § 79 (application number 978/82, 1991) and *Hermi v. Italy*, § 79 (application number 18913, 2005) debated whether the indictment should be communicated to the defendant who does speak and understand the language of the court before which the proceedings occur, in a verbal or written form. To this end, the following is mentioned:

"Although article 6 §3.a of ECHR does not provide that relevant information should be communicated verbally or translated in writing for the defendant who is a foreign citizen, the defendant who does not know the language used in court can practically be deprived of his rights if the indictment is not translated to him in writing, in the language he understands." This is the ECtHR's essential approach of a solution to the aforementioned dilemma.

c) Nevertheless, in the already mentioned judgment *Kamasinski v. Austria*, §81, ECHR also referred to the possibility of informing verbally the defendant of the charges against him:

"However, sufficient information can also be offered on the charges by the oral interpretation of the indictment, where this allows the defendant to prepare his defence."

The options for the supply of the information to the defendant, on the charges against him, as presented in the case *Kamasinski v. Austria*, emphasize the necessity of monitoring and studying the practices of ECtHR with regard to the application of the right mentioned in the convention. As mentioned in this judgment and quoted above, article 6.§3.a ECHR does not lay down explicitly the form of information of the defendant on the charges against him, but stipulates the criteria by which such information may be supplied verbally or in writing. Obviously, given the principle of a living instrument by which the practice of ECtHR also changes in time with regard to the application of the right mentioned in the

convention, national courts must register these changes and apply them accordingly to their practice.

At any rate, in accordance with those presented by the mentioned judgment, the solution to the dilemma regarding the form of information of the defendant on the charges against him or her should be searched from the perspective of the defence – the key-criterion is the possibility of preparing the defendant's effective defence. In practice, usually, this will be *questio facti* for each situation, and the answer will depend on the numerous factors of each of them (complexity of a criminal action, whether the action was or was not committed in collusion, and so on).

d) In the judgment *X v. Austria* (application number 7830/77, 1988.), regarding the right of access to the case materials, ECHR stated the following position:

"There is no right for the defendant, in accordance with this provision (i.e. article 6 of ECHR, *author's note*), to the translation of all the materials in the case file." This is an aspect of the right to information in criminal proceedings, on which the ECHR stated its principle position regarding the scope of this right, in light of the right to a fair trial pursuant to article 6 of the ECHR.

e) Since the activity of interpretation and/or translation also generates costs, in the judgment *Luedicke, Belkacem and Koc v. Germany*, §45 (application number 6210/73, 1980), ECtHR emphasized the right to free interpretation or translation, for an effective defence of the defendant, as follows:

"The costs generated by the translation of the charges should be borne by the state in accordance with article 6 §3 of ECHR, guaranteeing the right to translator free assistance."

We need to note that, unlike other rights mentioned at letters b) - d) and where the practice itself of ECtHR interpreted the content of these rights, in this case, the Court simply referred to the existing text of the convention, i.e. of the corresponding provision of ECHR.

f) The general position of ECtHR regarding the right to access to the case materials is, among others, stated in the judgment *Maiseyev v. Russia* (application number 62936/00, 2008), emphasizing the direct connection between the right of access to the case materials and the exercise of the right to a fair trial.

"Adequate access to the case materials and the use of notes and copies of the important file documents are essential guarantees of a fair trial."

g) In its practice, ECHR also approached the aspect regarding the moment when the defendant has the right of access to the case materials. To this end, in the judgment *A.T. v Luxembourg* (application number 30460/13, 2015), it noted:

“The European Court of Human Rights finds that, if the defendant’s access to case materials is denied before his or her first hearing before the investigating judge, this does not amount to a violation of ECHR article 6, because this provision of the Convention does not guarantee unrestricted access to the case materials where the authorities have sufficient reasons, for the defence of a public interest, to deny access to the case materials, in order not to hinder the effectiveness of an investigation by such an approach.”

We need to note that this judgment is also relevant because it puts explicitly in context the right to a fair trial and the Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings. More exactly, it connects article 6 of ECHR (right to a fair trial) with article 7 in the aforementioned Directive (right of access to case materials) - §80 in the judgment.

h) ...but, regarding the counsel’s participation to the defendant’s first hearing before the police and then before the investigating judge, the judgment mentions:

“...ECtHR finds that article 6§3.c of the convention is violated, in relation to article 6, paragraph 1, i.e. the lack of the counsel’s participation **during** the police investigation; [the Court] finds that article 6, §3 c of the Convention is breached, in relation to article 6, §1, in the sense of the lack of communication between the defendant and his counsel **before** the first hearing by the investigating judge”.

i) Regarding the exercise of the right of access to the case materials, with limitations of such access included, the judgment of ECtHR in the case Rowe and Dewis v. the United Kingdom (application number 28901/95, §63. 2000) is relevant; therein, the Court referred to the body ultimately competent to decide on the denial of the right of access to the case materials:

“The prosecutor cannot decide on the denial of access to specific relevant evidence (materials of the criminal file, *author’s note*) without informing or requesting the judge’s consent ...”

j) The identical position of ECtHR was reiterated in the case P. G. and H. v. the United Kingdom (application number 44787/98, 2001). In this judgment, regarding the application of the restriction of access to the judicial file, it stated:

“The judicial authority has the role to decide on the right of access to the file materials, weighing the public interest and the defendant’s rights by the application of the proportionality test”.

IV. TRANSPOSITION OF THE DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL IN THE CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CROATIA

Regarding the right to interpretation and/or translation in criminal proceedings in the Republic of Croatia, first we need to emphasize that it is also included in the Constitution of the Republic of Croatia. By stating in article 2 the principle of a fair trial, the Constitution mentions also, as one of the suspect's, respectively defendant's, fundamental rights, the right to detailed information in a language that he or she understanding, on the nature and reasons of the charges against him or her, as well as on the incriminating evidence.

Following such a constitutional solution, which is fully compatible with the solutions included in ECHR and CFR, the right to interpretation and/or translation has found a place also in the current Code of Criminal Procedure of the Republic of Croatia ("Official Gazette" no. 152/08, 76/09, 80/11, 121/11 - consolidated text, 91/12 - Decision of the Constitutional Court of the Republic of Croatia, 143/12, 56/13, 145/13, 152/14 and 70/17, hereinafter called CPP/08). Moreover, in the first chapter titled "Principles of criminal proceedings", CPP/08 stated explicitly that it transposes in the legal text the Directive 2010/64/EU and the Directive 2012/13/EU.

Article 8 of CPP/08 first mentions that in the Republic of Croatia, in criminal proceedings, Croatian language and the Latin alphabet are used. Thus, in some jurisdictions, additional to Croatian and to the Latin alphabet, in accordance with the constitutional law mentioned in the introduction regarding human rights and freedoms and rights of ethnic and national communities or minorities in the Republic of Croatia, it is possible to also use other languages or alphabets of the minorities.

Regarding the translation/interpretation in criminal proceedings in the Republic of Croatia, a relevant legal source is also the Law on the use of languages and alphabets of national minorities in the Republic of Croatia, which defines very practically the manner in which the party to the proceedings may manifest their choice of language and alphabet used in the proceedings. We will continue with presenting comparatively specific decisions based on Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (hereinafter called: Directive 210/64/EU) and decisions regarding the same aspects in the Croatian criminal procedural legislation.

a) Object and scope (article 1 of the Directive)

Directive 2010/64/EU lays down the rules on the right to interpretation and translation in criminal proceedings and in the proceedings for the execution of the European arrest warrant. CPP/08 also

regulates the aspects of translation/interpretation in criminal proceedings initiated in line with the definition of article 17 in CPP/08:

- by ruling the final character of the decision on the performance of the investigation,
- by confirming the indictment if the investigation was not performed,
- by establishing a hearing session based on a private complaint, and
- by ruling a judgment of issuing a criminal order.

Following the described Croatian normative solution, CPP/08 limits, reduces the scope of the right to interpretation/ translation. Nevertheless, the introduction already mentions the necessity of a teleological focused interpretation of the legal regulations the mandatory nature of this interpretation needs to also be mentioned in the context of the notion of autonomous interpretations of concepts drafted by ECtHR in its practice and also borrowed by Directive 2010/64/EU. Thus, the beginning of criminal proceedings is considered when a person is informed officially or in another way by the competent state authority that they are suspected of or charged with a criminal offense (article 1, paragraph 2 of Directive 2010/64/EU).

Therefore, in the described context, the right to interpretation/translation is also prescribed in the national Croatian legislation for such a person, starting from the said moment and until the completion of the criminal proceedings, so not only from when the criminal proceedings begin, as provided by the cited article 17 of CPP. In other words, the right to translation and/or interpretation is in the Republic of Croatia, too, a right both in the stage of criminal prosecution (criminal complaint, investigations) and in the stage of the criminal trial. Moreover, since usually and most often before the judicial proceedings, the police investigation and the prosecutor's activity take place, the suspects' right to translation and/or interpretation also emanates from article 11f of the Law on the police responsibilities and competences, respectively from the related provisions of the Law on the activity of the prosecutor's office. Thus, the right to translation and/or interpretation practically "covers" the whole activity conducted by the state's repressive apparatus from the beginning of its prosecution activities at the committing of the criminal offense.

The next regulation relevant for the right to translation and/or interpretation is the one that regulates the matter of the European arrest warrant, hence of the Law regarding judicial cooperation on criminal matters between the Member States of the European Union (Official Gazette no.: 91/10, 81/13, 124/13 and 26/15 – hereinafter called LCJMP-EU). The right to translation and/or interpretation is ensured in these

proceedings by the adequate application of the related provisions of CPP/08.

b) Right to interpretation (article 2 of the Directive)

After being mentioned as constitutional statements of principle on the use of language and alphabet in criminal proceedings, CPP/08 in article 8, paragraph 3, the parties and other participants in the proceedings are allowed to use their language.

Thus, the use of one's mother tongue also includes the language of signs for deaf and deaf-mute individuals. This legal provision relates to the requirement of article 2 in Directive 2010/64/EU. So CPP/08 does not borrow directly the provision at article 2, paragraph 4 of the Directive 2010/64/EU regarding the mechanism for laying down the speech capacities of the suspects/defendants and the necessity to hire an interpreter, because it emanates from the spirit of the Law itself.

For example, article 15 of CPP/08 provides that the court or another authority included in the procedural activity will instruct the defendant (and/or another person) on the right to translation and/or interpretation, if they find that such person needs such assistance. Moreover, the court or another competent authority is required to warn such a person on the consequences of omitting some actions in the proceedings. Another similar legal provision is the one in article 376 of CPP/08 on the phase of preparation of the hearing, respectively of the hearing session (preliminary hearing), when the president of the senate needs to make sure that the defendant understands the indictment.

Thus, the procedure itself for the evaluation of the defendant's mentioned capacities is in the control of the judge or of another competent authority participating in the preliminary criminal proceedings, i.e. before the judicial phase (police, prosecutor's office). We believe that the existing procedural solutions do not prevent the judge, in the related evaluation, from also employing, when needed, experts of a certain type that will help that his or her evaluation regarding a specific aspect be correct. Furthermore, the provisions of CPP/08 that standardize the defendant's hearing enforce upon the court itself the obligation of instructing the defendant on his or her right to translation and/or interpretation "where there are doubts whether the defendant known the court's official language." / article 273, paragraph 6 of CPP/08.

If the defendant is denied the right to translation and/or interpretation, art. 8, paragraph 6 of CPP/08 entitles him or her to file an appeal and, where the defendant considers that the quality of the translation is not sufficient, he or she has the right to file a complaint with the authority that conducts the proceedings; if this authority finds that the complaint is justified, they will appoint another interpreter (article 8, paragraph 10 of CPP/08). It is unclear why the Croatian legislator provided

as means of protection of the defendant's right to translation the right to file an appeal, while regarding the quality of the translation, provided the right to file a complaint. Two essential aspects of the same right to translation are the focus here and, in our opinion, there has been no reason that in a case of doubt regarding the quality of the translation the defendant should not be also given the right to appeal.

Regarding the application mentioned at article 2, paragraph 2 of the Directive, CPP/08 answered with the contents of article 8, paragraph 8, thus providing the defendant's right to the translation of the discussions and messages with the counsel, communication that is performed for the preparation of the defence, the filing of the remedies at law, respectively for the purpose of taking other actions in the proceedings, if these actions are necessary for the use of the procedural rights of defence. In this situation and in similar cases, CPP/08 requires the defendant's application regarding the exercise of the mentioned rights.

Article 8, paragraph 11 of CPP/08 provides the possibility of translation and interpretation by telephone connection or by audio-video devices, if the procedural right of the defence are not breached this way. Such a provision is aligned with article 2, paragraph 6 of the Directive, with the mention that the Directive placed the use of these means in the context of the fair nature of the proceedings, and CPP/08 the narrower framework of this right - the right to defence.

c) The right to the translation of essential documents (article 3 of the Directive)

Directive 2010/64/EU requires that Member States' national legislations ensure for the suspects or defendants the written translation of all the essential documents for the exercise of the right to defence and for a guarantee of the fair nature of the proceedings, which is in line with the already described Convention right and with the ECtHR practice. Directive 2010/64/EU describes as essential documents:

- all the decisions of confinement,
- any act of charge or indictment, and
- court decision.

Member States can extend this right also to other documents that they evaluate as essential from the perspective of an effective defence in the criminal proceedings, according to their own legislative standards. The Republic of Croatia took this opportunity. Thus, in article 8, paragraph 5, CPP/08 considers the intent of Directive 2010/64/EU and stipulates the mandatory translation of more documents mentioned in this article, extending this right also to:

- the note regarding the rights,
- the decision regarding the performance of the investigation,
- the order to produce evidence,

- subpoena,
- court ruling (so both to the judgment, and to the decision).

The aforementioned court rulings relate both to the decision made by the final completion of the criminal proceedings and to the procedure of the extraordinary remedies at law.

Moreover, on the defendant's explicit request, CPP/08 requires that the authority that performs the proceedings translate the evidence of part of it, if this is necessary for the use of the procedural rights of defence. Thus, emphasis is placed on the application of article 3 of the Directive. The exception from the written translation is also provided here, in order to allow a verbal translation or a verbal summary of the evidence, provided that this does not breach the procedural rights of defence, and the defendant also has counsel (legal assistance). In other words, in the case of any kind of translation, CPP/08 insists on the consolidation of the guarantee of defence by the presence of the defendant's counsel, i.e. of a person specialized in law and who can protect accordingly the defendant's rights in the proceedings.

Obviously, through the mandatory translation of the listed circle of documents, CPP/08 also allowed to the defendant an adequate information on the performance of the criminal proceedings; this means that, in this sense, the balance between the prosecution's and the defence's interests is obtained, so that the latter should be able to counteract efficiently the thesis in the indictment act.

Article 3, paragraph 5 of Directive 2010/64/EU requires the normative inclusion in the EU Member States with regard to the appeal against the competent authority's decision to reject the defendant's application for the written translation of evidence or part of it, which the defendant finds necessary for the use of the procedural rights of defence. CPP/08 admitted this application in article 8, paragraph 6 of the present Law. Regarding the said appeal, according to the current procedural situation, either the Chamber of Council in the related court or directly the superior court will be the one to make the decision.

d.) The applications regarding the right to the translation of the essential documents that relate to the procedure of execution of the European arrest warrant (articles 6 and 7 of the Directive) are borrowed in full in the already mentioned law LCJMP-EU. This provides that, regarding the right to translation and/or interpretation, the provisions of other regulations that regulate this matter will apply accordingly; these are, first of all, the provisions of CPP/08. Thus, the interpreter's role is found only in the provision of article 24.b in LCJMP-EU, in the Chamber of Council proceedings, where it is mentioned that, in the session of this judicial authority, if necessary, the interpreter will also be called, as well as in the provision of article 24 of the said Law regarding the rights of the

investigated person, where his or her right to an interpreter is also provided. Then, the final and transitional provisions of this law (article 132) refer to the previously mentioned application of CPP/08.

e.) Costs of the interpretation and translation services (article 4 of the Directive)

The defendant's Convention-stipulated right is to be exempt from the obligation to pay the interpretation and translation costs, so that his or her defence be as efficient as possible. Thus, this Constitutional right is found in article 4 of the Directive, being transposed in article 145, paragraph 6 of CPP/08. In accordance with the last provision of CPP/08 "the costs of translation in the languages of the minorities in the Republic of Croatia, which appear by the application of the Constitution and of the Law regarding the rights of the minority members of the Republic of Croatia to use their own language, as well as the costs of the verbal and written translation will not be applied to the defendant by the persons who, in accordance with this Law, are required to compensate the expenses of the proceedings."

f.) Quality of the interpretation and of the translation (article 5 of the Directive)

In order to obtain, maintain and improve the quality of interpretation and translation, article 5 requires that the Member States draft registers with correspondingly independent qualified translators and interpreters, to be available to the legal representatives and competent bodies. The Republic of Croatia responded to this request, with the exception of the law text in CPP/08 and of the adoption of the Regulation regarding permanent sworn translators ("Official Gazette" 86/2008, hereinafter called: Regulation), the adoption of which is attached to the competence of the Ministry of Justice. This Regulation provides the conditions for the activity of permanent sworn interpreter. Since this Regulation was meant as a response to the Directive's requirements regarding the quality of the translation/interpretation, we will continue to present the conditions to be satisfied by an individual in order to obtain the quality of permanent sworn interpreter¹³⁰:

1. the general conditions provided for the admission in public service (age, professional capacity, criminal record without condemnations for specific criminal and other actions)

¹³⁰ This Regulation is organized two years before the Directive, being adopted as regulation amending the previously valid regulation, which regulated the same aspects. These facts confirm the thesis according to which the Republic of Croatia also approached prior to the adoption of the Directive aspects regarding the quality of the translation and/or interpretation, trying to respond to the requests of adequate quality of these activities.

2. additionally to knowing Croatian, the person needs to master in full a specific foreign language for which they claim to be an interpreter. If a person claims that he or she is an interpreter in a court of law in which, additional to Croatian, the language of the ethnic or national community or of the minority is also an official language, the said person also needs to know that language
3. knowledge of the judicial system structure, of the state administration and of legal terminology
4. holder of a university degree

The activity of permanent sworn translator may be performed both by individuals (natural persons) and by legal persons. For legal persons (companies), the register of the competent commercial court has to enter as their main activity the activity of translation; these companies are required to have at least one employee who is a sworn translator for the foreign languages registered in the activity.

The position of permanent sworn translator for a specific foreign language is exercised in the provided proceedings that is started by submitting an application to the president of a court of law or of a commercial tribunal, depending on the address or place of residence of the applicant. The applicant is followed by the CV, the proof of citizenship, the proof of studies and of knowledge of the language.

Knowledge of the foreign language is proven by university degree or by a certificate of graduation of a recognized examination regarding the knowledge of the language for which the applicant requests the appointment. The aforementioned certificate relates to the C2-level knowledge of language, in accordance with the normative European framework of reference.

Before deciding on an applicant's petition, the tribunal president, i.e. the commercial tribunal, offers guidance to the applicant for professional training in one of the professional associations of permanent sworn interpreters. These professional associations have developed professional training programs, previously approved by the Ministry of Justice. The training of the applicants may take up to two months. After the completion of the training, the candidate for the position of permanent sworn interpreter takes the exam in front of the Commission appointed by the president of the tribunal, i.e. the commercial tribunal. The president of the tribunal, i.e. of the commercial tribunal will reject by decision the application of the said person, if:

1. he or she fails to meet the requirements mentioned initially as conditions for permanent sworn interpreters,
2. if, at the examination, the applicant does not obtain a satisfactory result, or

3. where the applicant did not undergo professional training in one of the professional associations of permanent sworn interpreters.

If the applicant obtains positive results in the examination of his knowledge, fulfilling the aforementioned legal requirements, the president of the tribunal, i.e. of the commercial tribunal, will rule a decision of appointment of the permanent sworn interpreter. The permanent sworn translator's mandate is for four years. After passing the exam, the person appointed permanent sworn translator takes the oath before the president of the tribunal, i.e. of the commercial tribunal. After the expiry of his or her appointment, the permanent sworn translator may be appointed again for a four-year period, without a limit regarding the total number of mandates.

The permanent sworn translator is required to keep confidential everything he or she may find out about during his or her activity of permanent sworn translator, subject to the penalties provided by the criminal material legislation. The president of the tribunal, i.e. of the commercial tribunal, will revoke the responsibilities of the permanent sworn translator:

- if the interpreter requests it,
- if it is found that the conditions based on which he or she was appointed have not existed or have been discontinued,
 - if, based on a final decision of a competent authority, he or she is declared incapable to perform his or her activity,
 - if, based on a final decision of a court of law, their professional capacity is confiscated,
 - if he or she is sentenced for a criminal offense that is an impediment to the admission in the public service and if he or she was sentenced with a final decision for a criminal offense that removes his or her right to fulfil the duties of permanent sworn interpreter, while the legal consequences of his sentencing follow or the interdiction to exercise his or her profession is issued in the period in which he or she applies for the appointment as permanent sworn translator,
 - if he or she fulfils his or her translation duties in a negligent or disorderly fashion,
 - if, following the change of address, he or she leaves the area of the tribunal, i.e. of the commercial tribunal for which he or she was appointed,¹³¹
 - if they breach the obligation of confidentiality undertaken when performing the activity of permanent sworn translator.

We need to note that an applicant for the position of permanent sworn translator, as well as permanent sworn translator, in all the case

¹³¹ Most likely, this provision would not withstand the reexamination of its legality

where decisions are made regarding his or her quality in the procedure of appointment or revocation, has the right to appeal against such decisions. The Ministry of Justice is the one to decide in the case of the appeal. Thus, the aspect involved here is not only the achievement of the constitutional principle of the right to appeal, but also an additional possibility regarding the obtaining of the quality of the involved activities.

Regarding permanent sworn translator, a single electronic list of the permanent sworn translators for the entire Croatian territory is managed. This list is updated by the tribunal, i.e. by the competent commercial tribunal that appointed the interpreter (article 17 of the Regulation). The lists must be updated correctly and on time. The permanent interpreter is required to keep record of his or her works in the form of a register called "Register of translations and certifications. Before beginning the entry of data in the register, the register is authorized by the president of the tribunal.

The regulation regarding permanent sworn interpreters also provides the responsibilities of the permanent sworn interpreter with regard to the office operations; it standardizes the fees and the reimbursement of costs of the activity of permanent sworn interpreters, but these aspects are not described in this study, because they exceed the framework of the relevant topic.

Both CPP/08 and the Regulation provide the possibility of employing a so-called ad hoc interpreter, as expert from a particular zone of speech, whose activity of translation in judicial proceedings is not his or her basic activity. The same possibility is also provided in article 31 of the Regulation. This is necessary because the dynamic of migration is increasingly higher, which also means a higher possibility that the judicial proceedings come to include a person who speaks one of the rare foreign languages. Regardless of whether this is an extremely desired normative solution, we need to show its weak points. Unlike the permanent sworn interpreters who are required to undergo strict stipulated controls, including training programs, the ad hoc interpreter is a person about whose professional qualities the court does not usually know much, and regarding the quality of the translator or other conditions that are verified in the procedure of permanent sworn interpreter / translator.

It is only through the question regarding professional qualification that one find whether a person graduated a specific program of university studies for a foreign language, and all the other aspects of this situation (especially with regard to professional conditions) will be *questio facti* for the court. In other words, during the translation/ interpretation itself the court will have to assess its quality and admissibility.

In accordance with the practice available to the courts of the Republic of Croatia, it is clear that judges, in the described situations, use

specialists for a specific foreign language or from the related faculties, respectively from other education institutions or from the diplomatic and consular offices of the defendant's state of origin.

Since the situation of ad hoc translation/ interpretation will be one that will definitely repeat itself in the judicial proceedings, perhaps the Ministry of Justice, as author of the Single Electronic List of permanent sworn translator for the entire Croatian territory, should consider making also a separate electronic list of the ad hoc interpreters for some languages. Although there are some difficulties in drafting and updating such a list (the identification of such persons, prior knowledge of their professional references, etc.), we believe it would provide tremendous help to the judges' practice, especially when they need to ensure translation from one of the rare languages in a very short time. This is valid especially for the situations in the criminal prosecution phase, particularly in the initial stage, when suspects are arrested and the terms are laid down by the law in times and days.

A subsequent proposal regarding the improvement of the quality of translation/ interpretation in criminal proceedings follows from the fact that the European Union is a single market of the Member States, on which article 2, paragraph 3 of the Regulation is based, in accordance with which a citizen of another EU Member State may also be a permanent sworn interpreter (subject to the fulfilment of the aforementioned appointment criteria).

Since, in accordance with the Directive, Member States are required to draft a register of the translators, respectively of the interpreters, starting from the assumption that this obligation is observed, we consider that Member States should put together, by their own contributions, at the level of the European Union, a single register. Thus, by the possibility of using audio-video tools, more effective responses could be achieved with regard to the request of using the services of translation and interpretation in the European Union overall.

In conclusion, regarding the quality of the translation, we also need to emphasize the rather infrequent phenomenon of hiring an interpreter at the choice of the defendant himself who either does not trust the activity of the permanent sworn translator, or simply wishes to control, to oversee the quality of the translation by a permanent sworn interpreter.

We believe that such a situation should not pose a problem in the practice of the courts, because, just as the defendant is authorized to have counsel of his choice, as procedural representative on legal matters, he is undoubtedly authorized to also employ an interpreter of his choice. In other words, the defendant is preoccupied with the effectiveness of his defence. Obviously, in such a situation, the costs for such an employed interpreter should be borne personally by the defendant. This also helps the court

indirectly in the fulfilment of its obligation of ensuring a fair trial in all of its aspects.

If in the final conclusions regarding this Directive we refer to its normative solutions, as well as to the solutions of CPP/08 with the information in the questionnaire regarding the application of the directive, answered by Croatian judges, we may find that the solutions of the Directive and of CPP/08 are largely in accordance with the judges' expectation, regardless of the relatively small number of questioned judges.

For example, most of the judges in the Republic of Croatia believe that there should be a mechanism to check whether the defendant speaks or understands the language of the court and this finding should be effected by the judge himself, through direct communication with the defendant. The judges who answered the questionnaire also find the improvement and confirmation of the quality of the translator's activity by an adequate verification of his or her professional knowledge in prescribed proceedings.

Regarding the obligation of confidentiality attached to the process of translation/ interpretation, most judges find that such information should be performed by the authority before which the interpreter performs his or her activity, as provided in the provisions of CPP/08 regarding the participation of a translator / interpreter in criminal proceedings.

Nearly all the questioned judges are also of the opinion that the defendant should be granted the right to appeal the decision by which his or her right to translation / interpretation is denied. *Prima vista*, this comparison suggests that the judges of the Republic of Croatia find in the text of the Directive and of CPP/08 the adequate normative framework with regard to the settlement of the aspects of translation and/ or interpretation in criminal proceedings.

V. TRANSPOSITION THE DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND THE COUNCIL IN THE CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF CROATIA

Regarding the right to interpretation and /or information in criminal proceedings of the Republic of Croatia, the Constitution of the Republic of Croatia, in art. 29, proclaiming the principle of a fair trial, provides, among other rights and as the first of such rights, the right of a suspect, defendant or accused person to be informed promptly, in detail and in a language he or she understands of the nature and reasons of the charges against him or her and of the evidence brought against him or her (article 29, paragraph 2, subparagraph 1 of the Constitution of the Republic of Croatia). This constitutional category was drafted by CPP/08 in the

provisions that regard the rights of the suspects, defendants, accused in criminal proceedings. Directive/2012/13/EU approaches the information of the suspect/ defendant on the following aspects:

1. regarding the suspect's/ defendant's procedural rights,
2. regarding the procedural rights of such a person who is detained,
3. regarding the right to detailed information on the charge, and
4. regarding the rights of access to the case materials

Although ECHR does not provide explicitly the private right to information, the practice of ECtHR with regard to the application of the Convention indicates unequivocally the existence of a positive obligation of the state authorities in relation to the right to information. ECtHR also considers that it is not the suspect/ defendant who has the procedural obligation to request that during the criminal proceedings he or she be informed, but that this obligation belongs to these bodies.

Such a solution is in full accordance with the ratio of forces (especially in the beginning of the criminal prosecution) of the criminal prosecution body in relation to an individual. Regarding to the rights to be communicated to the suspect/ defendant, ECHR does not have specific provisions to this end.

Nevertheless, as already mentioned in the introductory part of the presentation, these rights are first of all related to the right to a fair trial, in accordance with the practice of ECtHR (article 6 of the Convention) and to the right to freedom and security (article 5 of the Convention). In the practice of this court, the suspect's/ defendant's right to silence has been emphasized without reserve (interdiction of enforcing the obligation of self-incrimination), as has the right to counsel, which is closely linked with the previous right (by achieving it).

a) Scope (article 2 of the Directive)

By a meaning thus defined of the terms (suspect - defendant - accused - convicted) and by prescribing the right to information with regard to the rights of each of those mentioned according to the law, CPP/08 fulfils, essentially, the requirement of article 2 of the Directive/2012/13/EU. More precisely, this directive applies starting from when the competent authorities of a Member State notify a person that he or she is suspected or charged (defendant) with committing a criminal offense and ending with the end of the criminal proceedings.

Information in criminal proceedings extends to the end of the proceedings, i.e. to the final settlement of the question of whether the defendant did commit the criminal action, including, if applicable, the appeal proceedings. Obviously, depending on the nature of the criminal proceedings as such, information is the most important in the initial phases of the proceedings, but in practice there are cases where it is also relevant

in the later stages and in even in the final phase of the proceedings, for example when changing the charge that may follow the phase of judgment of the proceedings.

Considering the previously mentioned division of the punitive actions in the Republic of Croatia, by the Law on offenses “Official Gazette”, no.: 107/07, 39/13, 157/13, 110/15 and 70/17) the Republic of Croatia has fulfilled the Directive requirement relating to the situations in which the police or other bodies of the state administration are competent to enforce penalties – fines for specific acts of offense. This means that such decisions may be cancelled by a remedy at law (complaint, appeal) that is filed to the contravention court, which is when the mechanism of information in the contravention proceedings against the defendant is also triggered.

b) The right to information on the rights (article 3 of the Directive)

Article 3 of the Directive provides and requires that the Member States promptly supply to the suspects / defendants information on the minimum procedural rights, to allow their effective exercise, i.e.:

- the right of being assisted by an attorney,
- any right to free legal counsel and the conditions for obtaining such counsel,
- the right to be informed on the charges, according to article 6 of the Directive,
- the right to interpretation and translation, and
- the right to silence.

The Directive does not provide the mandatory form of the mentioned information, either verbal or in writing, but it does require that this information be performed in a simple and easily understandable language, considering the vulnerable suspects' / defendants' special needs. In other words, the information on the rights shall be made in a language that can be easily understood by the suspect/ defendant. This means that the “technical dictionary” shall be avoided; this is understandable only for the specialists taking part in the criminal proceedings.

CPP/08 “shifted” the right of information in several places of its text, including the information on the person's procedural quality in the criminal proceedings (suspect, defendant, accused, convicted). Such a methodological solution is fully understandable because, additional to the information on the “general” rights that each of the mentioned persons has, some information relates exclusively to specific procedural qualities of a person (for example, arrested person).

We have already signalled the terminological establishment of CPP/08 for suspects, defendants and accused and we have shown that a

conclusion may be drawn regarding the rights a person has based on the very term used in the Croatian criminal procedural legislation.

Nevertheless, a “grey zone” should be defined when a person shifts his or her quality to another one, for example from suspect to defendant. CPP/08 settles this aspect by article 208, which entered into force on 27 July 2017, but which will apply starting from 1 December 2017.

Thus, after a criminal offense is committed, the police continues to be able to collect information from citizens, as informal sources of knowledge of the criminal offense. In other words, the police cannot interrogate citizens as witnesses of the related event.

However, if reasons of suspicion arise with one of the citizens during the gathering of information, i.e. this citizen may have committed the criminal offense, the gathering of information shall be suspended, and the police may interrogate the said person as suspect, but with the prior delivery of the note on the following rights:

- the right to counsel,
- the right to interpretation / translation,
- the right not to give statements and answer questions, as well

as

- the right to leave the police premises at any moment, except when he or she is arrested by the police.

As to the note regarding the defendant's rights (hence the person against which a decision is made regarding the execution of the investigation or who received the notification regarding the performance of preliminary evidentiary actions, the person against which a criminal complaint is filed or a criminal order is issued by judgment) article 239 of CPP/08 provides the following:

- why is he or she charged and the circumstances that lead to a founded suspicion against him or her,
- he or she is not required to exercise his or her defence, nor is he or she required to answer the questions they are asked, ,
- that he or she has access to the case materials in accordance with the law,
- that he or she has the right to use his or her language, as well as the right to an interpreter in this sense,
- that he or she has to right to choose counsel or counsel will be appointed *ex officio* in accordance with the law and that he or she has the right to counsel under the budget funds, according to the law.

c) Note on the rights regarding the arrest (article 4 of the Directive)

Detention as such and regardless of its form (Croatian classification: arrest, detention, provisional detention) is one of the most invasive proceedings of the state's repressive apparatus on the individual's

freedom. Therefore, the Directive's requirements that arrested individuals receive urgently a written note regarding their right is logical. This notification, together with the one at article 3 of the Directive (mentioned at V-b.) must also include guidelines regarding:

- the right of access to the case materials,
- the right of informing the consular authorities and a person,
- the right of access of emergency medical care, and
- the maximum number of hours or days for which the suspected or charged person may be detained prior to going before a judicial authority.

The obligation to inform the arrested persons of the mentioned rights is a logical choice, because, practically, without having knowledge of them, the position of the arrested person would be hopeless. Thus, without the right of access to the case materials, the arrested person cannot actually verify the legality of his or her arrest. Without contact with the outer world through the consular authorities and/or a trustworthy person, potentially many other rights of the arrested person are eluded (for example, the individual's statutory rights regarding marriage, rights that follow from the employment relation, etc.).

The arrested person may also be in a state of health needing emergency medical assistance. In conclusion, the request of legal security requires a notification on the longest term possible at the end of which the arrested person must be brought before a judicial authority that will decide on the legality of the arrest. Thus, this catalogue of additional rights that are specific from the viewpoint of the arrest allows the arrested person to exercise an effective arrest, especially with regard to the fulfilment of the arrest conditions.

We need to remind that the arrested person also needs to be informed on the criminal offense for which he or she is arrested, on his or her legal indicative, as well as on the proof based on which they are identified as suspect in a well-founded manner in relation to an actual criminal offense. It is only the information given as such, including the factual and legal basis of the arrest event that will allow the control of the legality of the arrest as such. On the other hand, it is more than clear that the criminal prosecution authorities will not fulfil this obligation under the Directive as long as an individual is only mentioned at the arrest, as basis for the same action, for example murder, without other details of a specific event, through which the arrested person will be able to challenge the prosecutor's thesis, respectively that he or she is suspected on solid ground of the related offense..

This notification of the rights stays in the possession of the arrested person during the whole duration of detention. The Directive requirement is that the written note regarding the rights should be drafted in a sufficiently

and easily understandable manner, from a linguistic point of view, and translate in a foreign language, if needed.

To the Directive's thus formulated normative requirement, CPP/08 responded with article 7, on the content of the information the arrested person is to receive immediately, with regard to his or her rights. Moreover, article 108a of CPP/08 specifies explicitly the content of the written note regarding the rights, to include the following notifications:

- on the reasons of the arrest and of suspicion,
- on the right that he or she is not required to give statements,
- on the right to the counsel of choice or to a counsel appointed by the court of law from the list of attorneys on duty,
- on the right to interpretation and translation,
- on the right that, on his or her request, his or her family or another person named by him or her is informed of his or her arrest,
- on the right of a foreign citizen that, on his or her request, the consular authority or the embassy be immediately notified of the arrest and that he or she is ensured contact with it without delay.

Thus, the time standard of the Directive, i.e. "urgent", is transposed in "immediately", but there are no content differences in this distinction, since both expressions are to be interpreted as action without delay, promptly after the arrest. Any other interpretation and application of this standard would oppose the very purpose of the Directive and the spirit of CPP/08. The written note on the rights is, in this case, a mandatory form also in CPP/08.

d) Note on the rights in the proceeding regarding the European arrest warrant (article 5 of the Directive)

The Directive requires that, in the Member States, a person who is arrested for the execution of a European arrest warrant, be informed promptly on his or her rights, in accordance with the national legislation of the state of execution in the proceedings regarding the European arrest warrant. This requirement of the Directive is fulfilled in article 24 of LCJMP-EU, since the prosecutor is required to inform the person for which the European arrest warrant is issued on:

- the content and reasons for the issuing of the European arrest warrant and
- the possibility of consenting for the delivery to the issuing country by waiving the application of the specialty principle.

At the hearing for the provisional detention decision in the proceedings for the execution of the European arrest warrant, the investigating judge checks whether:

- the person was informed on the right to assistance (counsel),
- on the right to translation / interpretation,

- on the right to request the appointment of counsel from the court and

- on the right not to make any statement (the right to silence).

Where the person is not informed on these rights until the presentation before the investigating judge, the latter shall invite the state prosecutor to do the same without delay. At the arrest and before the first hearing, the arrested person must receive the written note regarding his or her rights. Additional to the already mentioned rights, this note also includes:

- note on the right to appeal against the decision on the provisional detention,

- right of access to the case materials,

- right for the consular authority or a person appointed by the informed person to be informed of the arrest,

- right of access to emergency medical care and

- right to information on the maximum duration of provisional detention, for the delivery based on the European arrest warrant.

So this is the information on rights that, from the point of view of the content, concerns all the arrested persons, but here the information is partially adjusted and extended regarding the fact that it relates to the execution of the European arrest warrant.

e) The right to information on the charges (article 6 of the Directive)

Article 6 of the Directive requires that the Member States supply to the suspects/ defendants information on the criminal offenses of which they are suspected/ with which they are charged.

Nevertheless, regarding the scope of the information on the criminal offenses, the Directive requires the states to supply as much detail as necessary in order to ensure a fair trial and an effective defence. It is logical and, in this sense, it is expected that the details of the criminal offense be more concrete, more precise, in the later stages of the proceedings than in their beginning. This means that, in the case of the arrested individuals, the information shall refer to the reasons of the arrest, which also includes information about the criminal offense for which they are suspected or with which they are charged.

As deadline for the supply of detailed information on the charge, which includes the type and legal classification of a criminal offense, the Directive lays down the term for the referral of the indictment to the court. This is in line with the fact that the charge defines the framework of debate before the court.

Thus, the right to be informed on the charges shall be achieved in such a way that it should contain detailed information on the charges, including the type and legal classification of the criminal offense, as well as

the defendant's participation to it (individual perpetrator, joint principal, accessory, support).

In conclusion, if there are changes regarding the content of the information given by the authorities to the suspects/ defendants, the courts and other competent bodies must send immediately the modified information to them.

Therefore, the information, the notification on the charges does not produce the current obligation of supplying proof to support the charge, because it is only starting with such information that the identity of the object of the proceeding is established, i.e. the criminal offense with which the defendant is charged is defined.

Nevertheless, this is the lower threshold, the defendant's minimum right, and the Croatian CPP/08 provides that in the indictment, as act through which the object of the proceedings is determined, the evidence on which the charge is founded shall also be mentioned, so that the criminal council should be able to decide on its soundness and sent it to trial.

All the aforementioned requirements of the Directive are implemented through the corresponding provisions in CPP/08, respectively LCJMP-EU. Thus, the text of the law observes the requirement of the Directive in accordance with which the establishment, respectively the definition of a criminal offense should be increasingly higher as time passes. Thus, article 6, paragraph 3 of the Directive provides that the details on the charges, with the factual description of a specific criminal event, should include the type and legal classification of the criminal offense, as well as the modality in which the defendant participated to it (individual perpetrator or co-author in the form of support, accessory or joint perpetration, in the narrow sense of the word). For the comparison of such a solution of the Directive with the same one in CPP/08 we will list the mandatory components of the indictment in accordance with the Croatian criminal procedural legislation. Article 342, paragraph 1, points 2 and 3 of CPP/08 require, among other, with regard to the indictment:

- the description of the action that suggests the legal characteristics of the criminal offense,
- the date and place where the criminal offense was committed,
- the object on which and the means by which the criminal offense is committed, as well as other circumstances necessary for an identification, as clear as possible, of the criminal offense,
- the legal name of the criminal offense, by mentioning the provisions of the Criminal Code applied at the prosecutor's proposal.

f) Right of access to the materials of the case (article 7 of the Directive)

The Directive on the right to information was adopted first of all for the reinforcement of the suspects' / defendants' procedural rights. Thus, the right of access to the case materials is an extremely important aspect, because the achievement of this right depends frequently on the success of the defendant's defence, considering the position of ECtHR according to which the right in the convention in ECHR, including also the rights regulated by the EU Directives, shall not be exclusively theoretical and illusory, but a practical and effective manner of defence held by the suspect/ defendant.

In the described context, the Directive first provides that a person in arrest or detention in any phase of the criminal proceedings shall have the right of access to the documents that are essential for the effective challenge of the decision by which the said person is detained.

In other words, for an individual, the access to such documents should allow the right to examine the legality of his or her arrest or detention. Of course, this right belongs both to the defendant and to his or her counsel as procedural representative.

This Directive provision was transposed in Croatian criminal legislation by article 183 - article 184 of CPP/08. These are the provisions that regulate the right of access to the file, including the refusal of such a right, but when the defendant is in provisional detention, he or she can never be refused the right of access to the part of the file that is relevant for the evaluation of the existence of a well-founded suspicion that he or she did commit the criminal act and the existence of the circumstances based on which the decision of establishing or extending the provisional detention is based (article 184, a, paragraph 4 of CPP/08). Thus, both the Directive and CPP/08 recognize and admit the right to the individual's freedom as fundamental human right, and in the case of its narrowing as balance, they also provide unrestricted access to parts of the file that are relevant for the assessment of the legality of the detention.

Article 7, paragraph 3 of the Directive regulates the final term within which the defence obtains the right of access obtains the case materials – at the latest at the submission of the indictment in court for deliberation. This matter of the final term for achievement of the right of access to the case materials is, essentially, a balance that engages the entire contemporary criminal proceedings. It is the relation between the state's aim of efficiency of the criminal proceedings, on the one hand, and the same state's duty that, by legal means, including the right of access to the case materials, they enable the effective protection of the individual's rights in judicial proceedings, on the other hand. The Croatian legislator solved this aspect by article 184, paragraph 4, points 1 - 4 of CPP/08. This legal requirement provides that the defendant and the counsel have the right of access to the file:

- after the defendant was heard, if the hearing was performed before the making of the decision to conduct the investigation, respectively before the defendant was informed of the administration of evidentiary actions,

- starting from the delivery of the decision on the performance of the investigation,

- starting from the delivery of the notification regarding the administration of evidentiary actions against the defendant, notification to be delivered within 3 days after the administration of the first evidentiary action and

- starting from the delivery of the private complaint.

CPP/08 also provides urgent evidentiary actions that are taken where there is a risk of postponement and before the initiation of the criminal proceedings (article 212 of CPP/08). In such a situation, where urgent evidentiary actions are administered against a known defendant, the defendant and the counsel have the right of access to the minutes of these actions within maximum 30 days after their execution.

With regard to the described legal solutions, it is obvious that CPP/08 transposed in full the Directive's requirements regarding the final term for the achievement of the right of access to the case materials in criminal proceedings. Moreover, with regard to the exercise of this right, we may say that the necessity of an efficient and effective defence of the defendant in criminal proceedings is very important.

Additional to the elements described in the initial evaluation, the standardization of the refusal of access to the case materials also has effect. Article 7, paragraph 4 of the Directive provides the possibility of the mentioned denial, deviations from the law, as well as *numerus clausus*, as determined number, limited by possibilities: :

- if such an approach could seriously pose a threat to another person's life or fundamental rights,

- if such a refusal were necessary in order to protect an important public interest, such as the interest of the investigation underway or damages caused to the national security of the Member State in which the criminal proceedings occur.

Regardless of the base, i.e. the reasons for the denial of the access to the case materials, this is decided by the judicial body or at least such a decision is subject to the review of the court. Such a decision of the Directive is in line with the Convention requirement that the aspects regarding the rights of the individuals be decided by bodies with court responsibilities.

CPP/08 solves the presented matter regarding the right of access to the case materials in article 184 a. that provides the possibility of denial of the access to case materials in some parts or for the whole file:

- if there is a risk that, by the access to a part of or all of the file, the purpose of the investigation be at risk by the prevention or hindering of the collection of relevant evidence,
- or one's life, one's body or property at wide scale would be at risk.

It is obvious that the reasons for the refusal of the right to access the materials in the case included in CPC/08 correspond, in essence, to the ones mentioned in the Directive, where they are somehow detailed, a fact that is consistent to the principle of the criminal procedure legitimacy, particularly with respect to the need for a strict interpretation of the judicial provisions of the criminal law (the strict law).

However, the solutions presented here must be connected to the provisions of ECHR and the ECHR practice with respect to the implementation of these provisions. Specifically, this means that the restrictions mentioned by the Directive and CPC/08 can be accepted only to the extent that they are necessary as such in a democratic society, proportional to what must be obtained by implementing the directive and, last, if such restrictions are provided by the law.

With respect to the access to the materials of the case, in accordance with the provision in article 184.a of the CPC/08 the state prosecutors makes a decision by the means of a decision that does not need to be motivated. The defendant has the right to appeal against such a decision within three days, and the appeal is settled by the investigating magistrate.

It is obvious that in accordance with the Croatian legislation, the decision to refuse the access to the material of the cause is made by a judicial body (the state prosecutor), whereas the appeal against the decision is settled by the investigating magistrate (the judicial body). This type of structure corresponds entirely to the regulation of this matter in article 7, paragraph 4 of the Directive.

The legal solution of the CPC/08 is interesting; in accordance with that solution, the state prosecutor does not have the obligation (but the state prosecutor may) motivate the decision by which the access is refused to the materials of the cause. This is a logical consequence of the fact that, in some cases, in the statement of reasons, the values that must be protected may be put in jeopardy if access to the materials of the case is denied.

Still, to implement the judicial control of the legitimacy of the restriction of this right, the state prosecutor has the responsibility to mention, in the appeal procedure, to the investigating magistrate, the reasons of the refusal, meaning the reasons why the defendant does not have the right to access the case file. The investigating magistrate decides on the appeal lodged by the defendant within the short term of 48 hours. If

the investigating magistrate rejects the appeal lodged by the defendant as groundless, such decision must be communicated to the defendant without a statement of reasons, and to the case prosecutor with the statement of reasons.

In addition, the investigating magistrate is authorized, when legal assumptions are fulfilled, to refuse the defendant's access to the case file. Hence, the reasons are adjusted specifically to the investigation stage of the procedure, and these restrictions may last until the end of the investigation. The above-mentioned reasons take into account the likelihood of damages in the investigation, in the same procedure or in a different procedure against the same defendant or other defendants, or if by exercising the right to access the casefile put in danger the life of other persons. About the refusal of this right, the investigating magistrate decides upon the request of the case prosecutor. Such solution is consistent with the structure of the criminal procedure in accordance with CPP/08 in which the magistrate who handles the preliminary procedure is the prosecutor, whereas the investigating magistrate guarantees that the rights of the defendant in this stage of the criminal investigation remain inviolable.

While in the final review of the comparison between the provisions of the Directive and the provisions of CPC/08 we will take into account the results of the investigation conducted by Croatian judges, it is obvious that their expectations as practitioners are identical to the solutions in the Directive, namely the CPC/08. For instance, the majority the respondents among the judges consider that:

- the person arrested must be informed by means of a written letter on his/her rights during the investigation;
- the final deadline for informing the suspects/defendants on their rights must be stated;
- both the defendant and defender must have access to the materials in the casefile;
- the right to be informed during the criminal investigation is relevant to the length of the investigation (not only the prosecution stage) ...

VI. CASE LAW OF THE SUPREME COURT OF THE REPUBLIC OF CROATIA IN APPLICATION OF THE DIRECTIVE

To begin with, it is important to stress that the practice of the Supreme Court of the Republic of Croatia (hereinafter referred to as SCRC) in applying the right to translation and/or interpretation and the right to information is not very extensive. However, it needs to be duly considered, as the SCRC decisions in these relatively few cases related to

the relevant directives convey clear and unambiguous messages concerning the meaning and proper application of the right to translation and/or interpretation and the right to information.

We will start with an overview of two decisions of SCRC. They are particularly important because they are relatively new (2015 and 2017) and reflect the current position of the highest court of law in Croatia with regard to the aforementioned rights. Furthermore, their content provides all practitioners with a general example of interpretation and application of the said directives. Then, we will briefly present excerpts from other SCRC decisions that referred to this topic. Although the overview below is not an exhaustive presentation of the practice of SCRC on respecting the right to translation and/or interpretation and the right to information in criminal proceedings, we believe that it covers most relevant issues in this area.

1. SCRC Decision No. 1 KŽ-US 52/15-4 of 23 April 2015

"The Bench of the Supreme Court of the Republic of Croatia, composed of Supreme Court Judge S.K.B., as presiding judge, and M.S. and I.V., as members, assisted by senior judicial adviser M.S., as clerk of the court, in the criminal case against the accused Z.T.H. for the crime stipulated by art. 348 par. 1 of the Criminal Code, reviewing the appeal filed by the accused Z.T.H. against the Decision of the Tribunal of Zagreb No. K-US-50/14 of 15 December 2014, during the sessions of 22 January 2015 and 23 April 2015,

has decided:

I. The Court admits the appeal filed by the accused Z.T.H., returns the trial court Decision of the Tribunal of Zagreb No. K-US-50/14 of 15 December 2014 and considers the appeal filed by the accused Z.T.H. against the decision of this court of 24 November 2014, No. K-US-50/14 is considered permitted.

II. The Court admits the appeal filed by the accused Z.T.H., reverts the Decision of the Tribunal of Zagreb No. K-US-50/14 of 24 November 2014 and returns the case to the trial court for retrial."

The headnote of the decision states the following:

"The Tribunal of Zagreb, by Decision No. K-US-50/14 of 15 December 2014, based on article 472, paragraph 2, correlated with article 495 and article 464 of the Criminal Procedure Code (Official Gazette No. 152/08, 76/09, 80/11, 91/12 - decision of the Constitutional Court, 143/12 and 56/13 - hereinafter referred to as ZKP/08) dismissed the appeal filed by Z.T.H. through his counsels, G.M., attorney at law in Z., and L. V., attorney at law in Z., as not permitted.

Against this decision, the accused Z.T.H. filed an appeal through his counsels, G.M. and L.V., proposing that "the Supreme Court of the Republic of Croatia examines the grounds of appeal and determines that they are justified and admits the appeal against the decision in accordance with the provisions of article 494 paragraph 3 of CPC/08 and amends the appeal decision according to the grounds of appeal and rules that the accused Z.T.H. has the right to be provided with translations of the essential documents of the case and reverts the appealed decision and sends it back to the trial court for retrial."

The General Prosecutor's Office of the Republic of Croatia, by Petition No. I KŽ-Us-52/15 of 14 January 2015, informed the Supreme Court of the Republic of Croatia that it accessed the materials of the case of the Tribunal of Zagreb against the accused Z.T.H. for the crime stipulated by art. 348, paragraph 1 of the Criminal Code (Official Gazette No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03 - decision of the Constitutional Court, 105/04, 84/05, 71/06, 110/07, 152/08 and 57/11 - hereinafter referred to as CC/97).

The appeal is grounded.

As regards Section I of the operative part of this decision the Decision of the Tribunal of Zagreb No. K-US-50/14 of 24 November 2014 dismissed the request of the accused Z.T.H. to be provided with translations from Croatian into Hungarian of the documents supporting the confirmed indictment of the Directorate for Corruption and Organized Crime Prevention (hereinafter referred to as USKOK) No. K-US-145/11 of 31 March 2014 as premature.

In this decision, the Tribunal of Zagreb referred to the right of appeal, determining that, according to article 491 paragraph 3 of CPC/08, a special appeal cannot be filed against this decision, but only an appeal against judgment (page 3877 of the case file).

Against the Decision of the Tribunal of Zagreb No. K-US-50/14 of 24 November 2014, the accused Z.T.H. filed an appeal through his counsels, G.M. and L.V., attorneys-at-law in Z., in spite of the fact that the Tribunal of Zagreb had referred in that decision to the right of appeal, determining that, according to article 491 paragraph 3 of CPC/08, a special appeal could be filed against this decision, but only an appeal against judgment (page 3877 of the case file).

The accused Z.T.H. filed an appeal and the trial court dismissed it as not permitted.

The trial court justified its decision to dismiss the appeal as follows: "Specifically, the decision to deny the request of the counsels of the accused to have the documents supporting the confirmed indictment of USKOK translated from Croatian into Hungarian was delivered during the preliminary session before the presiding judge.

In accordance with the provisions of article 370 paragraph 1 of CPC/08, the provisions concerning regular court sessions apply accordingly to preliminary sessions, unless the law stipulates otherwise. In this specific case, the decision dismissing the request of the accused Z.T.H. to be provided with translations of the documents from Croatian into Hungarian is a decision of this type made in the preliminary session phase and in preparation of the trial session when in this phase of the proceedings it is decided with regard to the evidence to be submitted in the trial phase, so that all decisions made in this phase by the presiding judge are decisions that refer to the preparation of the trial.

Article 491 paragraph 1 of CPC/08 stipulates that the decisions issued in preparation of the trial and judgment may be appealed only by way of an appeal against judgment, which means that a special appeal cannot be filed against the aforementioned decision. In the case at hand, the appeal filed with this court by the counsels on 11 December 2014 against Decision No. K-US-50/14 of 24 November 2014 of this Court is not permitted and will be dismissed in accordance with the applicable legal provisions" (page 3912 of the case file).

In the petition of appeal filed on 11 December 2014 (pages 3906-3907 in the case file), the accused Z.T.H. emphasized, through his counsels, that the court wrongfully referred to article 491 paragraph 3 of CPC/08, as its provisions refer exclusively to those decisions related to the preparation of the session and judgment, i.e. to the activity of the court where a decision is made during the preparation of the trial and judgment, and not to decisions ruling with regard to the petitions (proposals) filed by the accused to ensure his exercise of the right of defence, as a component of the safeguarding of a fair trial.

In this specific case, the request of the accused Z.T.H. is filed for the purpose of exercising a fundamental right, i.e. the right to a fair trial (the right to effective defence), as defined by article 6 of the Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as CHRFF) and not in connection with a ruling of the court (presiding judge) concerning the preparation of the trial and judgment.

Thus, the Supreme Court of the Republic of Croatia also considered the provisions of article 3 paragraph 5 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 (Official Journal of the European Council No. L 280/1 of 26 October 2010, page 217, hereinafter referred to as Directive 2010/64/EU, according to which "Member States shall ensure that ... suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings."

Thus, when the proposals submitted by a party during the preparation of the trial (preliminary hearing - article 370 of CPC/08) refers to the exercise of the fundamental rights of the accused person, the appeal against a decision that denies (or restricts) such rights must be tried, which means that an appeal is permitted in such situations, contrary to the decision of the trial court. Specifically, a legal limitation of the right of defence of the accused (and of the right of effective defence in particular) cannot be justified by referring to the interests of an economic and consecutive approach.

Furthermore, according to the Recitals of Directive 2010/64/EU, the provisions of Directive 2010/64/EU "...should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union (paragraph 33) and "...the level of protection should never fall below the standards provided by the ECHR" (paragraph 32).

Considering that, according to the provisions of article 3 paragraph 5 of Directive 2010/64/EU, "... suspected or accused persons have [...] the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings", according to the opinion of the Supreme Court of the Republic of Croatia, as appellate court, the denial to provide translations of essential documents to safeguard the fairness of proceedings must be possible to be revised, which means that, as already stated in this decision, an appeal against such decision is admissible and its "inadmissibility" cannot be applied by restricting the proceedings in absentia.

As regards Section II of the operative part of this decision,

Decision No. K-US-50/14 of 24 November 2014 of the Tribunal in Zagreb (pages 3875-3877 in the case file) dismissed the request of the counsel of the accused Z.T.H. to be provided with translations from Croatian into Hungarian of the documents supporting Indictment No. K-US-145/11 of 31 March 2014 of USKOK as premature.

In the grounds of this decision, it was noted that the counsels of the accused Z.T.H., G.M. and L.V., attorneys-at-law from Z., had filed upon the preliminary hearing an application to have all the documents supporting the confirmed indictment translated from Croatian into Hungarian, considering that the accused Z.T.H. was a Hungarian citizen and could not understand the language of the criminal proceedings.

In addition to that, the counsels of the accused Z.T.H. emphasize that the translation of the documents is necessary to enable the accused Z.T.H. know the content of the evidence against him and be able to give adequate instructions to his counsels to represent (defend) him in these criminal proceedings.

To support their request, the counsels of the accused Z.T.H. refer to the provisions of article 8 paragraph 3 of CPC/08 and to article 3 of Directive 2010/64/EU, which have been transposed into the laws of the Republic of Croatia and are, therefore, applicable.

According to the conclusion of the trial court, "the request of the accused Z.T.H. is premature and groundless" (page 2876, excerpt 3, in the case file).

Regardless of the fact that "premature" and "groundless" are not identical procedural concepts, the trial court concluded in the headnote of the appealed decision: "Considering that, at this time, the accused Z.T.H. is tried in absentia and is not available to the judicial authorities of the Republic of Croatia, i.e. he did not appear as an accused person in the proceedings and he did not participate actively and directly when translations were made and evidence was filed, the provisions of article 8 of CPC/08 and of article 3 of Directive 2010/64/EU are not applicable to him" (page 3 excerpt 7 of the appealed decision).

At the end of the appealed decision, the trial court stresses the following: "if the accused Z.T.H. becomes available to the judicial authorities of the Republic of Croatia and if he participates actively and directly in the criminal proceedings and is present, as an accused person, when evidence is translated and documents are read, according to the provisions of article 8 of CPC/08, he will be permitted to benefit from verbal translation of the activities conducted during the proceedings, as well as to receive translations of the documents and other written evidence, as required for his defence, in the language that he speaks and understands, in order to fully exercise his rights in the criminal proceedings regarding the language of the proceedings" (pages 2-3 of the appealed decision).

The accused Z.T.H. filed an appeal against the decision (pages 3907-3910 in the case file) stating that, in the appealed decision, the trial court referred to the principle that "the provisions of CPC concerning the right to use own language and to be provided with translations of documents exclusively apply to an accused person who is directly present in the proceedings and that the provisions of CPC in this respect do not apply to a trial in absentia, and the provisions of article 8 of CPC/08 and article 3 of Directive 2010/64/EU cannot be applied in this specific case" (page 2 excerpt 4 of the petition of appeal - page 3907 in the case file).

Specifically, it is stated in the petition of appeal that, regardless of the fact that the trial court previously ruled in accordance with article 402 paragraph 3 of CPC/08 that the accused Z.T.H. would be tried in absentia, "the Criminal Procedure Code does not provide any specific procedure [...] that applies specifically and exclusively to a trial in absentia. Furthermore, no provision of Directive 2010/64/EU makes any difference between the right of the accused to translation in a trial in praesentia or in absentia.

Therefore, the provisions of article 8 of CPC/08, as well as the provisions of Directive 2010/64/EU apply accordingly to the procedural situation of a specific case" (page 3, excerpt 4 of the petition of appeal - page 3908 of the case file).

The petition of appeal further states the following: "...thus, it is particularly important to note that whether the proceedings against the accused are conducted in absentia or not has no impact on the case, as in both procedural situations the accused is entitled to effective defence in the criminal proceedings. It cannot be assumed that an accused person has different fundamental rights in criminal proceedings conducted in praesentia or in absentia"(page 4, excerpt 3 of the petition of appeal - page 3909 of the case file).

At the end of his petition of appeal, the accused Z.T.H. concludes: "The trial court wrongfully considers that the request of the accused to be provided with translations is premature because he is not physically present in the judicial proceedings. The court considers that the accused may exercise his rights to translation only if he is physically present at the trial and actively participates in the proceedings, as, in that case he will benefit from verbal translation of the proceedings, as well as from written translations of documents and other written evidence, as required for his defence. By this conclusion, the Court mixes up the right of accused persons to interpretation, stipulated by article 2 of Directive 2010/64/EU, and the right to translation of essential documents, stipulated by article 3 of Directive 2010/64/EU. It is completely logical that, in criminal proceedings, the accused should be provided first with written translations of essential document in order to be able to prepare an effective defence" (page 3910 of the case file).

In the opinion of the Supreme Court of the Republic of Croatia, as appellate court, the crucial question is whether in criminal proceedings conducted against the accused person in absentia the right of the accused to effective defence may be limited beyond the inherent limitations associated to a trial in absentia.

The Supreme Court of the Republic of Croatia, as appellate court, considers that such limitations may be applied exclusively in accordance with the provisions of article 8 of CPC/08 and with Directive 2010/64/EU, which is harmonized with the general standards on fundamental rights, as stipulated by the Convention.

Specifically, the Recitals of Directive 2010/64/EU (paragraph 30) expressly state the following: "Safeguarding the fairness of the proceedings requires that essential documents, or at least the relevant passages of such documents, be translated for the benefit of suspected or accused persons in accordance with this Directive. Certain documents should always be considered essential for that purpose and should

therefore be translated, such as any decision depriving a person of his liberty, any charge or indictment, and any judgment. It is for the competent authorities of the Member States to decide, on their own motion or upon a request of suspected or accused persons or of their legal counsel, which other documents are essential to safeguard the fairness of the proceedings and should therefore be translated as well."

The legal standard referred to is provided by the so-called minimum rights stipulated by article 3 of Directive 2010/64/EU:

"1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned 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 defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement 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, and

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings."

Article 8 paragraphs 1-12 of CPC/08 expressly stipulates that the accused is entitled to written translations of documents or parts of documents if such documents or parts of documents are essential to safeguard the right of defence of the accused person.

In determining the scope of application of the right to written translation of documents (or parts of documents) one should distinguish between the so-called essential documents (as defined by article 3 of Directive 2010/64/EU), whose written translation is mandatory, and the documents with regard to which the body conducting the proceedings may decide in its own discretion whether translation is necessary or not.

Regarding the purpose and scope, Directive 2010/64/EU (article 1) defines rules concerning the right to interpretation and translation in criminal proceedings.

According to the content of the so-called minimum rights (article 3 of Directive 2010/64/EU), it is obvious that "...the competent authorities shall, in any given case, decide whether any other document is essential" for the exercise of the right of defence (effective defence) and for safeguarding the fairness of the proceedings.

Of course, this does not mean that the Member States (and their judicial bodies) should, in any given criminal proceedings, ensure the translation of all documents and of all "documents supporting the indictment" (as the counsels of the accused Z.T.H. claimed in their petitions). On the other hand, the rights of a person accused in criminal proceedings to be provided with written translations of essential documents cannot be excluded for the sole reason that the accused is tried in absentia.

The ruling of the trial court that "...the provisions of CPC do not apply to a trial in absentia, and the provisions of article 8 of CPC/08 and article 3 of Directive 2010/64/EU cannot be applied in this specific case..." (page 3876 excerpt 7 of Decision No. K-Us-50/14 of 24 November 2014 of the Tribunal of Zagreb) cannot be accepted by the Supreme Court of the Republic of Croatia, as appellate court, considering that, according to the opinion of the Supreme Court of the Republic of Croatia, neither the provisions of article 8 of CPC/08 nor those of Directive 2010/64/EU exclude the right of the accused person to be provided with translations of the evidence filed in the criminal proceedings, even if the accused is tried in absentia.

Upon retrying the case, the trial court shall assess the content of the proposal of the accused Z.T.H. (pages 3899-3901 of the minutes of 8 December 2014), shall determine whether any of the proposals submitted should be considered as essential evidence for the purpose of the exercise of the right to effective defence of the accused Z.T.H. and only afterwards shall determine whether certain documents (or parts thereof) need to be translated or not for the purpose of safeguarding the right of the accused to effective defence even in a trial in absentia."

Case analysis:

It is clear that the Supreme Court of the Republic of Croatia analyzed 2 aspects of the current criminal case:

- a.) the admissibility of the appeal and
- b.) the merits of the appeal.

With regard to the first aspect (admissibility of the appeal), it is obvious that the Tribunal of Zagreb (hereinafter referred to as TZ) made its decision using a grammatical and logical method. Thus, the court applied the provisions of CPC/08 to restrict the right of the parties to file an appeal against a decision denying the right to be provided with translations of

parts of the case documents from Croatian (the official language of the court) into Hungarian (the language spoken by the accused Z.T.H.). Thus, the grammatical and logical application of the relevant provisions of CPC/08 was correct: TZ referred to the fact that it was the trial preparation phase and the decisions issued by the presiding judge in that phase cannot be challenged by a special appeal, but by an appeal against the judgment ruling with regard to the merits of the case.

However, this reasoning of TZ is inadequate and too narrow, as it lacks a target (teleological) approach. In other words, TZ failed to consider what type of right was the one claimed by the accused Z.T.H. Was it a right strictly limited to the preparation of the trial, or one of the fundamental human rights requiring special treatment? The counsels of Z.T.H. stressed in the petition of appeal that it was "the right of defence, as a component of the safeguarding of a fair trial."

Therefore, the decision of the Supreme Court of the Republic of Croatia is entirely logical and expectable, considering that, in admitting the appeal filed by the accused Z.T.H., it places the right to translation in the context of Directive 2010/64/EU and of article 6 of ECHR. Therefore, while accepting that it was the trial preparation phase, the Supreme Court of the Republic of Croatia considers that the right to translation is one of the fundamental rights of the accused person and the decision ruling with regard to such fundamental right needs to be re-examined. Consequently, contrary to the decision of TZ, the ruling on this aspect may be appealed and needs to be re-examined in the appeal proceedings. In other words, the limitation of the right of defence cannot be justified by the "interests of an economic and consecutive approach".

The decision of Supreme Court of the Republic of Croatia is important not only because it expressly refers to Directive 2010/64/EU, although it was transposed into CPC/08, but also because it quotes and emphasizes the Recitals of the said Directive. The Recitals also focus on the connection between the Directive and ECHR and CFR, as well as on the need to interconnect the regulatory solutions in these documents. Furthermore, a holistic approach is needed in the interpretation and application of the aforementioned legal sources.

To conclude, we believe that it is exactly in the "interest of an economic and consecutive approach" referred to by TZ that the issue of translation and/or interpretation should be solved as an incidental issue as soon as it arises in the proceedings. A different approach and postponing the solving of this issue that arises during the proceedings result in extending the duration and increasing the costs of the criminal proceedings.

As regards the merits, TZ linked the exercise of the right to translation directly to the personal presence of the accused Z.T.H. in the criminal proceedings.

The reasoning of the defence focused on the regulations: neither Directive 2010/64/EU nor CPC/08 make any difference between a trial in absentia and a trial in praesentia with regard to the right to translations.¹³²

Referring to the so-called minimum rights related to translation and/or interpretation (article 8 of the Directive), the Supreme Court of the Republic of Croatia also asked a crucial question with regard to the so-called essential documents that need to be translated in these criminal proceedings, i.e. whether in criminal proceedings conducted against the accused person in absentia the right of the accused to effective defence may be limited beyond the inherent limitations associated to a trial in absentia.

In answering this question, the Supreme Court of the Republic of Croatia essentially accepted the arguments supporting the appeal filed by Z.T.H. and determined that Directive 2010/64/EU does not exclude "the right of the accused person to be provided with translations of the evidence filed in the criminal proceedings, even if the accused is tried in absentia." Contrary to the mentioned facts, TZ failed to provide more detailed arguments for dismissing the request of the accused Z.T.H. for translation, but only determined in its decision that the accused Z.T.H. "did not appear as an accused person in the proceedings and he did not participate actively and directly when translations were made and evidence was filed, the provisions of article 8 of CPC/08 and of article 3 of Directive 2010/64/EU are not applicable to him."

2. SCRC Decision I Kž 289 (2017-4 of 25 May 2017)

"The bench of the Supreme Court of the Republic of Croatia composed of S.K.B., as presiding judge, and I.V. and Z.K., as members, assisted by senior judicial adviser D.K., as clerk of the court, in the criminal proceedings against the extradited person G.L. for the crime stipulated by article 204 paragraphs 1 and 4 et al of the Criminal Code of the Republic of Serbia, deliberating on the appeal of the extradited person against the decision of the Tribunal of Vukovar of 3 May 2017, filed with No. Kv II-75/17-5 (Kir-139/17) during the trial session of 25 May 2017,

has decided as follows:

¹³² In addition to that, the defense erroneously claimed that Directive 2010/62/EU "applies directly", apparently mixing this up with the so-called direct effect of the directive.

The Court admits the appeal of the extradited person G.L. and cancels the appealed decision, returning the case to the trial court for retrial.

Headnote

By the appealed decision, based on article 56, paragraph 1, correlated with article 33 and article 34 paragraph 1 of the Law on international legal assistance in criminal proceedings (Official Gazette No. 178/04 - hereinafter referred to as LILACP), it was determined that the necessary conditions were fulfilled for extradition of G.L. to the republic of Serbia to serve a final sentence of six years in prison delivered by the Court of Appeals of Kragujevac with No. KŽ 1 914/15 of 14 September 2015, modifying Judgment No. K-334/14 of 19 June 2015 of the Court of Užice, for the crime of aggravated theft and complicity according to art. 204 paragraph 4, correlated with paragraph 1, item 1, correlated with article 33 and article 61 of the Criminal Code of the Republic of Serbia (which corresponds to the crime against property – aggravated theft, as defined by article 229, paragraph 1, item 1, correlated with article 228, paragraph 1 and article 52, paragraph 1 and article 36, paragraph 2 of the Criminal Code of the Republic of Croatia (Official Gazette No. 125/11, 144/12, 56/15 i 61/15 – hereinafter referred to as CC/11).

The extradited person G.L. filed an appeal against this decision through his counsel S.D.K., attorney-at-law in Vukovar, for a serious violation of the criminal procedure provisions of art. 468 paragraph 2 of the Criminal Procedure Code (Official Gazette No. 152/08, 76/09, 80/11, 91/12 - decision of the Constitutional Court 143/12, 56/13, 145/13 and 152/14 - hereinafter referred to as CPC/08), proposing the cancellation of the appealed decision and the returning of the case to the trial court for retrial.

In accordance with art. 495 correlated with article 474 paragraph 1 of CPC/08, the case is submitted for review to the General Prosecutor of the republic of Croatia.

The appeal filed by the extradited person is grounded.

The plaintiff rightfully claims that his right to a fair trial was seriously violated in the extradition procedure, as the documents submitted by the state requesting extradition and the application for extradition were not translated in Croatian and using the Latin alphabet. This is a serious violation of the criminal procedure provisions of article 468 paragraph 2 of CPC/08, as mentioned in the petition of appeal.

More specifically, the review of the case documents shows that the Republic of Serbia submitted the application for extradition and the related documents (the judgments of the Court of Appeals of Kragujevac and of the Court of Užice, the excerpt from the Criminal Code of the Republic of

Serbia, the certificate of citizenship and the identity card of G.L.) in Serbian, using the Cyrillic alphabet.

It is stated in the petition of appeal that the counsel of the extradited person, counsel S.D.K., does not understand the Cyrillic alphabet and, as a consequence, in spite of having access to the case file, cannot provide proper legal assistance to her client and prepare the appeal properly, as she cannot know the content of the documents supporting the application for extradition.

In accordance with article 23 of the European Convention on Extradition of 13 December 1957 (Official Gazette - international treaties No. 14/94), the documents supporting the request for extradition must be in the official language of the requesting state or in the official state from which extradition is sought, while article 3 paragraph 1 of the Bilateral Agreement between the Republic of Croatia and the Republic of Serbia on Extradition of 29 June 2010 mentions that the applications and documents must be prepared in the language of the requesting state and the attaching of translations in the language of the country from which extradition is sought is not required.

According to the aforementioned regulations, the Republic of Serbia was not required to submit translations of the application and documents in the Croatian language and Latin alphabet, a fact accepted by the plaintiff in his petition of appeal.

However, considering that, for the purpose of article 81 of LILACP, in international judicial assistance proceedings, the provisions of the Criminal Procedure Code also apply, the plaintiff rightfully refers to the right of defence provided by article 8 of the said Code, which stipulates that the Croatian language and the Latin alphabet are used in criminal proceedings before the national courts and that any accused person who does not understand the language of the proceedings is entitled to interpretation and translation.

In addition to the written translations of documents that are to be provided according to article 8 paragraph 5 of CPC/08, paragraph 8 of the same article stipulates that the accused person is entitled to the translation of conversation and correspondence with his counsel for the purpose of preparing the defence, filing appeals and doing any other acts related to the proceedings, to the extent required to exercise the procedural rights of defence.

In accordance with article 66 paragraph 1 item 3 of CPC/08, the accused person must be assisted by counsel whenever a detention or preventive arrest decision is issued against him, as in the case at hand, and, in accordance with article 67 paragraph 1 of CPC/08, the counsel is authorized to take for the benefit of his client any action that the accused person himself would take.

Considering the facts above, regardless of the fact that, during the hearing of 3 April 2017, the extradited person expressly waived the right to translation, the importance of the effective and efficient exercise of the right of defence must be taken into account, which is enshrined by article 29 paragraph 2 of the Constitution of the Republic of Croatia, as well as article 6 paragraphs 1 and 3 of the Convention on Human Rights and Fundamental Freedoms. According to the autonomous and relevant interpretation of the European Court of Human Rights present in many decisions of ECHR, the exercise by accused persons of their right of defence must be effective, which means that the counsel must be competent not only professionally, but in all respects.

The obligation of the court to provide the defendant with an experienced and properly qualified counsel is even more important in situations where, as in the case at hand, the counsel is appointed by the court and the appointed authority is responsible for the competence of the counsel (ECHR Judgment in case of Prežec vs. Croatia of 15 October 2009). Therefore, only an experienced and skilled counsel who knows the language and alphabet used in the proceedings can effectively represent the defendant in the proceedings and satisfy the requirements of an effective defence.

Considering that the counsel mentions in the petition of appeal that she does not understand the Cyrillic alphabet and she is not even required to, as it is the alphabet officially used by the court, and, for the purpose of effectively exercising the procedural rights of defence, the trial court has the obligation, either by default or following a written and grounded request, to provide a translation of the documents in the Latin alphabet in accordance with article 8 paragraph 6 of CPC/08.

Based on the facts mentioned above, the appeal filed by the extradited person should have been accepted and, based on article 494 paragraph 1 item 3 of CPC/08, the ruling of the trial court should have been as stated in the operative part of this decision.

Upon retrial, the trial court shall remedy the deficiencies presented here and, if it is stated again that the legal prerequisites for extradition were fulfilled, should consider that the said conditions for extradition, in application of the principle of specialty stated by article 37 paragraph 1 of LILACP, should be also specified in the operative part of the decision, not only in the headnote."

Case analysis:

Although it is a recent case (25 May 2017), unlike in the previously discussed two-year-old decision, SCRC remarkably fails to refer in its decision to Directive 2010/64/EU.

However, deliberating on the appeal, the Court indirectly made a decision that is in line with the Directive by applying the provisions of

CPC/08 and of the decisions of ECHR. When a holistic and teleological method is used in interpreting the law as a whole (although this is not an essential aspect of this case), the intended goal is achieved, irrespective of the legal approach used.

This case is relevant (inter alia) for the following reasons:

- a.) the impact of international agreements,
- b.) defence by a lawyer appointed by the court,

Thus, this case is an example of how the Directive, due to the broad scope of the solutions that it provides, helps solving a situation generated by an international treaty. Specifically, the ratified international agreements have sovereign power¹³³. This means that, in the case at hand, the provisions of the agreement prevail over the provisions of CPC/08 and the court had to approve the translation of the documents from the alphabet, regardless of the fact that, according to the Croatian criminal procedure (CPC/08), the Croatian language and the Latin alphabet are officially used primarily. In other words, Directive 2010/64/EU stipulates a mandatory minimum standard with regard to the right to translation, while permitting the defining and application of a higher standard, as the aforementioned international agreement actually does. Thus, the EU Member States must also consider in their practice the content and standards of the Directive when concluding agreement with non-EU countries.

In accordance with the standard in the Convention, as mentioned by ECHR, the defendant is entitled to benefit in the criminal proceedings from proper quality defence. This was one of the opinions of the presiding judge of SCRC when delivering the judgment in this criminal and civil case, as he emphasized that the state is the one that appoints a lawyer and is responsible for the quality of the services provided by him. The quality of services depends, among other things, on the translation of documents in a language that the lawyer, as attorney of the defendant in the proceedings, understands.

SCRC, as appellate court, deliberating on appeals against decisions of courts, also issued other rulings on the application of rights based on the relevant Directives. As those cases are not particularly complex, we will briefly present them together with our opinions where appropriate.

¹³³ The agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on judicial assistance in criminal and civil proceedings, Official Gazette - International Agreements No. 6/1998 of 1 April 1998.

3. SCRC Decision I KŽ-769/12 of 20 February 2013

In the extradition proceedings, the defendant (the extradited person) waived as early as on the first hearing his right to be assisted by a certified interpreter "...considering that he was able to understand Croatian properly." Based on the declaration of the extradited person, SCRC concluded that his right to use his language was not restricted in the proceedings. Therefore, the trial court did not commit a material procedural violation, as the extradited person claims in his appeal.

Comment: in our opinion, the decision of SCRC is vague, as it refers to the declaration of the extradited person according to which "he was able to understand Croatian properly." Specifically, the quality communication of the defendant (extradited person) in the extradition proceedings will be possible if he not only understands, but also speaks Croatian. Only the language and alphabet used will allow the defendant (extradited person) fully participate in the criminal proceedings by understanding and speaking/writing, so that his right to a fair trial is duly respected, as required by ECHR, CFR EU and the standards defined by Directive 2010/64/EU.

4. SCRC Decision I KŽ-1078/08 of 3 June 2009

Deliberating on the appeal filed by the defendant, who is a member of the Albanian ethnic minority in the Republic of Croatia, SCRC dismissed the claim made by the defendant in his appeal that his right to understand the proceedings and to use the Albanian language in the criminal proceedings had been restricted, as, according to the reasoning of SCRC, "it is required for the defendant himself to declare that he does not understand the language or for the court, based on its own perception, to conclude that this has the purpose to ensure unobstructed communication and the respect of the interests of the defence."

As demonstrated by the minutes of the trial sessions, the proceedings were conducted in the presence of an Albanian language interpreter. Moreover, the defendant declared, prior to trial, that he did not need an interpreter and that he was able to understand and use the Croatian language. Thus, his claims in the appeal are groundless.

Comment: unlike in the previously discussed case (the SCRC decision in section VI.3), it is obvious that in this case SCRC evaluated the abuse of the right in the criminal proceedings. Specifically, while prior to the commencement of proceedings, the accused person stated his defence after having declared that he was able to understand and speak Croatian, during the trial he insisted on the hiring of an interpreter, but the court dismissed his request. Thus, SCRC expressly mentioned that, during the preliminary hearing, the accused person had confirmed that he was able to understand and speak Croatian.

5. SCRC Decision I KŽ-213/2006 of 22 May 2007

In this criminal case, deliberating on the appeal of the defendant, SCRC clarified the way in which the procedural activity of the interpreter during the trial should have been documented. The Court mentioned in this respect that "it is sufficient to mention in the minutes the presence of the interpreter during the session, which involves continuous translation, and it is not necessary to write in the minutes each verbal translation of the action taken by the defendant during the trial session." Moreover, SCRC notes that the defence failed to mention in the minutes of the session the challenge concerning the translation into Italian.

Comment: according to the current regulations applicable in the Republic of Croatia, it is mandatory to record the first hearing of the defendant on audio and video and the recordings can be subsequently watched and listened to in order to answer to questions concerning the right to translation (need for translation, quality of translation, etc.).

6. SCRC Decision I KŽ-500/01 of 30 October 2001

SCRC determined that no material violation of the procedural rights occurred during the criminal proceedings and the right of the defendant in this respect was not breached, even though in the preliminary phase of the proceedings, before investigation, when the temporary property seizure report was drafted, the Spanish language interpreter who subsequently provided assistance during the same criminal proceedings had not been present.

Comment: as regards the right to translation and/or interpretation (as well as other procedural rights), not any violation of the procedural rules is a material violation resulting in the annulment of the court decision. In this case, SCRC noted the violation, as well as the fact that it was harmless in nature, considering that it was subsequently remedied through the assistance provided by the Spanish translator.

VII. ANALYSIS OF CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. Case of Baytar vs. Turkey – right to translation/interpretation (Application No. 45440/04, judgment of 14 October 2014)

Circumstances of the case:

On 17 December 2001 the applicant visited her brother in prison. Her brother was a member of the Kurdistan Workers' Party (PKK), a political organization that is illegal according to the Turkish regulations and decisions. Specifically, the official position of Turkey is that PKK is a paramilitary organization that fights for the independence of Kurdistan and Turkey considers it responsible for numerous terrorist attacks committed in

Turkey since 1984. The staff responsible for body searches found on the applicant a piece of paper that had been folded several times and wrapped in tape. It was an unsigned letter written by a member of the PKK. The applicant was taken into police custody on the same day and questioned in Turkish by a police officer the following day. The applicant stated that she had picked up that piece of paper at the bus stop thinking that it might have some. On 1 May 2001 she gave a statement to the same effect before the public prosecutor. As she was illiterate, she signed the statements with her fingerprint. She was remanded in custody. On 27 September 2001 the State Security Court of Van acquitted the applicant, considering her version of events to be credible.

On 17 December 2001 the applicant visited her brother again in prison and the staff responsible for body searches had discovered on her a sixteen-page document protected by adhesive tape. The document contained information about the PKK's activities to be conducted in prisons against the prison authorities and about prison staff. The following day, the applicant was questioned in Turkish. She stated that she had seen the document accidentally in the prison waiting room and had picked it up out of mere curiosity. According to the minutes of the hearing, the police officers informed the applicant with regard to her right to the assistance of a lawyer but she decided to represent herself and waived that right.

The applicant was arrested and subsequently questioned by the district court judge who found that she did not speak Turkish with sufficient fluency and informed her on her right to be assisted by an interpreter, which she accepted. Then, the judge asked a member of the applicant's family who was waiting in the corridor outside the courtroom to act as interpreter. The relative accepted and the applicant was questioned with his assistance. The applicant repeated her previous declaration made to the police, but added that both statements (the one made to the police and the one to the judge) concerned an event that had occurred during a prior visit and that no document had been discovered on her person when she last visited the prison. Moreover, he stated that, not being able to read or write, she had signed the police report with her fingerprint without knowing what it said. Criminal proceedings were brought against the applicant for membership of an illegal armed organization and for aiding and abetting such an organization.

The applicant was given a prison sentence of three years and nine months. The Court of Cassation quashed that judgment and referred the case back to the first-instance court for retrial. The first-instance court gave a prison sentence for the same period but, considering the time already spent by the applicant in custody, she was released. Finally, she was sentenced on 31 October 2006 to 1 year and 3 months in prison for aiding and abetting an illegal armed organization.

The applicant filed an application with ECHR, referring to article 6 paragraphs 1 and 3 of the Convention and claiming that we had not been allowed to be assisted by an interpreter during the police questioning ("she had not been assisted by an interpreter when questioned by the gendarmes while she was in their custody the statement taken in those circumstances constituted illegally obtained evidence which should therefore have been excluded by the trial court"). The Turkish Government argued: "The applicant had not shown how the absence of an interpreter during her police custody had impaired her right to a fair trial, as when she had subsequently reiterated her statement to a judge, an interpreter had then been present. The Government further argued that the applicant had been assisted by an interpreter throughout the remainder of the proceedings."

The Court's assessment

With regard to article 6 paragraph 3 of the Convention correlated with article 6 paragraph 1 of the Convention

The Court reiterates that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him 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. The right to be assisted by an interpreter must be guaranteed throughout the criminal proceedings, including during the police questioning.

The applicant's level of knowledge of Turkish rendered necessary the assistance of an interpreter. Both the District Court and the trial court decided that she needed an interpreter.

However, while the applicant enjoyed the assistance of an interpreter when she was examined by the judge responsible for deciding whether she should be remanded in custody, this had not been the case during her questioning by the police. Specifically, the police questioned her without assistance of an interpreter and during questioning she stated that she had found the impugned document in the prison waiting room, thus admitting that a document had indeed been found in her possession. The Court has already emphasized the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained at this stage may be decisive for the subsequent proceedings. An individual held in police custody enjoys a certain number of rights, such as the right to remain silent or to be assisted by a lawyer.

However, the decision to exercise or waive such rights can only be taken if the individual concerned clearly understands the charges. If it is assumed that he or she understands the charges, he or she can consider what is at stake in the proceedings and assess the advisability of such a

waiver. The Court takes the view that the applicant was not placed in a position where she could fully assess the consequences of her alleged waiver of her right to remain silent or her right to be assisted by a lawyer, as the police did not question her with assistance of an interpreter and did not inform her clearly on the charges brought against her and that was a violation of article 6 paragraph 3 of the Convention correlated with article 6 paragraph 1 of the Convention.

Moreover, this initial defect thus had repercussions for other rights and the subsequent provision of assistance of an interpreter was not such as to cure the defect which had vitiated the proceedings at their initial stage. ECHR also observes that the interpretation before the judge was made by a member of the applicant's family and judge "apparently failed to verify the skills of that interpreter".

2. Case of Ibrahim and others vs. United Kingdom – right to information in criminal proceedings.

(Applications No. 50541/08, 50571/08, 50573/08, 40351/09, judgment of 16 December 2014)

Circumstances of the case:

On 21 July 2005, explosive devices were activated in the London public transportation system, but did not explode. The perpetrators fled the scene, but were apprehended later. After the arrest, the first three applicants were denied the right to be assisted by counsel for the so-called safety interviews (interviews conducted urgently for the purpose of protecting life and preventing serious damage to property).

Under the Terrorism Act 2000, such interviews may be conducted without the presence of counsel and before the accused person requests legal assistance. During the safety interview, the applicants stated that they had not participated in the terrorist attack. During the trial, the applicants confirmed that they had participated in the attack, but claimed that it had been intended as a hoax and that no actual explosion should have occurred.

The statements made by the applicants during the safety interviews were used as evidence in the criminal proceedings. In 2007, the applicants were convicted for conspiracy to murder, each being sentenced to 40 years in prison. The Court of Appeal refused the applicants' leave to appeal against conviction.

The fourth applicant was not suspected in connection with the detonation of explosive devices and the police had initially questioned him as a witness. However, the fourth applicant incriminated himself during the hearing by revealing that he had met and helped one of the suspects after the attack. The police did not arrest him at that stage of the proceedings or inform him that he had no obligation to make any statements and that he was entitled to be assisted by a lawyer. However, the police questioned the

fourth applicant as a witness and obtained his written statement. Later, the fourth applicant was arrested and informed on his right to be assisted by a lawyer. During the criminal proceedings, the fourth applicant referred to his written statement to the police, which was used as evidence in the criminal proceedings. In February 2008, the fourth applicant was convicted of assisting one of the three applicants mentioned above in the bombing and of failing to disclose information. He was sentenced to ten years in prison.

The applicants alleged a violation of Article 6 paragraphs 1 and 3 (c) of the Convention in that they had been interviewed by the police without access to a lawyer, which was a breach of their right to a fair trial, and that statements made in those interviews had been used at their trials.

The Court's assessment

The Court stressed that, in certain cases, the right to be assisted by a lawyer may be subject to certain restrictions. The judgment of the Supreme Council in case of *Salduz vs. Turkey*, the Court referred to the possibility to deny the right to legal advice if compelling reasons exist. However, even if such reasons exist, in order to safeguard the right to a fair trial, any statement made by the defendant to the police without the presence of a lawyer must be excluded.

In the case at hand, the Court examined whether the use (as evidence in the criminal proceedings) of the written statements made by the defendants during the police questioning without the presence of a lawyer affected the criminal proceedings, considering the principles of the right to a fair trial in the criminal proceedings seen as a whole. In this context, the judgment of ECHR answered to two key questions.

The first question refers to restricting the right to legal assistance. The Court considers that, at the time when the fourth applicant was questioned, there was a serious and imminent threat to public safety, in particular, the threat of a new attack, and considering the mentioned threat, the restriction of the right to legal assistance was justified. As regards the first three applicants, the Court emphasized that the authorities had issued an individual decision for each applicant, in which they evaluated the appropriateness of such restrictions. The police observed the relevant regulations, in spite of the own restrictions imposed in conducting their operations.

Considering the circumstances of the case, the decision not to arrest the fourth applicant was also justified, because the arrest could have made him fearful and unwilling to disclose to the police crucial information for protection of public safety. The information disclosed by the fourth applicant to the police was extremely important, as at that time only one of the suspects had been arrested, while the others were still at large.

As regards the second question, the Court assessed whether the right to a fair trial was violated by the use of the applicant's statements

obtained in this manner as evidence in the criminal proceedings. In the first three applicants' case, the Court noted that there was a clear and detailed framework in place, set out in the UK legislation, safeguarding the right of arrested persons to legal assistance. This legal framework also provides certain restrictions to the aforementioned right, which are strict and exhaustive.

Thus, the provisions of the Terrorism Act 2000 ensures proper balance between the importance of the right to legal assistance and the imperious need due to which, in exceptional cases, may obtain information required to protect public safety. The limitation of the right to legal assistance consisted in the fact that the exercise of such right was delayed for four to eight hours (depending of the applicant concerned), which was in line with the applicable law, which permits a delay of up to 48 hours.

Furthermore, the restriction was decided by the competent police officer and was sufficiently justified. Moreover, the purpose of the safety interviews was achieved, which consisted in collecting essential information for public safety. During the criminal proceedings, procedural mechanisms were available to the applicants by which they could challenge their previous statements and the use of such statements as evidence.

The first-instance court strictly examined the circumstances of the case in which the applicants had been subject to safety interviews and explained in detail why it considered that the use of the applicants' statements as evidence did not threaten their right to a fair trial. In conducting the proceedings, the first-instance court paid particular attention to this aspect and indicated the jury that the safety mechanisms were applied by restricting the right to legal assistance. To conclude, the statements of the applicants were not the only evidence based on which they were convicted, but other extensive evidence indicated the guilt of the applicants.

As regards the fourth applicant, the Court determined that there had been a breach of the relevant internal practice concerning potential suspects. However, the Court considers that a clear legal framework existed to support the admissibility of the use of the statement as evidence in the criminal proceedings. The first-instance court examined sufficiently the applicant's objection to the use of the aforementioned statement and determined that it was not made under coercion nor was it made in circumstances likely to render it unreliable. Furthermore, the first-instance court presented in detail the reasons that justified the use of the statement as evidence in the criminal proceedings.

In the Court's assessment, the fourth applicant made the statement freely, without coercion, and voluntarily came to the police station for an interview. Up to his arrest, the fourth applicant was treated as a witness

and the police obtained his statement in this capacity. It should be also noted that the initial interview at the police station was not intended to determine the extent to which the applicant had been involved in the events, but to collect information on the planning of the crime and to identify the perpetrators and their accomplices.

The court also referred to the fact that the applicant had not withdrawn his statement. After his arrest, the applicant initially denied being assisted by a lawyer, then hired a lawyer and had sufficient time until the next safety interview to prepare his defence and possibly withdraw his initial statement. However, instead of this, the applicant expanded his initial statement seeking to obtain a more favourable treatment in the proceedings by voluntarily cooperating with the police. During the further safety interviews conducted in the presence of a lawyer, the applicant did not change his initial statement. Moreover, due to his voluntary cooperation with the police, the applicant was sentenced to only two years in prison.

Considering all these aspects, the Court finds that the right of the applicants to a fair trial was not prejudiced by the limitation of their right to legal assistance during the police questioning, when statements subsequently used as evidence in the criminal proceedings were obtained from them. As a result, the Court determined that there was no breach of article 6 paragraphs 1 and 3 (c) of the Convention.

3. Case of A.T. vs. Luxembourg – right to information in criminal proceedings.

(Application No. 30460/13, judgment of 9 May 2015)

Circumstances of the case:

On 4 December 2009 the applicant was arrested in the United Kingdom under a European Arrest Warrant issued by the authorities in Luxembourg on charges of rape and indecent assault on a girl under the age of sixteen, with the aggravating circumstance that the perpetrator held a position of authority over her. On 17 December 2009 the applicant was surrendered to the Luxembourg authorities and questioned at the police station in the presence of an interpreter.

It transpires from the police report that the applicant initially refused to make any statement and claimed his right to legal assistance. After having received the requisite explanations regarding the procedure to be followed in cases such as his, he agreed to take part in the questioning. He stated his version of events and contested all the charges against him, denying any guilt.

At the end of the interrogation he requested legal assistance for the following day's interrogation before the investigating judge. On the following day, he was questioned by the investigating judge in the presence of an interpreter and of an appointed lawyer. The applicant did not change the statement he had made to the police.

By a judgment of 31 March 2011 the Court sentenced the applicant to a seven-year prison term accompanied by a three-year partial probation period. The court noted that the applicant had constantly changed his version of events, and pointed out that according to a credibility analysis none of the evidence gathered had cast any legitimate doubts on the truthfulness of the victim's statements. On 7 February 2012 the Court of Appeal upheld the first-instance judgment, taking into account, in particular, the difference between the statements which applicant had made during the police questioning and his depositions during the first-instance and appeal hearings. As regards the objections of the applicant concerning the failure to provide for the assistance of a lawyer during the question by police, the Court of Appeal noted that the applicant had agreed to give statements without the assistance of counsel. On 22 November 2012 the Court of Cassation dismissed the applicant's appeal on points of law.

The applicant left Luxembourg for the United Kingdom and the prosecution issued a new European arrest warrant for the purposes of executing the 7 February 2012 judgment. The applicant was finally surrendered to the Luxembourg authorities and is currently incarcerated in Luxembourg.

Referring to article 6 paragraph 1 (right to a fair trial) and to article 6 paragraph 3 (right to legal assistance), the applicant complained of the lack of legal assistance during his questioning by the police and of the lack of effective legal assistance before the investigating judge.

He further complained that he was denied access to the materials of the case, which was a breach of his right to a fair trial provided by the aforementioned Convention.

The Court's assessment:

a.) The right to a fair trial requires that the defendant be granted the right to assistance by counsel from the first interrogation by the police, unless the specific circumstances of the case justify the restriction of his right of access to a lawyer. Such limitations and other similar restrictions should be clearly defined and justified.

The Court referred to the police interrogation and determined that, according to the applicable law, the defendant is entitled to be assisted by a lawyer during investigation by the police, but not if he was arrested under a European arrest warrant. The right to legal assistance is expressly excluded in this situation.

The Court noted that the Court of Appeal only referred to the fact that, at the time of interrogation by the police, the defendant had agreed to make statements without legal assistance. However, the court failed to investigate whether it should exclude such statement of the defendant and took it into account together with other evidence in delivering its judgment.

The facts presented above show that the Court of Appeal failed to analyse the case and to eliminate the consequences generated by the waiver of the right to legal assistance. Thus,

The Court determined that the provisions of article 6 paragraph 3 (c) correlated with article 6 paragraph 1 of the Convention were breached by the fact that the defendant had been denied the right to legal assistance during the police interrogation and that the consequences of such denial had not been subsequently eliminated by the national courts.

b.) As regards the first hearing of the applicant before the investigating judge, the Court separated the matter concerning the access to the materials of the case from that of communication of the applicant with his lawyer. The laws of Luxembourg provide access to the materials of the case only after the first hearing by the investigating judge. The Court reiterates that restrictions on access to the case file at the stages of instituting criminal proceedings, inquiry and investigation may be justified by, among other things, the necessity to preserve the secrecy of the data possessed by the authorities and to protect the rights of the other persons.

However, the defendant had the possibility to prepare his defence even before the issuing of the indictment, including the right to remain silent and the right of access to the case file after the first hearing by the investigating judge. Therefore, the Court finds that a proper balance is ensured by the guarantee on access to the case file from the end of the first interrogation and therefore there was no violation of Article 6 of the Convention.

c.) However, the Court notes the importance of consultations between the lawyer and his client upstream of the first interrogation by the investigating judge, considering that it is an opportunity for holding crucial exchanges, if only for the lawyer to remind his client of his relevant rights. Of course, the law should guarantee such consultation, but the laws of Luxembourg fail to do so.

Specifically, ECHR emphasizes the fact that the lawyer must be able to provide effective and practical assistance and that this should be enshrined in legislation, which is not the case in Luxembourg. In addition to that, ECHR expressly refers in this case to the provisions of article 3 of Directive 2013/48/EU. In this respect, the Court was unconvinced by the Government's argument that communication between the client and his lawyer is possible under current practice and insisted that a legislation solution should exist.

Considering that the applicant could not communicate with his lawyer before the first hearing by the investigating judge, the Court finds that there was a violation of Article 6 paragraph 3 (c) in conjunction with Article 6 paragraph 1 of the Convention.

4. Case of Golder vs. United Kingdom – right to information in criminal proceedings.

(Application No. 4451/70, judgment of 21 February 1975)

Although it is a very old case, it has not lost its relevance, as it illustrates a breach of the rights that are currently guaranteed in the EU Member States by the Directive on the right to information in criminal proceedings and by article 6 of ECHRFF.

The case refers to an applicant who failed to communicate with his lawyer for the purpose of taking civil action for libel because the prison authorities restricted this right. Specifically, one of the prison guards accused him of having participated in the disturbances that had taken place in the prison. The applicant considered this allegation as libellous. As he was prevented from communicating with his lawyer, the applicant considered that his right of access to justice was restricted and, as a result, he could not exercise his right to commence an action.

ECHR determined by its judgment that, by the described act of the prison authorities (restriction of consultation with the lawyer), the United Kingdom breached the right of the applicant to a fair trial stipulated by article 6 of ECHRFF, as the rights mentioned in the Convention (including the right to legal assistance) is meaningless without access to justice. Therefore, in this case, we acknowledge the right to information as a prerequisite of the right of access to courts (justice).

5. Case of Uzukauskas vs. Lithuania – right to information in criminal proceedings.

(Application No. 16965/04, judgment of 6 July 2010)

The authorities revoked the applicant's license to hold/carry firearms based on information held by the police authorities according to which the applicant was a threat to society. The applicant filed a complaint against the decision of the authorities, but his complaint was dismissed and he was not provided with the information in the police record files according to which he allegedly was a threat to society. The court relied on such operational records in dismissing the applicant's complaint.

With regard to the application, ECHR found that the proceedings failed to comply with the provisions of art. 6 of ECHRFF, as the principles of fairness and equality of arms had not been respected. In other words, the applicant was not informed on the content of the evidence against him and, as a result, he was unable to refer and respond to it.

In the same context, it is important to note that this decision of ECHR illustrates the right to information on accusations, which the suspected/accused person is entitled to under the provisions of article 6 of the Directive.

6. Case of DEB Deutsche Energiehandels- und Beratungsgesellschaft vs. Federal Republic of Germany¹³⁴ - right to information in legal proceedings – preliminary ruling by the Court of Justice of the European Union

(Judgment C-279/09 of 22 December 2010)

A legal entity - an electricity distribution company - intended to commence an action against the federal Republic of Germany for delays in transposing the two directives into the national laws, which the company claimed to have caused it financial loss. As a result of the financial difficulties caused by such delay, the company was unable to pay the legal costs related to the proceedings and the lawyer's fees in order to be represented in accordance with the relevant procedural rules.

Thus, the competent court referred to the Court of Justice of the European Union for a preliminary ruling.

Upon deliberating on such preliminary ruling, the Court of Justice of the European Union considered the practice of ECHR and determined that free legal assistance for legal entities is not excluded in principle. However, upon issuing a ruling and granting such assistance, the following mandatory elements must be assessed:

1. the matter in dispute,
2. the prospects for success,
3. importance of what is at stake for the applicant,
4. the complexity of the relevant law and procedure,
5. the applicant's capacity to represent himself effectively
6. whether or not the costs of the proceedings might represent an insurmountable obstacle to access to the courts.

Thus, with regard more specifically to legal assistance to companies (legal persons), additional (optional) criteria may be also examined:

- whether the legal entity is profit-making or non-profit-making,
- the financial capacity of the partners or shareholders,
- the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

This is a ruling of the Court of Justice of the European Union that defines criteria for application of the right stipulated by article 3 paragraph 1 letter b) of the Directive on the right to information in criminal proceedings.

¹³⁴ Although it does not refer to the practice of ECHR, which is discussed in this chapter of the paper, we considered it necessary to elaborate on some key aspects of this decision of the Court of Justice of the European Union, as they are relevant for the application of the discussed directive.

7. Case of Tsonyo Tsonev vs. Bulgaria – right to information in criminal proceedings.

(Application No. 2376/03, judgment of 14 January 2010)

The applicant served a sentence of 18 months' imprisonment based on a final judgment for bodily injury and breach of domicile. In order to lodge an appeal with the Supreme Court of Cassation, he requested to be appointed a counsel. His request was dismissed without any specific reasons for refusal being given.

Relying on article 6 of ECHRFF, the applicant claimed in his application to ECHR that his right to a fair trial was breached.

With regard to the merits of the case, ECHR initially found that a counsel had already been appointed for the applicant in these criminal proceedings, as it had been determined that he had not had sufficient means to pay for legal assistance. It is also determined that, upon filing the current request for the appointment of a counsel, the applicant mentioned that he did not have sufficient means to pay for legal assistance. Then, ECHR finally determined that no information was available to demonstrate that the necessary means to pay for legal assistance. As a result, the Court determined that there was a breach of article 6 paragraphs 1 and 3 of the ECHRFF.

The relevance of this judgment of ECHR should be considered in connection with the provisions of article 3 paragraph 1 letters a) and b) of the Directive (the right to be assisted by a counsel and the right to free legal assistance).

8. Case of Twalib vs. Greece – right to information in criminal proceedings.

(Application No. 24294/94, judgment of 9 June 1998)

During the first-instance trial, the applicant was represented by an appointed counsel, but on the trial of his appeal he was represented by a humanitarian organization that, among other things, provides legal representation services. ECHR found strong indication that the applicant had not had sufficient financial means to pay for legal assistance throughout the proceedings. Therefore, as the state failed to provide him with adequate legal assistance during the appeal proceedings, it is determined that the right of the applicant to a fair trial safeguarded by article 6 of ECHRFF was breached.

This judgment of ECHR has the same relevance in connection with the Directive as the previous decision of ECHR (item 7).

9. Case of Zdravko Stanev vs. Bulgaria – right to information in criminal proceedings.

(Application No. 32238/04, judgment of 6 November 2012)

The applicant, who was unemployed and had an university degree (in other field than law) lodged an appeal for the reason that he had been denied the appointment of a counsel in a criminal proceeding in which he had been accused of forgery.

Although the case was not particularly complex, according to ECHR, it included aspects related to the validity and lawfulness of evidence, as well as to the criminal proceedings themselves and to individual and material aspects (interpretation of intent, etc.).

Under the circumstances, ECHR considers that a qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution. Therefore, since the applicant was not provided with legal assistance, his right to a fair trial under article 6 paragraph 3 letter c) of ECHRFF could have been violated.

Besides illustrating the rights enshrined by the Directive, this case is also relevant because, in delivering its judgment on provision of legal assistance, ECHR applied the so-called test of the interests of justice, which includes:

7. the seriousness of the charges brought against the defendant,
8. the complexity of the case,
9. the social and personal situation of the defendant.¹³⁵

10. Case of Salduz vs. Turkey – right to information in criminal proceedings.

(Application No. 36391/02, judgment of 27 November 2008)

The applicant was convicted for participation in an unlawful demonstration in support of the Workers' Party of Kurdistan. He was interrogated by the police in the absence of a lawyer and admitted to the accusations brought against him. Although during subsequent hearings he denied his testimony, i.e. his confession to the police, the court convicted him relying on his statements to the police given while in custody.

In its judgment that determines the existence of a breach of the right to a fair trial stipulated by article 6 paragraph 3 letter c) of ECHRFF, the Court mentions that the applicant should have been assisted by a counsel starting with the first police interrogation, as the accused persons are particularly vulnerable at that stage of the proceedings.

Furthermore, ECHR stresses that the evidence obtained during prosecution can be decisive for the outcome of the proceedings. Therefore,

¹³⁵ The criteria of the interests of justice test are satisfied depending on the circumstances of each individual case. In some case, the fulfillment of one criteria is sufficient, while in others two or all three elements of the test need to be simultaneously fulfilled.

the early access to a lawyer safeguards the right of the defendant to remain silent and provides a sound guarantee as to preventing an unfair treatment of the defendant by authorities. However, ECHR mentions that the right of defence may be restricted, but only with clear limitations as regards the application and the extent of such restriction in time. In this particular case, the absence of legal assistance irretrievably affected the applicant's defence rights.

11. Case of Lanz vs. Austria
(Application No. 24430/94, judgment of 31 January 2002)

The applicant was arrested on suspicion of having committed fraud, after which the judge ordered that the applicant's contacts with his defence counsel should take place under the surveillance of the court because of the existence of a danger of collusion, absconding or interfering with the investigation by manipulating (destroying, rewriting) documents that were to be obtained only during prosecution.

Deliberating on the claim of the applicant that his defence rights were dangerously breached, the ECHR determined that an accused's right to communicate with his defence counsel out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society. If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness or even become ineffective. Therefore, the supervision decided in this case by the investigating judge seriously breached the applicant's defence right and is a violation of the provisions of article 6 paragraph 3 letters b) and c) of ECHRFF.

12. Case of Ordre des barreaux francophones et germanophone vs. Conseil des ministres¹³⁶
(Court of Justice of the European Union, Judgment C-305/05 of 26 June 2007)

Similar to the previous ECHR case (item 11), Court of Justice of the European Union also noted that lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, if they were obliged to cooperate with the authorities by passing them information obtained in the course of related legal consultations.

13. Case of Aras vs. Turkey
(Application No. 15065/07, judgment of 18 November 2014)

¹³⁶ Again, this is not a case brought before ECHR, but it is mentioned considering its relevance.

The applicant was arrested on suspicion of aggravated fraud and was subsequently interrogated by the police without being assisted by a lawyer. The applicant defended himself actively and submitted his defence. He did the same before the prosecutor, where he maintained his statement again without legal assistance. Before the investigating judge, the lawyer was permitted to enter the hearing room, but not to speak or consult with the applicant.

Assessing the grounds of the application ECHR concludes that the mere presence of the applicant's lawyer in the hearing room, without being permitted to actively defend his client, cannot be considered to have been sufficient by the standards of effective defence provided by article 6 paragraph 3 letter c) of the Convention. The applicant should have had access to a lawyer from the first interrogation by the police and the subsequent passive presence of the lawyer during the hearing by the investigating judge does not fulfil the effective defence requirements according to the standards of the Convention.

14. Case of Lagerblom vs. Sweden
(Application No. 26891/95, judgment of 14 January 2003)

The applicant, a Finnish national, requested the replacement of the initially appointed lawyer with a Finnish-speaking public defence counsel. The Swedish courts dismissed his request.

ECHR initially mentions that the defendant has the right to be assisted by a defence counsel of his own choice, but immediately notes that this is not an absolute right by nature. In this specific case, the applicant speaks and understands Swedish and is able to effectively participate in the trial and in the general proceedings. Therefore, the Swedish courts rightfully dismissed his request for the appointment of a Finnish-speaking defence counsel. Therefore, there was no breach of his right to a fair trial within the meaning of article 6 of the Convention.

15. Case of Pishchalnikov vs. Russia
(Application No. 7025/04, judgment of 24 September 2009)

The applicant was accused of aggravated robbery. On the first interrogation, which was conducted without legal assistance, the applicant confessed to having committed the crime. Subsequently, he denied the legal assistance offered, i.e. being represented by a counsel. However, further into the proceedings, after having been appointed a counsel, he denied the aforementioned confession. In spite of that, he was finally convicted based on the statement given upon his arrest.

In its judgment, ECHR stresses that if an accused has no lawyer, he has less chance of being informed of his rights in the criminal proceedings and, as a consequence, there is less chance that they will be respected. Of course, an accused may refuse legal assistance at any

stage of criminal proceedings, but such a waiver must be voluntary, must also constitute a knowing and intelligent relinquishment of a right and must be made in an unequivocal manner and attended by minimum safeguards commensurate to its importance. Before an accused can be said to have implicitly, through his conduct, waived a right, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be.

Considering the circumstances of this particular case, it is unlikely that the applicant could reasonably have appreciated the consequences of his waiver of the right to be assisted by a counsel and ECHR determines that his right to a fair trial under article 6 of the Convention was breached, as there was not a valid waiver of the said right.

16. Case of Galstyan vs. Armenia
(Application No. 26986/03, judgment of 18 November 2007)

Unless the interests of justice require otherwise, self-representation in criminal proceedings is permitted and acceptable and, as a consequence, it is not contrary to the Convention. The applicant failed to demonstrate that the choice to be self-represented was the result of any threats or physical violence inflicted on him to determine him deny the hiring of a lawyer. Therefore, the respondent State cannot be considered responsible for the lack of legal representation of the applicant and no breach of the right stipulated by article 6 of the Convention existed.

We will further present 2 ECHR cases against the Republic of Croatia in an attempt to look at the Directives in the context of the Croatian judicial practice as assessed by ECHR

Case of Gregačević vs. Croatia
(Application No. 58331/09, judgment of 10 July 2012)

The trial court found the applicant guilty on four counts of fraud and sentenced him to five years' imprisonment. He lodged an appeal claiming that the conviction was based on the findings and opinion of the accounting expert from 13 July 2007, while the expert's assessment report was delivered to his lawyer only on the final hearing of 18 July 2007, when the defence did not have sufficient time to review it and prepare a response to the expert's findings and opinion. He further mentions that the expert's assessment also relies on some documents provided by the police during the trial session, which were not accessible to the defence.

In his appeal, he also states that the requested for the expert to be heard during the trial session, considering certain controversial statements in his findings and opinions, as well as because two witnesses were present, G. and M., but the court dismissed these proposal without any justification. The appellate court upheld the judgment by which the

applicant had been found guilty, but reverted the decision of the trial court and reduced the sentence to four years' imprisonment.

After the judgment became final, the applicant also lodged a constitutional complaint, which the Constitutional Court of the Republic of Croatia dismissed as groundless on 16 May 2009.

Referring to article 6 paragraph 1 of the Convention, the applicant mentioned in his application that the described approach of the Croatian courts had violated his right to a fair trial.

Determining that the petition of the applicant is grounded and that his right to a fair trial was breached in this respect, ECHR refers to the right of the defendant to have sufficient time to prepare his defence in connection with the right of access to the materials of the case. Moreover, the Court indicates that the authority that conducts the criminal proceedings and obtains additional evidence during the proceedings must timely make available such evidence to the defendant in order to allow him analyse them, as stipulated by the Directive on the right to information in criminal proceedings.

As the Croatian courts failed to comply with this obligation, they are also responsible for the fact that the applicant was not able to timely prepare his defence. Thus, according to the Court's assessment, the case was complex and the applicant's complaints concern two items of evidence considered in sentencing the applicant to imprisonment.

Case of Dolenec vs. Croatia

(Application No. 25282/06, judgment of 26 November 2009)

The applicant was found guilty on 20 counts of theft and aggravated theft and was finally sentenced to six years and four months' imprisonment.

The applicant mentioned in his petition that his rights under article 6 paragraph 3 (b) and (c) were breached, inter alia, by the fact that he had been denied access to the materials of the case. Although his requests concerning the access to the materials of the case were formally admitted by the Croatian courts, the applicant exercised this right only once before being convicted. The Court finds that the applicant filed an application for access to the materials of the case on 7 March 2005, but did not receive any answer. Throughout the proceedings, except for two days, 30 March and 1 April, the applicant was in detention and had no possibility of free access to the case file. ECHR further notes that, indeed, the applicant exercised his right of access to the materials of the case once: he was taken to the court conducting the criminal proceedings against him on 1 October 2004 where he examined the case file and made copies of certain documents. However, the judgment of 26 August 2004 was quashed on 14 January 2005, inter alia, because the applicant had had neither sufficient contact with his defendant nor sufficient time to prepare his defence. On 7

March 2005, upon retrial before the first-instance court, the applicant requested once more to be granted access to the materials of the case. He explained that on 1 October 2004 he had not had sufficient time to examine the large number of documents in the case file and that he had not received copies of all the documents he had requested.

However, his request remained unanswered. In a new appeal lodged against the judgment of the first-instance court of 1 April 2005, the applicant mentioned his objections regarding the fact that he had not been actually permitted to examine the case file. Thus, ECHR notes that the fact that the applicant did consult the case file on 1 October 2004 cannot be regarded as satisfying the requirement that the applicant be afforded adequate means and facilities for the preparation of his defence. In this respect, the Court observes that the Convention is intended to provide individuals with effective remedies in connection with safeguarding their fundamental rights, which definitely include the right to information in criminal proceedings and, in this particular case, the right of access to the materials of the case.

In this context, the deficient organization of the judicial system of the state, in which the case "travels" from the first-instance court up to the Constitutional Court, has no relevance for the Court, since all this time the applicant was not able to exercise his aforementioned right. Therefore, there was a breach of his right to a fair trial within the meaning of article 6 of the Convention.

CHAPTER VI

THE RIGHT TO INFORMATION AND THE RIGHT TO TRANSLATION AND INTERPRETATION - GERMAN PERSPECTIVE

Introduction

Directives 2010/64/EU and 2012/13/EU were transposed into the German law through the law on strengthening the procedural rights of accused persons in criminal proceedings, which came into force on 6 July 2013. The Directives are the first two legislative instruments of the roadmap of the Council of the European Union for implementing unified minimum rights in favour of accused persons. The Directives, also referred to as Measures A and B, lay down minimum procedural rights concerning translation and interpretation and the right to information in criminal proceedings. The enforcement regulations form a very compact law with reference to the two rather detailed Directives, considering that it is largely based on the system of rights of accused persons already existing in the German laws.

To better understand the Directives of 2010 and 2012 and the transposition of their provisions into the national law, we will present, further in this paper, the texts of the Directives, to the extent that they are relevant for the practical application, as well as the equivalent provisions of the German law, usually by quoting in full the articles concerned. The annex summarizes in a table the directives and the provisions of the German, Croatian and Romanian national laws to enable a comparative analysis of the transposition of the relevant provisions.

I. Transposition of the provisions of directives into the German law

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

At the core of the transposition of Directive 2010/64/EU is the right to interpretation and translation in criminal proceedings, also stipulated by art. 187 of the German law on the organization and functioning of the courts of law GVG. According to the current perception, this provision – like all the minimum rights related to

interlingual communication and information – is an expression of recognition of the accused person as a subject of the criminal proceedings: his active involvement in the communication process is essential for the formal legitimization of any decision made in any criminal proceedings. While before World War II the appointment of an interpreter still used to be made rather as a means of elucidating the case during trial, the case and practice nowadays, as well as the wish to make a clear separation from the denial of the position of the accused person as a subject of proceedings in the National Socialist period, lead to the consistent appointment of interpreters as an expression of the right to a fair trial: an accused person who does not speak or understand the language of the proceedings cannot be reduced to the status of a mere object that cannot be understood in the proceedings, but "must be put in the position to understand and to be understood in connection with the essential procedural actions that concern him. This regulatory approach is expressly based on the rights instituted by art. 6 III ECHR 11, having, therefore, the same legal grounds as the two Directives transposed.

Excerpt from Directive

Article 2

Right to interpretation

(1) Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

(2) Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between 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.

German Law

Art. 187 of the German Law on the organization and functioning of the courts of law GVG [Interpreters]

(1) An interpreter shall be appointed whenever persons who do not speak or understand the German language participate in a trial. Minutes will not be issued in a foreign language. However, to the extent that the judge deems it necessary, considering the importance of the case, any declaration made in a foreign language will be also recorded in

that language in the minutes or in an annex. In such cases, a translation certified by the interpreter shall be attached to the minutes.

(2) The appointment of an interpreter is not necessary if all participants speak and understand the foreign language concerned.

Excerpt from Directive

2) Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between 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.

German Law

Art. 46 of the Law on the fees of lawyers RVG [Costs]

(1) Costs, in particular travel costs, shall be paid only to the extent that they were necessary for the proper trial of the case.

(2) If the court determines, following a request made by the lawyer before the travel date, that the travel is necessary, such determination is binding in the procedure of calculating the payments and advances from the state budget (art. 55). In proceedings concerning fines applied by administrative authorities, the role of the court is taken by the administrative authority. As regards the costs referred to in art. 670 of the Civil Code, par. 1 theses 1 and 2 shall apply accordingly; the value of the refundable costs related to hiring an interpreter or translator is limited to the rates provided by the Law on payments and compensations granted by the judicial system (Justizvergütungs und Entschädigungsgesetz).

Excerpt from Directive

(3) The right to interpretation under paragraphs (1) and (2) includes appropriate assistance for persons with hearing or speech impediments.

German Law

Art. 186 of the German Law on the organization and functioning of the courts of law GVG [Communication with persons with hearing and speech deficiencies]

(1) Communication with persons with hearing and speech deficiencies during trial shall be made, as chosen by the persons concerned, verbally, in writing, or through a person able to facilitate communication, appointed by the court. The court shall make available adequate technical means for verbal and written communication. Any

person with hearing or speech deficiencies shall be informed with regard to his right to choose the means of communication.

(2) The court may request written communication or the involvement of an interpreter if the person with hearing or speech deficiencies failed to exercise the right to choose stipulated by par. 1 or if the form of communication chosen according to par. 1 does not permit sufficient communication or communication requires disproportionate effort.

Excerpt from Directive

(4) Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

German Law

The general obligation of all prosecution authorities and courts to elucidate the case, challenging only by ordinary remedies, especially by way of appeal.

Excerpt from Directive

(5) Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

German Law

Art. 191 of the German Law on the organization and functioning of the courts of law GVG [Exclusion and denial of appointment of an interpreter]

With regard to interpreters, the provisions concerning the exclusion and denial of appointment of expert witnesses shall apply accordingly. The decision shall be made by the court or judge that appointed the interpreter.

Corroborated by art. 33 par. 1 of the Criminal Procedure Code CPC (CPC):

Art. 33 Hearing the other part before issuing a decision

(1) The court shall issue a decision in the trial phase of the criminal proceedings, after hearing the participants.

(2) The court shall issue decisions outside the trial phase after hearing the position of the prosecutor or after the prosecutor files a written declaration.

(3) In case of a decision issued under par 2, the court shall hear the other participant before accepting any facts or evidence with regard to which the participant has not been heard.

(4) Whenever preventive arrest, judicial attachment or other measures are instructed, the provisions of par. 3 shall not apply if the hearing is likely to have a negative impact on the purpose of the instructed measures. The provisions of par. 3 shall not prejudice the provisions that regulate, in particular, the hearing of participants.

The decision may be challenged only by way of appeal.

Excerpt from Directive

(6) 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.

German Law

Art. 185 (1a) of the German Law on the organization and functioning of the courts of law GVG

The court may approve for the interpreter to be in a different location during a trial session, hearing or interrogation. The trial session, hearing or interrogation shall be broadcast in real time, by video and audio technology, at such location and in the court room.

Excerpt from Directive

(8) Interpretation provided under this Article shall 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. See art. 5

German Law

See art. 5

Excerpt from Directive

Article 3

Right to translation of essential documents

(1) Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned 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 defence and to safeguard the fairness of the proceedings.

(2) Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

(3) The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

German Law

Art. 187 of the German Law on the organization and functioning of the courts of law GVG [Interpreters for accused or convicted persons]

(1) The court shall appoint an interpreter or a translator for any accused or convicted person who does not speak or understand the German language or who has hearing or speech deficiencies, to the extent that this is necessary in order to ensure the exercise by such person of his procedural rights in the criminal proceedings. The court shall inform the accused person, in a language that he can understand, with regard to the fact that he has the right to request to be assisted free of charge by an interpreter or translator throughout the criminal trial.

(2) For the purpose of exercise of the procedural rights in criminal proceedings by a person who does not speak and understand the German language, written translation of decisions concerning measure depriving the person of his liberty, as well as indictments, criminal fines and non-final judgments is usually required. Written translation of excerpts is sufficient if this respects the procedural rights of the accused person in criminal proceedings. The written translation shall be made available promptly to the accused person. Written translation may be replaced with verbal translation of the documents or a verbal summary of the content of documents, if this respects the procedural rights of the accused person in criminal proceedings. This condition is considered fulfilled when the accused person is assisted by a lawyer.

(3) The accused person may effectively waive written translation only if he was informed in advance with regard to his right to receive a written translation under paragraphs 1 and 2 and with regard to the effects of such waiver. The provision of information in accordance with thesis 1 and any waiver shall be recorded in writing.

(4) The provisions of paragraph 1 shall apply accordingly to the aggrieved persons entitled to claim damages in a criminal trial under the provisions of art. 395 of the Criminal Procedure Code.

Excerpt from Directive

(5) Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of

documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

German Law

Challenge only by ordinary remedies, especially by way of appeal (interdiction to use evidence or violation of the *audiatur et altera pars* principle or of the principle of guaranteeing a fair trial).

Excerpt from Directive

(9) Translation provided under this Article shall 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.

See art. 5

German Law

See art. 5

Excerpt from Directive

Article 5

Quality of the interpretation and translation

(1) Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2 paragraph (8) and Article 3 paragraph (9).

(2) In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

German Law

Federal database since 01.10.2016:

<http://www.justiz-dolmetscher.de/>

General certification art. 189 par. 2 of the Law on the organization and functioning of the courts of law GVG for the Federal Land of Baden-Württemberg (example):

Art. 14 and art. 15 letter b of the Regulations of enforcement of the Law on the organization and functioning of the courts of law AGGVG, corroborated by the administrative instruction of 2010

Administrative instruction on amending the Administrative Instruction of the Ministry of Justice for application of art. 14 and art. 15 letter b of the Regulations of enforcement of the Law on the organization and functioning of the courts of law_AGGVG of 5 May 2010 - application: 3162/0083 -

- Die Justiz magazine

With regard to: Administrative instruction of 6 December 2006 - application: 3162/0083 -

(Die Justiz magazine, 2007, p. 106)

I.

For the purpose of enforcement of the provisions of 14 and art. 15 letter b of the Regulations of enforcement of the Law on the organization and functioning of the courts of law_AGGVG, the following instruction is issued:

1 Verification of the application (art. 14 par. 2 and par. 3, art. 14 letter a, art. 15 par. 2 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law_AGGVG) for general certification as judicial interpreter, as well as of the application for certification as translator of judicial documents

1.1 For the purpose of verifying the fulfilment of the conditions stipulated by art. 14 par. 3 thesis 1 No. 1, 2, and 3 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law_AGGVG, the applicant shall submit:

- CV in table format,*
- declaration on own responsibility as to whether the applicant is subject to any criminal proceedings,*
- declaration on own responsibility that the applicant is in good financial standing. If necessary, certificates issued in foreign languages accompanied by certified translations into German shall be enclosed.*

1.2 For the purpose of verification of compliance with the requirements stipulated by art. 14 par. 2 and par. 3 thesis 1 No. 3 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law_AGGVG, a transcript from the Central Federal Registry shall be obtained in accordance with art. 41 par. 1 No. 1 and par. 4 of the Law on the Central Registry BZRG, without prejudice to the provisions of art. 14 letter a par. 2 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law AGGVG.

1.3. For the purpose of verifying the fulfilment of the conditions stipulated by art. 14 par. 3 thesis 1 No. 4 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law AGGVG (professional ability), the applicant shall submit a

certificate or diploma attesting the passing of the required professional examination.

1.3.1 For this purpose, the applicant shall prove the passing of an examination in accordance with the Ordinance of the Ministry of Education on examination of translators and interpreters of 21 October 1997 (Official Journal of Baden Württemberg, p. 484), as amended by the Ordinance of the Ministry of Education on amending the Ordinance on examination of translators, of 21 January 2004 (Official Journal of Baden, p. 81), or of any other state examination for interpreters and translators held in another federal land in accordance with the Directive of the Ministry of Education on the procedure for recognition of examinations for translators and interpreters..

1.3.2 The Agreement on the European Economic Area is relevant in relation to Iceland, Lichtenstein and Norway. Applicants who are citizens of Switzerland are considered equal in this respect to the citizens of the European Union since 1 June 2002 (art. 4 par. 3 thesis 1 No. 1 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law AGGVG).

1.3.3 In case of any doubt as to whether the certification document submitted was obtained by passing a state examination or a similar examination or with regard to a diploma, certificate or any other document attesting professional qualification for the purpose of art. 14 letter a par. 1 of the Regulations of enforcement of the Law on the organization and functioning of the courts of law AGGVG or if additional examination is required, the applicant shall submit the professional qualification document to the Administrative Council in Karlsruhe (Regierungspräsidium Karlsruhe), Directorate 7 - Schools and Education - Office for Examination of Translators and Interpreters, for the purpose of taking a new examination.

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

The system of obligations of judicial authorities to provide information to accused persons under the German law is completely different from the system defined by the new Directive 2012/13/EU on the right to information. While the latter is structured around the right to information, the German criminal procedure law considers each phase of judicial proceedings and the respective authorities that are in charge with each phase. There are also overlaps with Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. For instance, the new regulation in art. 187 I 2 of the German Law on the

organization and functioning of the courts of law GVG is based on the right to information art. 3 Id of Directive 2012/13/EU with regard to the rights established by the Directive. Apart from the adaptation of the Letter of Rights in art. 114 letter b II CPC, the transposing law stipulates only one new obligation, i.e. the obligation to inform suspected or accused persons with regard to their right to have a lawyer appointed by the court (art. 136 I 3, 114 letter b II 1 No. 4 letter a CPC). The other obligations to provide information, stipulated by art. 3, 4, 5 and 6 of Directive 2012/13/EU, already exist in the German law, as demonstrated by the following comparative analysis of the main provisions of the Directives and of the German law.

Excerpt from Directive

Article 3

Right to information about rights

(1) Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- a) the right of access to a lawyer;
- b) any entitlement to free legal advice and the conditions for obtaining such advice;
- c) the right to be informed of the accusation, in accordance with Article 6;
- d) the right to interpretation and translation;
- e) the right to remain silent.

(2) Member States shall ensure that the information provided for under paragraph (1) shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

German Law

Art. 136 [1] CPC First hearing

(1) At the beginning of the first hearing, the accused person shall be informed with regard to the accusations brought against him and the applicable provisions of the criminal law. The accused person shall be informed with regard to the fact that the law allows him to state his position with regard to the accusations or to refrain from making any declaration on the case, as well as to the fact that he may be assisted by a chosen lawyer at any time, including before being heard. Furthermore, he shall be informed that he may request the producing of evidence in his defence and that, according to the provisions of art. 40, par. 1 and

par. 2, he may request the appointment of a lawyer for the purpose of the provisions of art. 141 par. 1 and par. 3. In certain situations, the accused person shall be informed that he may express himself in writing, as well as with regard to the fact that the possibility of a judicial settlement between the offender and the victim is available.

(2) The hearing shall offer to the accused person the possibility to eliminate the suspicions against him and to make use of the circumstances that are favourable to him.

(3) The personal circumstances of the accused person shall also be recorded on the first hearing.

Art. 136 letter a CPC Prohibited hearing methods; interdictions concerning the use of evidence

(1) The freedom of the accused person to think and act according to his will cannot be limited by abuse, exhaustion, actions on his body, administration of substances, acts of cruelty, misleading or hypnosis. Coercion may be applied only to the extent permitted by the criminal procedure law. Threats with the application of an inadmissible measure or promising benefits that are not provided by the law is forbidden.

(2) Measures that impair the memory or discretion of the accused persons are prohibited.

(3) The interdictions stipulated by par. 1 and par. 2 shall apply notwithstanding the agreement of the suspected person. No declaration obtained by violating these interdictions may be used, notwithstanding the agreement of the accused person to their use.

Art. 163 letter a CPC Hearing of accused persons

(1) The accused person shall be heard, at the latest, before completion of prosecution, unless prosecution is cancelled. The provisions of art. 58 letter a par. 1 thesis 1, par. 2 and par. 3, as well as art. 58 letter b shall apply accordingly. In simple cases, written statements are sufficient.

(2) If the accused persons requests the collection of evidence to dismiss accusations, such evidence shall be collected to the extent that it is relevant.

(3) The accused person shall appear before the prosecutor whenever summoned. Art. 133 – 136 letter a and 168 letter c par. 1 and 5 shall apply accordingly. The competent court shall rule with regard to the lawfulness of summoning in accordance with art. 162 upon the request of the accused person. The provisions of art. 297 - 300, 302, 306 - 309, 311 letter a and 473 letter a shall apply accordingly. The decision of the court is final.

(4) Upon the first hearing by the police, the accused person shall be informed with regard to the accusations against him. The provisions

of art. 136 par. 1 theses 2, 3, 4, par. 2, 3 and art. 136 letter a shall also apply to the hearing of the accused person by the police.

(5) The provisions of art. 187 par. 1, 2, 3 and art. 189 par. 4 of the law on the organization and functioning of the courts of law shall apply accordingly.

In the trial phase:

Art. 243 par. 5 CPC

The accused person shall be informed promptly with regard to the fact that he may choose to state his position with regard to the accusations or to refrain from making any declaration on the case. If the accused person is willing to make declarations, he shall be heard in accordance with the provisions of art. 136 par. 2.

Excerpt from Directive

Article 4

Letter of Rights on arrest

(1) Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.

(2) In addition to the information set out in Article 3, the Letter of Rights referred to in paragraph (1) of this Article shall contain information about the following rights as they apply under national law:

- a) the right of access to the materials of the case;
- b) the right to have consular authorities and one person informed;
- c) the right of access to urgent medical assistance; and
- d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

(3) The Letter of Rights shall also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

(4) The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I.

(5) Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.

German Law

Art. 114 letter b CPC Providing information to accused persons who are arrested

(1) An accused person who is arrested shall be promptly informed in writing, in a language that he understands, with regard to his rights. If it is obvious that written information is not sufficient, the accused person who is arrested shall be also informed verbally. The same shall apply whenever the provision of information in writing is not possible; however, written information shall be provided as soon as possible. The accused person shall confirm in writing that he has been informed; in case of denying confirmation, such denial shall be recorded on the case file.

(2) The accused person shall be informed, in accordance with the provisions of par. 1 above, that:

1. he will be brought promptly before the court, on the next day after the arrest, at the latest, and the court will hear him and rule with regard to maintaining the arrest,

2. he may choose to state his position with regard to the accusations or to refrain from making any declaration on the case,

3. he may request the collection of certain evidence for the purpose of dismissal of accusations against him,

4. he may be assisted by a chosen lawyer at any time, including before being heard,

4a. in the situations stipulated by art. 140 par. 1 and 2, he may request the appointment of a lawyer in accordance with the provisions of art. 141 par. 1 and 3,

5. he may request to be examined by a physician chosen by him,

6. he may contact a family member or a person that he trusts, to the extent that this does not interfere with prosecution,

7. in accordance with the provisions of art. 147 par. 7, he may request information and copies of the documents on file, if he does not have a lawyer, and

8. whether the competent judge maintains the measure of preventive arrest.

a) he may challenge the arrest warrant or request a review of the arrest (art. 117 par. 1 and 2) and a public hearing in court (art. 118 par. 1 and 2),

b) if the challenge is dismissed, he may request the issuing of a court decision in accordance with the provisions of art. 119 par. 5 and

c) during detention, he may request a court ruling against the decisions and measures of authorities under art. 119 letter a par. 1

The accused person shall be informed with regard to the right of his lawyer to have access to the documents of the case in accordance with the provisions of art. 147. Any accused person who does not speak

or understand sufficiently the German language or who has hearing or speech deficiencies shall be informed, in a language that he can understand, with regard to the fact that, in accordance with the provisions of art. 187 par. 1-3 of the law on the organization and functioning of the courts of law, he is entitled to be assisted, free of charge, by an interpreter or translator throughout the criminal proceedings. An accused foreign citizen shall be informed that he may request for the consulate of his country of citizenship to be notified, as well as that he may communicate with the consulate in writing.

Excerpt from Directive

Article 6

Right to information about the accusation

(1) Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

(2) Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

(3) Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

(4) Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.

German Law

See Article 2: The German law regulates the provision of information with regard to the rights, as well as with regard to the case against the accused person.

Excerpt from Directive

Article 7

Right of access to the materials of the case

(1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents

related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

(2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

(3) Without prejudice to paragraph (1), access to the materials referred to in paragraph (2) shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

German Law

Art. 147 CPC The right to have access to the documents of the case; the right to see the evidence; the right the right of accused persons to information

(1) The lawyer is entitled to have access to the documents of the case held by the court or to the documents that will be sent to court if indictment is issued, as well as to see the evidence kept in the evidence room.

(2) If completion of prosecution on the case has not been declared officially, the request of the lawyer to have access to the all or certain documents of the case or to see the evidence may be denied, if this would adversely affect prosecution. If the conditions stipulated by thesis 1 and the accused person has been placed in preventive arrest or approval for preventive arrest was requested for the person held in custody, the lawyer will be properly provided with essential information to be able to evaluate the lawfulness of the arrest; usually, in such cases, the lawyer is allowed to see the documents of the case.

(3) The lawyer cannot be denied access, at any time during the criminal proceedings, to the minutes of the hearings of the accused persons, to examinations conducted by the judge in which the presence of the lawyer was allowed or should have been allowed, as well as to expert witnesses' reports.

(4) Upon request, the lawyer shall be allowed to take documents, excluding any evidence, in order to review him at his office or at home, unless relevant reasons to the contrary exist. The decision cannot be challenged.

(5) Decisions regarding the right of access to the documents of the case shall be made by the prosecutor before the criminal trial and after the issuing of a final judgment and by the judge on the case in all other phases of the proceedings. If the prosecutor's office denies access to the documents of the case after the completion of prosecution is officially recorded on file under the provisions of par. 3 or if the accused person is arrested, the issuing of a decision by the competent court may be requested under the provisions of art. 162. The provisions of art. 297 - 300, 302, 306 - 309, 311 letter a and 473 letter a shall apply accordingly. The court shall not give reasons for the decision if this would affect the purpose of prosecution.

(6) If the reason for denying the access to the documents of the case persists, the prosecutor's office shall suspend the ordinance on completion of prosecution at the latest. The lawyer shall be promptly informed as soon as his free access to the documents of the case is restored.

(7) Any accused person who is not assisted by a lawyer shall be provided, upon request with information and copies of the documents of the case to the extent that this is necessary to ensure proper defence, does not interfere with the purpose of prosecution, even in a criminal trial, and does not prejudice the protected interests of other parties. The provisions of par. 2, first half of thesis 2, per. 5 and art. 477 par. 5 shall apply accordingly.

Excerpt from Directive

(4) By way of derogation from paragraphs (2) and (3), provided that this does not prejudice the right to a fair trial, access to certain materials may be refused 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 the national security of the Member State in which the criminal proceedings are instituted. 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.

German Law

See art. 7, paragraphs 1 and 2

Excerpt from Directive

Article 8

Verification and remedies

(1) Member States shall ensure that when information is provided to suspects or accused persons in accordance with Articles 3 to 6 this is noted using the recording procedure specified in the law of the Member State concerned.

(2) 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.

German Law

Challenge only by ordinary remedies, especially by way of appeal (interdiction to use evidence or violation of the (interdiction to use evidence or violation of the principle according to which the other party must be heard before issuing a decision, as well as of the right to a fair trial).

II. Decisions and rulings of judicial control/supreme courts on particular aspects related to the application of the directives.

1. Federal Court of Justice

a. Providing information to accused persons

After a Bundesliga football match, in the parking lot of the stadium, the cars of the away team's supporters were spray-painted with swastikas in the home team's colours. The police was called and the police officers who arrived at the scene asked a group of people nearby if they had seen who spray-painted the parked cars. The police officers did not inform those persons as accused persons. B, who was among the persons in the group, answered police officer P aggressively: "Every idiot who is not one of ours and parks here will get a souvenir from us on his car." B is accused and convicted of destruction of property (art. 303 CC) and use of symbols of organizations that are contrary to the Constitution (art. 86 letter a CC). In the reasons for the judgment, to determine that B, who has no criminal history and denied making any declaration during the trial, actually committed the criminal offence, also relied on B's answer to police officer P, which P presented to the court as a witness during the trial. Legal counsel V, who, immediately after the hearing of P as a witness, had challenged the admission by the court of P's statement regarding what P had said, filed an appeal against the

judgment. In support of the appeal, he challenged the fact that the court took into consideration what the accused B said.

Is the appeal grounded?

Problem:

Only when a person is **accused** such person must be **informed**, more specifically, before his hearing

- In case of hearing by the police as an accused person, in accordance with the provisions of art. 163 letter a par. 4, and art. 136 par. 1 CPC,
- In case of hearing by the prosecutor's office as an accused person, in accordance with the provisions of art. 163 letter a par. 3, and art. 136 par. 1 CPC, and
- In case of hearing by the examining judge as an accused person, in accordance with the provisions of art. 136, par. 1 CPC or art. 115 par. 3, art. 115 letter a, par. 2 CPC.

A person may become **accused**

1. either by **a specific conduct of the police, the prosecutor or the examining judge** that shows **their will to prosecute** the person for having committed a criminal offence
2. or by the existence of a **serious suspicion** concerning the person.

With regard to paragraph 1.

Regardless whether serious suspicion exists, a person may become accused either by **a specific conduct of the police, the prosecutor or the examining judge**, if the exterior conduct of the police, the prosecutor or the examining judge clearly shows **their will to prosecute** the person for having committed a criminal offence (Federal Court of Justice BGH NStZ 1997, 398 – with reference to **art. 397 par. 1 of the Fiscal Code**; Federal Court of Justice BGH NJW 2007, 2706, 2707).

Such conduct of the police, the prosecutor or the examining judge, resulting in a person's becoming accused exists, for instance, when:

- a) a measure that, according to CPC, is a measure against accused persons is instructed against the person concerned, e.g.
 - detention, art. 127 CPC,
 - the examining judge issues an arrest warrant under art. 112 CPC or the prosecutor's office requests the issuing of an arrest warrant or the police proposes the prosecutor's office to request the issuing of an arrest warrant,

- blood samples of the person are taken under art. 81 letter a CPC (and not under art. 81 letter c par. 2 CPC),
- a domicile search is conducted under art. 102 CPC (and not under art. 103 CPC).

b) the person is heard as a witness, but the conduct of the authority that hears the witness clearly shows that it intends to determine the witness admit to have committed the criminal offence, either by putting pressure or by statements like "By what you say, you become more and more of a suspect".

However: The simple provision of information to the witness under art. 55 par. 2 CPC does not automatically turn him into an accused person (Federal Court of Justice BGH NJW 2007, 2706).

With regard to paragraph 2.

Regardless whether the police, the prosecutor's office or the examining judge have already instructed measures that are specific to prosecution, the person also becomes accused when there is a **serious suspicion** against him, based on facts, Federal Court of Justice BGH Collection of Criminal Cases 37, 48, 52; Federal Court of Justice BGH NJW 2007, 2706, 2708 (Simple suppositions or a vague suspicion that the person might have committed the criminal offence do not turn him yet into an accused person).

Solution:

According to the provisions of **art. 337 CPC**, the appeal is grounded if:

- there is a **violation of the law**
- and**
- the conviction **is based** on such violation of the law.

A violation of provisions of **art. 163 letter a par. 4, 136 par. 1 CPC** (omission to inform the accused B, in particular, the omission to inform him with regard to the right to remain silent) may be considered as a possible violation of the law. However, the provisions of art. 163 letter a par. 4, 136 par. 1 CPC would have been violated only if B had already been accused at the time he was questioned by the police officer. Nevertheless, at that time, there was no conclusive indication that B had committed the criminal offence. The fact that B was with other persons near the parking lot (= close to the place where the criminal offence had been committed) lead only to a supposition or a vague suspicion, not a serious and grounded suspicion that B had committed the offence.

Considering that, at the time when asked by the police officer, B was not an accused person yet, there was no obligation to inform him as

an accused person before asking that question. Therefore, the police officers did not violate the provisions of art. 163 letter a par. 4, 136 par. 1 CPC.

For this reason, considering that there was no violation of the law, the appeal is not grounded.

b. Providing information (variation of Case a)

The same case as above, with the difference that, before asking B that question, the police officer notices that B had on his hands paint of the same colour as the one used to paint the Nazi symbols (swastikas) on the cars.

Problem:

The same as in the case above

Solution:

According to the provisions of **art. 337 CPC**, the appeal is grounded if:

- there is a **violation of the law**
- and**
- the conviction **is based** on such violation of the law.

Violation of the law:

At the time when B was asked that question by the police officer, he was an **accused person**: considering that B had on his hands paint of the same colour as the one used to paint the Nazi symbols (swastikas) on the cars, there was solid indication that B, who was close to the scene of the criminal offences, had committed the offences.

Under the circumstances, the police officer should have informed B, before asking the question, in accordance with the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC, that he was an accused person, in particular, with regard to the right to remain silent. The fact that the police officer did not do it violated the provisions of art. 136 par. 1 CPC corroborated by art. 163 letter a par. 4 CPC. The police has some room for action in determining whether serious suspicion exists with regard to a person. Therefore, the person must be informed in accordance with the provisions of art. 63 letter a par. 4, 136 par. 1 CPC as an accused person. If the determination by the police that, based on the existing facts, no serious suspicion exists (yet) with regard to a person and, as a consequence, the person is not required (yet) to be informed as an accused person in accordance with the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC is plausible, then, there is no violation of the

provisions of art. 163 letter a par. 4, 136 par. 1 CPC. However, if such determination by the police is no longer plausible – as in the case at hand – considering the existence of facts that justify suspicion, then, the police, by failing to inform the accused person, objectively and arbitrarily exceeds the limits of the room for action available and violates the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC; Federal Court of Justice BGH NJW 2007, 2706, 2708).

Legal grounds

A judgment is based on an infringement of the procedural provisions whenever the ruling of the court would have been different (from the appealed judgment) if the procedure had been duly observed.

Considering that the violation of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC refers to a procedural error that occurred during the prosecution phase, it is considered that the judgment is based on such procedural error only if the **procedural error persists until the delivery of judgment**. This means that the judgment is based on a violation of the provisions of art. 136 par. 1 CPC corroborated by art. 163 letter a par. 4 CPC occurring in the prosecution phase to the extent that, if the procedural error had been treated appropriately, the court could have reached a different ruling, more favourable to the accused person.

Considering that, during the trial, the lawyer **challenged** in due time, i.e., immediately after the hearing of P as a witness, the fact that the court took into consideration the statements of the accused person (and also considering that there was no indication that B, who had no criminal history, was aware of his right to remain silent), the interdiction to use the statements of B was applicable (Federal Court of Justice BGH Collection of Criminal Cases 38. 214; Federal Court of Justice BGH NSTZ 1997, 502: challenge outside the trial phase is not sufficient.)

If the court had given effect to this **interdiction to use** and, as a consequence, had not taken into account B's answer to the police officer's question, it might have reached a different conclusion, resulting in the dismissal of accusations.

For this reason, the judgment is based on a violation, at the time when it was issued, of the provisions of art. 136 par. 1 CPC corroborated by art. 163 letter a par. 4 CPC.

For this reason, the appeal is grounded.

c. Second acknowledgment after the provision of information on rights (art. 136 par. 1 CPC). Qualified information of the accused person

In the family home, A strangles his wife who desperately tries to defend herself, including by scratching him. A reports to the police the death of his wife, falsely stating that, upon returning from work, he had found her dead in their home. He also declared that a large amount of money was missing and that his wife must have been killed by a burglar she caught in the act. However, the police investigation determined that A was having an affair and was willing to divorce, but his wife did not agree to that. Moreover, following the death of his wife, A was the beneficiary of a considerable life insurance policy. On the autopsy, fragments of skin are found under the victim's fingernails, indicated the fact that she tried to defend herself by scratching the attacker. The molecular genetic test of these fragments of skin determined that they had the same DNA as A's DNA (art. 81 letter g par. 5 CPC).

Police chief commissioner L invites A to the police station for a hearing and informs him, before being heard as a witness, in accordance with the provisions of art. 55 par. 2 CPC, including with regard to the fact that he has the right to deny answering those questions which, if truthfully answered, would incriminate him. When K shows to A, during the hearing, the results of the DNA test, A admits to having committed the crime (= first admission). K arrests A. However, realizing that, by mistake, he failed to inform A as an accused person, he promptly informs him. After A is provided with information as an accused person, he admits again to having committed the crime (= second admission), because he believes he could not withdraw his first recognition anyway.

During the trial, A makes no statements with regard to the accusations against him. Under the circumstances, the court hears police commissioner K as a witness with regard to the two instances when A admitted to having committed the crime. Immediately after the hearing of K as a witness, A's lawyer challenges the fact that the court took into consideration the two instances when A admitted to having committed the crime. The court decides not to use the first admission (when A had not been informed as an accused person), but convicts A based on the second declaration to the police to life in prison for homicide. The lawyer files an appeal against the judgment of the trial court, challenging the use by the court of the admission to the crime obtained by the police. Is the appeal grounded?

Problem:

If a person suspected of having committed a criminal offence has become an accused person as a result of existence of serious suspicion (case 2 and case 3) and is heard by the police without being properly informed as an accused person, i.e. in breach of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC (as an accused person or, falsely, as a witness), the breach of art. 163 letter a par. 4, art. 136 par. 1 CPC results in an interdiction to use the declarations made during that hearing, if during the trial the accused person/his lawyer challenges in due time, i.e. immediately after the hearing as a witness of the police commissioner with regard to the statements made by the accused person to him, the use by the court of such statements (the time stipulated by art. 257 CPC).

If, after his first hearing by the police without being informed as an accused person, a person is heard again by the police, this time by being properly informed as an accused person, and if, on such second hearing, as an accused person, he makes the same statements with regard to the offence, the question arises whether the violation of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC (omission to inform the accused person) on the first hearing as an accused person persists, with the related consequences (provided that the use of the statements is subsequently challenged in due time, during the trial), also with regard to the statements made on the second hearing of the accused person.

Solution:

According to the provisions of **art. 337 CPC**, the appeal is grounded if:

- there is a **violation of the law** and
- the conviction **is based** on such violation of the law.

Violation of the law:

On the first police hearing, although the results of investigation (in particular, the result of the DNA test) indicated A as the possible criminal, which made A an accused person, he was not informed as an accused person. This is a violation of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC. The fact that A was informed with regard to his right to remain silent as a witness (a right that is limited only to certain questions) in accordance with the provisions of art. 163 letter a par. 5, art. 55 par. 2 CPC could not substitute the provisions of information regarding the (full) right to remain silent as an accused person (Federal Court of Justice BGH NStZ 2007, 653, 655).

Legal grounds:

The judgment is based on this violation of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC on the first hearing by the police if this violation of the law persists on the second hearing of the person by the police as an accused person. As a consequence, the court is not entitled to use in the judgment the admission by A to having committed the criminal offence obtained on the second hearing by the police as an accused person, considering the interdiction to use it as evidence.

If the accused person is heard again by the police, after the first hearing when he was not provided with the required information as an accused person, then, at the beginning of the second hearing as an accused person, the police should not only inform him with regard to the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC, but, additionally, with regard to the fact that, considering he was not properly informed as an accused person on the first hearing, his statements cannot be used (so-called qualified information, Federal Court of justice BGH NJW 2009, 1427). If the accused person still admits to having committed the criminal offence after the provision of qualified information or confirms the first admission as a whole (Federal Court of Justice BGH NStZ 2007, 653), the court may use such admission (even if the lawyer subsequently challenges in due time, during the trial, the use of the statement as evidence). Commissioner K provided information to A, as accused person, at the beginning of the first hearing, in accordance with the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC, but not (qualified) information regarding the fact that the first admission cannot be used, as he had not been informed as an accused person.

However, such omission to provide qualified information to the accused person – provided that the lawyer subsequently challenges in due time, during the trial, the use of the statements made on the first hearing – does not automatically result in an interdiction to use such second statement as evidence.

The answer to the question concerning the possibility to use the statements made as an accused person depends on the analysis, in each individual case, of the following aspects:

- conscious or unconscious (due to lack of knowledge or forgetting) omission by the police to provide qualified information to the accused person;
- interest of the authorities in elucidates the case, which is greater as the committed offence is more serious;
- the wrong belief of the accused person, on the second hearing, that he cannot deviate from the statements made on the first hearing.

On one hand, A supposed, on the second hearing, that he could not deviate from the first admission. Relevant in this respect is the fact that, on the second hearing, the accused person repeated and further detailed the statements made on the first hearing. On the other hand, police commissioner K did not omit consciously to provide qualified information to the accused person.

Furthermore, this is a murder case (art. 211 CC), therefore, a criminal offence punishable by the most severe penalty (life in prison).

The analysis of these aspects shows that, although the lawyer subsequently challenged, in due time, during the trial, the use of the second admission of guilt, the interdiction to use the statement as evidence does not apply, considering the high interest of the authority in solving the case.

Therefore, the court was entitled to rely in its judgment on the second admission of guilt by A. This means that the judgment is not based on a violation of the provisions of art. 163 letter a par. 4, art. 136 par. 1 CPC occurring on the first hearing. For this reason, the appeal is not grounded.

2. European Court of Human Rights

Prohibition of torture and the right to deny making declarations (art. 136 letter a CPC)

A, a Nigerian citizen, was seen at least twice by non-uniformed police officers near the railway station in Wuppertal while taking a small plastic bag out of his mouth and giving it to another person in exchange for a certain amount of money. When police officers arrested him on suspicions of drug dealing, he swallowed another small pack that he was still holding in his mouth. No other drugs were found in A's possession. To avoid compromising the investigation by protraction, the prosecutor instructed the administration of an emetic drug to A in order to make him regurgitate the bag. The suspected person was taken to a hospital in Wuppertal-Elberfeld. As he refused to take the emetic drug, four police officers had to hold him. A physician used a nasogastric tube to forcibly administer him a saline solution followed by ipecacuanha syrup. The physician also injected him with apomorphine, a morphine derivative. After that, the accused person regurgitated a plastic bag containing 0.2182 grams of cocaine.

Two weeks and a half after the administration of the emetic drug, the accused person underwent gastroscopy at the prison hospital, because he complained of permanent pain in the upper stomach area.

The diagnosis was inflammation of the lower digestive tract caused by gastric reflux.

After a second trial, when evidence was resubmitted, the Court of Wuppertal sentenced A, who had exercised from the very beginning his right to remain silent, by a suspended sentence, to six months in prison for drug dealing.

A wants to file an appeal against the judgment.

Problem:

Is there any chance for the appeal to be successful? The answer is to be found in the lawfulness of collection of evidence, and, in close connection to that, in the lawfulness of the use of evidence on which the court relied to reach the verdict. The problem here boils down to the lawfulness of the administration of the emetic drug.

Solution:

The provisions of art. 81 letter a of CPC allow for a forced body search of an accused person, provided that it does not have a negative impact on the health of the person. Such impact exists only if the physical welfare of the accused person is affected for a period that exceeds the period of investigation, but not when only temporary pain or other inconveniences occur. The provisions of art. 81 letter a CPC permit the police to make a decision of this kind in case of imminent danger.

The measure may be instructed only if it is indispensable and proportional to the seriousness of the offence. In this respect, the decision must be based on the proportionality principle. The administration of emetic drugs for the purpose of solving cases concerning serious criminal offences, including those involving narcotics, has been considered admissible in most situations, to the extent that it was not clear from the start that it was a case of petty dealing.

The European Court of Human Rights in Strasbourg limited by its decision of 11.07.2006 in case Jalloh v. Germany, on which the case discussed here is based, this usual practice in the prosecution of drug dealing cases. ECHR declared the administration of emetic drugs illegal and ordered Germany to pay compensations and damages to A. Presented below are the reasons that led to the decision made by ECHR by 11 votes to 6:

Even though, in this case, it was absolutely necessary to obtain evidence, the application of less invasive methods (e.g. waiting for the drugs to pass out of the body naturally) would have been sufficient. There was a violation of art. 3 of the European Convention on Human Rights. ECHR states as follows:

"The manner in which the impugned measure was carried out had been liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure had entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this had not been the intention, the measure was implemented in a way which had caused the applicant both physical pain and mental suffering. He had therefore been subjected to inhuman and degrading treatment contrary to Article 3."

ECHR also determined that there was a violation of art. 6 of the European Convention on Human Rights, as the right to a fair trial was not guaranteed. The right of the accused person to remain silent is extended by ECHR to the evidence incorporated in the body of the accused person, which he does not want to surrender willingly (other than by elimination). To that moment, this had not been considered, at least in Germany, as an action technically similar to a hearing. An analysis of the values safeguarded leads, in the case at hand, to the conclusion that the evidence so obtained could not be used by the court.

According to the German criminal procedure law, this is a violation of art. 136 letter 1 par. 1 CPC. It is not a case of continuing effects, but an inadmissible administration of substances, which results in an absolute prohibition of the use of the information so obtained, under the provisions of art. 136 par. 3 thesis 2 CPC. On these grounds, there is a chance for the appeal filed by the accused person to be successful.

Note:

There have been new debates recently over the methods used for hearings and for applying the provisions of art. 136 letter a CPC. Threats with torture, as attempted in the "Jacob von Metzler" case – for the purpose of obtaining a testimony or in order to prevent the victims held by the perpetrator (Gäffen) from being killed – are not compatible with the constitutional law. The head of Frankfurt Police, Daschner, was found by the Court of Frankfurt am Main on 20.12.2004 guilty of having instigated his subordinates to acts of coercion.

The recent debate on terrorism and the threatening situation perceived in Germany does not change anything in this respect either. The influence of a doctrine promoted lately by the United States of America in particular, according to which, in exceptional situations, especially in order to fight terrorism, "modern investigation techniques" and torture are acceptable to some extent, fortunately, have not changed anything in Germany in the strictly constitutional approach to this matter in the specialized literature and in the case law.

Checklists

In order to provide practitioners with an instrument for checking the proceedings against the provisions of Directive 2010/64/EU and Directive 2012/13/EU, we prepared the following checklists:

1. **Checklist** for 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

- Determining citizenship
- Need for translation (limiting the abuse of the right)
- Appointment of a certified interpreter or, if not available, of a person who speaks the language concerned
 - Providing services free of charge, including for communication with the lawyer
 - In case of preventive arrest: translation of essential documents
 - In all cases, translation of the indictment
 - In council room proceedings: translation of the criminal monetary penalty document, especially of the instructions for filing an appeal
- Checking the quality of translation

2. **Checklist** for Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

- Definition: beginning of prosecution
- Definition: when a suspected person becomes an accused person
- The moment when the obligation to provide information arises
 - Bringing the accused person before a judge without delay
 - Content of the obligation to provide information (art. 3 and art. 4 of the Directive):
 - the 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, in accordance with Article 6;
 - the right to interpretation and translation;
 - the right to remain silent;

- 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; and
 - the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.
- Adapting information to the phase of proceedings
 - Access to the materials of the case: the moment when extended access to the materials of the case is granted, on completion of prosecution
 - In case of preventive arrest: access will be granted earlier to elements of the case that are essential for preparing the defence
 - Definition: exercise of the right to have access to the materials of the case / the lawyer or the accused person
 - In case of errors occurring during the proceedings in connection with the obligation to provide information: application of prohibition on the use of evidence in court.

Implementation of the Directives 2010/64 EU on the right to interpretation and translation in criminal proceedings and 2012/13 EU on the right to information in criminal proceedings into the national law of Germany, Croatia and Romania

**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

Provisions Directive 2010/16 EU	Germany	Croatia	Romania
Art. 2 para 1 Right to interpretation (general)	§ 185 German Judicature Act (GVG)	Art.29. Constitution of the Republic of Croatia (CRC) Art. 8 Criminal procedure Act (CPA)	Art. 128 Constitution of Romania Art. 12 Criminal Procedure Code
Art. 2 para 2 Communication between suspected or accused persons and their legal counsel	§ 46 Attorney Fees Act (RVG)	Art.8 para.8 CPA	Art. 12, 83 Criminal Procedure Code
Art. 2 para 3 Assistance for persons with hearing or speech impediments	§ 186 GVG	Art.8.par.3. CPA	Art. 105 Criminal Procedure Code
Art 2 para 4 mechanism to ascertain whether suspected needs the assistance of an interpreter	General obligation to clarify the facts.	General obligations (eg. Art.15., 376. CPA)	General obligation to clarify the facts.

Art. 2 para 5 The right to challenge a decision finding that there is no need for interpretation /to complain that the quality of the interpretation is not sufficient	Right to challenge such a decision only through general mechanisms to appeal the court decision (violation of principle of fair trial or evidence exclusionary rule)	<ul style="list-style-type: none"> - Complaint on the quality of the interpretation before the trial Court (Art.8.para10 CPA) - Appeal (substantive violation of criminal procedure provisions) 	Right to challenge such a decision only through general mechanisms to appeal the court decision (violation of principle of fair trial or evidence exclusionary rule)
Art. 2 para 6 Communication technology	§ 185 (para 1a) GVG Videoconferencing with interpreter	Art.8 para 11 CPA	Art. 106 para. 2 Criminal Procedure Code (the accused person in custody)
Art. 3 para 1 Right to translation of essential documents	§ 187 GVG para 1	Art.8 para 5 and 6 CPA	Art. 344 para. 2 Criminal Procedure Code
Art. 3 para 2 Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment	§ 187 GVG para 2 Translation of documents include any decision depriving a person of his liberty, any charge or indictment, and any judgment	Art.8 para 5 CPA The same as § 187 GVG, more: Letter of Rights (legal notice), summons...	Art. 12, 407 Criminal Procedure Code

Art. 3 para 5 right to challenge a decision finding that there is no need for the translation / to complain that the quality of the translation is not sufficient	Right to challenge such a decision only through general mechanisms to appeal the court decision (violation of principle of fair trial or evidence exclusionary rule)	<ul style="list-style-type: none"> - Complaint on quality of the translation before the trial court - Appeal against the decision (substantive violation of CPA) 	Right to challenge such a decision only through general mechanisms to appeal the court decision (violation of principle of fair trial or evidence exclusionary rule)
Art. 4 Costs of interpretation and translation	§ 187 para 1 GVG	Art.145 para6 CPA	Art. 273 Criminal Procedure Code Law no. 178/1997
Art. 5 Quality of the interpretation and translation	Federal electronic register since 1.10.2016: http://www.iustiz-dolmetscher.de General admission: § 189 Abs. 2 GVG (Baden-Württemberg): §§ 14 bis 15 b AGGVG i.V.m. Administrative Regulation (2010)	Electronic register since 2010 – e-spis (http://www.pravosu.dje.hr) Regulation on court interpreters (Gazette 88/2008)	http://old.just.ro/MinisterulJusti%C8%9Biei/Listapersoanelorautorizate/Interpretisitraducatori/autorizati/tabid/129/Default.aspx
Art. 6 Training	German Academy for Judges and Public Prosecutors Programs of the Ministries of Justice (Bundesländer)	Croatian Judicial Academy Ministry of Justice	National Institute of Magistracy Ministry of Justice

**DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL of 22 May 2012
on the right to information in criminal proceedings**

Provisions Directive 2012/13 EU	Germany	Croatia	Romania
Art. 3 para 1a) the right of access to a lawyer	§ 136 para 1 Criminal Procedure (StPO)	Art. 65 Criminal Procedure Act	Art. 83 letter c, 89, 90 Criminal Procedure Code
Art. 3 para 1b) free legal advice	§ 140 StPO: Obligation of the court/public prosecutor to involve an attorney in case of suspicion of serious crime	Art. 72 Criminal procedure Act	Art. 10 Criminal Procedure Code
Art. 3 para 1c) the right to be informed of the accusation	§ 136 para 1 (StPO) + 163a StPO public prosecutor + 243 para 5 StPO judge	Art. 239 para1 subpara 1 CPA	Art. 83 letter a/1 Criminal Procedure Code
Art. 3 para 1e) the right to remain silent	§ 136 para 1 (StPO) + 163a StPO public prosecutor + 243 para 5 StPO judge	Art. 239 para 1 subpara 2 CPA	Art. 83 letter a, 109, 374 para. 2 Criminal Procedure Code
Art. 4 Letter of Rights on arrest Art. 5 European Arrest Warrant (Framework Decision 2002/584/JHA)	§ 114b StPO fully in line with Article 4 of the Directive 2012/13 EU	- Art. 7 para 2 subpara 1 CPA - Art. 108. para 1 CPA - Art. 24 Act on Judicial Cooperation in Criminal Matters with Members State of the EU	Art. 209 para. 5-9, 210, 218 para. 4, 225 para. 8 Criminal Procedure Code Art. 90 of the Law on Judicial Cooperation in Criminal Matters with Members State of the EU

Art. 6 Right to information about the accusation: - the criminal act suspected - reasons of detention - rights of defence	See Art. 3	See Art. 3	See Art. 3
Art. 7 Right of access to the materials of the case	§ 147 StPO Right of access to the materials of the case Para 1: attorney Para 3: in case of arrest	Art.183 para 1 CPA (in general) Art 184 CPA (parties, victim) Art 185 CPA (restrictions)	Art. 94-95 Criminal Procedure Code
Art. 7 para 4 Refusal is strictly necessary to safeguard an important private or public interest	§ 147 para 2 StPO Refusal of the access to the materials of the case	Art. 185 CPA —	Art. 94 para. 4 unless it would prejudice the proper conduct of prosecution
Art. 8 para 2 Right to challenge the possible failure or refusal of the competent authorities	§ 147 para 5 and 6 StPO Right to challenge refusal of the access to the materials of the case	Art.184 letter a) para.2 CPA	Art. 95 Criminal Procedure Code
Art. 9 Training	German Academy for Judges and Public Prosecutors Programs of the Ministries of Justice (Bundesländer)	Croatian Judicial Academy Ministry of Justice	National Institute of Magistracy