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2 Contributors

Partner	Name	Role	Contribution
UNILEI	Martufi, Adriano	Author / Reviewer	Chapters 6, 9, 11 and 12 / Chapters 5, 7, 8 and 10
UNILEI	Pitcher, Kelly	Author / Reviewer	Chapters 5, 7, 8 and 10 / Chapters 6, 9, 11 and 12
UNILEI	Ouwerkerk, Jannemieke	Supervisor / Author / Reviewer	Entire report / Chapters 7 and 9 / Chapters 5-12
EUI	Mariavittoria Catanzariti	Senior Legal Researcher	Entire report - feedback
EUI	Michele Gigli	PhD	Entire report - feedback
UNIBO	Giulia Lasagni	Project Coordinator	Entire report - feedback

Disclaimer: On behalf of Leiden University, the present deliverable has been drafted by Adriano Martufi, Kelly Pitcher and Jannemieke Ouwerkerk under the scientific supervision of Jannemieke Ouwerkerk. **For the purposes of this report, national case law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to**. The content of this report represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

3 Table of Contents

NATIONAL REPORT ON THE DOMESTIC IMPLEMENTATION OF THE CRIMINAL PROCEDURAL RIGHTS OF THE ACCUSED

4 Main findings/Executive summary

Formally speaking, all six of the Directives under consideration in this report have been implemented in the Netherlands. For the majority of the Directives, specific implementing legislation was introduced by the Dutch legislator, while only two of the Directives have been dealt with exclusively through implicit or indirect implementation: Directive (EU) 2016/343 on the presumption of innocence and right to be present at trial and Directive (EU) 2016/1919 on legal aid. The remaining four Directives required to a lesser or greater degree an intervention of the legislator and the adoption of an array of implementing provisions, enshrined through ordinary legislation (principally the Dutch Code of Criminal Procedure; *Wetboek van Strafvordering*, hereafter: CCP), delegated legislation, administrative acts and policy guidelines.

Directive 2010/64/EU on the right to interpretation and translation demanded the adoption of specific implementing legislation. As far as the right to interpretation is concerned, the implementing legislation is thought to partially codify existing Dutch practice, previously regulated by means of instructions addressed to the police and the Public Prosecution Service. In addition, the CCP provided for safeguards regarding the right to interpretation before the investigating magistrate and during trial hearings. However, the introduction of some ad hoc provisions in the CCP regarding the right to interpretation contributes significantly to enhance this right in the early stages of criminal proceedings. The newly introduced Article 29b to the CCP lays down the right to be assisted by an interpreter, thus allowing suspects to request the assistance of an interpreter before police questioning. By contrast, with regard to the right to translation of essential documents, the Act implementing the 2010 Directive brings about substantial changes, as national practice in this area has traditionally been more restrictive. In particular, the newly introduced Article 32a CCP stipulates in general terms that the suspect may request the translation of documents he or she considers 'necessary' for the defence. Among the points of concern raised with regard to the implementation of the Directive, one may refer to the lack of effective remedies to challenge a decision refusing the assistance of an interpreter. Further points of contention relate to the possibility of prosecutors to replace a detailed translation of the charges in the indictment with a summary description of the offence in a language the suspect understands. Similarly, Articles 365 and 366 CPP (which regulate the notification of a judgement to suspects who did not attend the trial hearing) do not provide for the translation of parts of a judgement

dealing with the evidentiary elements on which a verdict has been based. These provisions were heavily criticised and have become subject of increased scrutiny in the case law of the Supreme Court.

Regarding Directive 2012/13/EU on the right to information in criminal proceedings, while certain rights of the Directive required (some) explicit transposition into national law, others already had a basis in national law. Article 27c of the CCP was introduced into the CCP for the specific purpose of implementing the Directive and is a central provision in this regard. Among other things, it provides for the provision of information to the suspect on the reasons for stopping or arrest, as well on their rights in which respect it draws a distinction between arrested and non-arrested persons (access to the materials of the case was already provided for). Prior to its introduction, the CCP did not provide for the right to be informed of certain fundamental rights promptly, and while in practice suspects were provided with information on certain rights, this did not occur in all situations envisaged by the Directive, or in respect of all of the rights stipulated by the Directive in this regard. Points of concern to have arisen in relation to the implementation of Directive 2012/13/EU relate to the nature of the information to be provided on arrest (to which the Dutch Supreme Court has adopted a somewhat minimalist approach), access to the materials of the case (which the suspect or their lawyer must request) and the remedies cited by the Dutch legislator in respect of 'the possible failure or refusal of the competent authorities to provide information in accordance with this Directive' (which do not provide for the right to an effective remedy *without undue delay*).

Of the six Directives under discussion in this report, Directive 2013/48/EU has undoubtedly caused the most upheaval in the Netherlands. Prior to the ECtHR's judgment in the case of *Salduz v. Turkey* (ECtHR, App. no 36391/02, 27 November 2008), Dutch law did not provide for the right to consult a lawyer prior to police questioning, i.e. for access to a lawyer without undue delay, while the right to have a lawyer present and participate during police questioning was only recognised in 2015. Pursuant to Directive 2013/48/EU (and the developments in the ECtHR case law that preceded its adoption), the CCP now provides for both forms of access to a lawyer in Articles 28 to 28e of the CCP. In addition, the Surrender of Persons Act was amended for the purposes of implementing the Directive; it now declares that relevant provisions of the CCP apply mutatis mutandis to European arrest warrant proceedings. Implementing this Directive required significant changes to existing legislation. The fact that Dutch law did not provide for certain aspects of the right of access to a lawyer in criminal proceedings goes some way to explaining the formalistic nature of some of the legislation expressly transposing the Directive. A concern in respect of the implementation of the Directive is therefore that the relevant legislation is not evidently 'protective' in nature. In addition, implementation of the right to have a lawyer present and participate during questioning in particular is quite minimalistic. A final point of concern is the absence of *timely* remedies in respect of (possible) violations of the right of access to a lawyer in criminal proceedings.

Directive 2016/800/EU on the procedural safeguards for juvenile defendants has been implemented into Dutch law through the Act of 15 May 2019. This statute introduced significantly novel provisions, adding to the CCP, the Criminal Code (CC), the Surrender of Persons Act and the Young Offenders Institutions (Framework) Act. The adoption of the implementing legislation has picked up on a debate about the overall lack of adequate safeguards for juveniles in Dutch criminal procedure, most notably with respect to the lack of focus on the 'best interest' of the child in the context of police custody and deprivation of liberty. The implementing legislation introduced specific procedural safeguards to address the particular vulnerability of juvenile suspects. These include the right of justice-involved youths to be informed about their rights and, more generally, about the conduct of the proceedings. Article 488aa CCP lays down a comprehensive implementation of the safeguards provided for under Article 4 of the Directive, stipulating among other things that suspects shall be informed promptly after arrest of their right to be accompanied by parents or guardians and that police questioning may be audio-visually recorded pursuant to new provision of Article 488ac CCP. In accordance with the Directive, the implementing act introduced several provisions seeking to restrict the use of detention with respect to juvenile defendants.

Directive 2016/1919/EU was implemented entirely though existing legislation, as apparent from the official notification of implementation published by the Dutch government (although the government does not provide any further explanation as to how the existing legislation in question covers the relevant provision of the Directive, apparently deeming this to be self-explanatory). The rights and provisions of the Directive can be found in various laws, but principally the Legal Aid Act (*Wet op de rechtsbijstand*).[1] While the general picture to emerge from the national provisions is that of a legal aid system that complies with the Directive, that legal aid system is also widely perceived to be under financial pressure (as exacerbated by the need to accommodate the ECtHR's judgment in *Salduz v. Turkey*, providing for the right of access to a lawyer without undue delay). This has led to ongoing, critical debate. While to date, the Directive has not featured prominently in this discussion, it is clear that the criticisms being made have the potential to raise issues under the Directive, as relating to the quality of legal aid services in particular.

Directive 2016/343/EU was equally implemented through existing legislation. This is apparent from the official notification of implementation published by the Dutch government. Once again while this notification lists a long series of provisions that implement the various articles of the Directive it is not always clear how (and to what extent) these are covered by the provisions indicated by the government. If in in many respects, the overall system of the CCP is underpinned by the principle of

[1] Entered into force on 1 January 1994. For the consolidated version, see https://wetten.overheid.nl/BWBR0006368/2021-01-01.

the presumption of innocence, several provisions exist which may raise questions as to their consistency with the Directive. In particular, it is unclear to what extent the rules of judgement spelt out by the Code meet the requirements of Article 6(2) of the Directive, pursuant to which doubts regarding the question of guilt shall always benefit the suspect. In addition, the current case law of Supreme Court as regards the inferences from a suspect's decision to remain silent seem hard to square with the spirit of the Directive. As for the right to be present at trial, available appeals do not always secure the suspect's right to a novel determination of the merits of the case.

The overall picture to emerge is that of a pragmatic approach to the implementation of the six Directives. Where possible, the legislator has relied on existing legislation. Where the legislator has had to introduce new legislation, the relevant Directive-provisions have been framed in such a way as to ensure continuity within the consolidated version of the laws into which they were being implemented. As a result, the national implementation of the Directives is quite formalistic in nature, in that it does not always give expression to the protective dimension of the Directives in terms of effective defence, or empower suspects in this regard. It is also quite minimalistic in nature, the national provision on the presence and participation of a lawyer during police questioning being particularly illustrative in this regard. A further, more general, point to emerge concerns the right to an effective remedy and the absence in certain areas of *timely* remedies in respect of (possible) rights violations. The thinking in this regard appears to be that unfairness in the pre-trial stage can be remedied at the trial and appeals stages of the proceedings.

5 Introduction

This report addresses the implementation in the Netherlands of the six directives adopted under Article 82, paragraph 2 of the Treaty on the Functioning of the European Union (hereafter: TFEU) pursuant to the Stockholm Programme, for the purpose of creating a certain level of harmonization of procedural rights in criminal proceedings (hereafter: EU Procedural Directives). In the following sections, for each such directive an overview is provided of the legal framework implementing the rights contained therein, as well as relevant case law. For a fuller understanding of the implementation of the directives, however, some background information on the Dutch legal system is required, as relevant to the subject-matter of this report. The purpose of this introduction is to provide such information. To this end, first the constitutional framework for the protection of fundamental rights in criminal investigations and procedure in the Netherlands will be set out (Section 5.1). Thereafter, a brief overview of the institutional framework, i.e. of the criminal justice system in place and national authorities involved in the investigation and prosecution of crime, will be provided (Section 5.2). Following this, some general observations will be made on the approach of the legislator and courts in the Netherlands to the (implementation of the) EU Procedural Directives (Section 5.3), with a view to providing context for the following sections. The final subsection of this introduction will address the methodology adopted in researching the implementation of the EU Procedural Directives in the Netherlands, as described in the following sections (Section 5.4).

5.1 Constitutional Framework for Fundamental Rights Protection in Criminal Proceedings

In the Netherlands, the most important sources of fundamental rights in the context of criminal procedure, including criminal investigation and prosecution, are the Constitution of the Kingdom of the Netherlands (*Grondwet voor het Koninkrijk der Nederlanden*; hereafter: Constitution), the European Convention on Human Rights (hereafter: ECHR) and its Protocols, and the International Covenant on Civil and Political Rights (hereafter: ICCPR) – the Netherlands being a signatory to both international treaties (although regarding the ECHR, it should be noted that the Netherlands has not ratified Protocol No. 7 thereto) – the Charter of Fundamental Rights of the European Union (hereafter: EU Charter) and the EU Procedural Directives.

Fundamental rights play an important role in creating and shaping Dutch criminal procedure, including the rules on criminal investigation and prosecution, the primary source of which is the

Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, hereafter: CCP).[1] Nevertheless, fundamental rights protection is not always 'explicit'. Indeed, traditionally, such protection has been implicit, through the limitation of the powers conferred on the public authorities in order to investigate and prosecute crime, by attaching conditions to the exercise thereof. Relevant in this regard is that the notion of *'individuele rechtsbescherming'* – the *legal* protection of the individual who has been drawn into the criminal process (and which constitutes an important constraint on the pursuit of truth-finding) – has not been limited to individual rights protection (indeed, in the doctrine at least, *individuele rechtsbescherming* is a broader concept than individual rights protection, encompassing other principles and rules than fundamental rights).[2] It has always been the case, though, that the law regulating criminal investigation and prosecution (and providing the aforementioned legal protection) results in subjective rights enforceable before the courts in individual cases.[3] Nowadays, the law of criminal procedure is, in some areas at least, more explicit in its fundamental rights protection, in that in certain contexts it contains more explicit references to 'rights' (such references having increased significantly since implementation of the EU Procedural Directives). Nevertheless, it is worth emphasizing that, traditionally, the CCP has been conceived of as a system of powers to be exercised by the authorities within the limits set by written and unwritten rules and principles of law.

The CCP, then, is the primary source of law as regards the rules governing the investigation and prosecution of crime. It is also where most of the rights provided for in the EU Procedural Directives can be found (although they can also be found in other Acts of Parliament not falling under the law of criminal procedure as such[4]). Regarding the CCP, which entered into force in 1926, it is important to note is that it is currently undergoing a largescale reform, with a view to 'modernising' it. The idea is to streamline and restructure the CCP, making it easier to understand for those working in the criminal justice system and for the general public and 'future-proofing' it with a view to ensuring that the criminal justice system is able to keep up with technological advances.[5] Aside from this and on a very practical note, this means that the CCP will be renumbered. The project officially commenced

[1] Entered into force on 1 January 1926. For the consolidated version, see https://wetten.overheid.nl/BWBR0001903/2021-07-01.
[2] See in this regard Pitcher discussing the reductionist nature of 'rights-analysis' in the context of criminal procedure, thereby also drawing on Dutch scholarship: K.M. Pitcher, 'Rights-Analysis in Addressing Pre-Trial Impropriety: An Obstacle to Fairness?', in: J. Jackson & S. Summers (eds), *Obstacles to Fairness in Criminal Proceedings. Individual Rights and Institutional Forms*, Oxford: Hart Publishing 2018.
[3] J.H. Gerards & J.W.A. Fleuren, *Implementatie van het EVRM en de uitspraken van het EHRM in de nationale rechtspraak. Een rechtsvergelijkend onderzoek*, Den Haag: WODC 2013, pp. 230-231.
[4] An example of which is the Custodial Institutions (Framework) Act.
[5] For an overview in the English language of this project, see https://www.government.nl/topics/modernisation-code-of-criminalprocedure (last accessed 18 May 2021).

in 2014, while the official, consolidated, version of the proposal was published in July 2020.[6] The next step is for the Council of State (*Raad van State*) to assess it, before it is submitted to Parliament.

With the CCP being the primary source of law in the aforementioned regard, in practice, it is also the first point of reference in identifying the rules applicable to criminal proceedings. In addition, though, the investigation and prosecution of crime must be in accordance with fundamental rights enshrined in the Constitution as well as the international treaties to which the Netherlands is a signatory, most notably, the ECHR and ICCPR, and EU (criminal) law and the Charter and EU Procedural Directives in particular. Of these instruments, the ECHR has thus far been the most influential, although the influence of those EU instruments is becoming more and more visible.[7] Perhaps surprisingly, the Constitution has been less of a driving force in shaping the law of criminal procedure. There are various reasons for this. Relevant in this regard is that the Constitution does not *yet* expressly provide for the right to a fair trial.[8] Moreover, Article 120 of the Constitution prohibits courts, including the highest court – the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*; hereafter: Supreme Court) – from ruling on the constitutionality of Acts of Parliament, i.e. the compatibility thereof with the Constitution. The Supreme Court, then, is not a constitutional court (but rather a court of cassation).[9] It may, however, decline to apply an Act of Parliament on the basis that it is incompatible with a provision of an international treaty to which the Netherlands is a party or a resolution of an international organisation, as may other, lower, courts.[10]

Turning now to the relationship between the ECHR on the hand and the EU Charter and Procedural Directives on the other, while in theory the relationship is clear-cut (and it is understood that the latter are not limited to the cross-border context), in legal practice, there is a tendency to overlook the latter instruments in favour of the ECHR, even when EU law is involved, i.e. the legal situation comes

[6] https://www.rijksoverheid.nl/documenten/publicaties/2020/07/30/ambtelijke-versie-juli-2020-wetsvoorstel-wetboek-van-strafvordering (last accessed 18 May 2021).
[7] M. Luchtman & R. Widdershoven, 'Het Nederlandse strafrecht in de ban van het Unierecht', *Ars Aequi* 2018, pp. 873-889.
[8] In 2018, however, an Act of Parliament was passed pursuant to which the right is to be incorporated into the Constitution. It is the outcome of years of political, academic and public debate. While the Act of Parliament has now been passed, it has yet to enter into force in the consolidated version of the Constitution.
[9] There is in fact no constitutional court in place in the Netherlands.
[10] Art. 94 of the Constitution provides that: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' (Official translation, available at: https://www.legislationline.org/download/id/4824/file/Netherlands_Const_2008_eng.pdf.)

'within the scope of EU law',[11] by virtue of the courts applying a topic covered by the EU Procedural Directives. More is said about the approach of the courts to the topics covered by the EU Procedural Directives (and use of the preliminary ruling procedure provided for under Article 267 of the TFEU, in relation to the advisory opinion procedure provided for under Protocol No. 16 to the ECHR, which the Netherlands has now ratified) below in Subsection 5.3, but for now that relationship may be summarised as follows: In circumstances in which there is overlap between the two in terms of fundamental rights protection, i.e. EU law is involved, with the direct effect of EU law flowing not from national constitutional law (as it does for international treaties such as the ECHR) but from the principle of primacy of EU law, in such circumstances, such law, including the EU Charter, prevails over national constitutional law, rendering the question of whether pursuant to such national law the ECHR has direct effect superfluous.[12] Thus, in matters of fundamental rights protection falling with the scope of EU law, it is the EU Charter that should be the first point of reference. As stated, however, in practice there is a tendency to overlook this, in legislative and judicial law-making also. Regarding the former, it is worth noting that the modernisation project referred to above has been criticised for paying insufficient heed to the influence of EU (criminal) law on criminal proceedings.[13] In respect of the national academic literature also, it is fair to say that there is a tendency to overlook or underestimate the influence of EU (criminal) law on national criminal proceedings.

Finally, in setting out the constitutional framework in the Netherlands for fundamental rights protection in the context of criminal proceedings, it is important to say something about the courts' approach to the ECHR (the approach to the EU Charter and EU Procedural Directives being set out in Subsection 5.3 below). In general, courts (including criminal courts) do not hesitate to apply the provisions of the ECHR and corresponding case law of the European Court of Human Rights (hereafter: ECtHR) in concrete cases; it is standard practice.[14] In this context, '[t]reaty-consistent interpretation of national law is a frequently used technique in the Dutch courts to avoid a violation of the ECHR, especially when an act of parliament is at issue.'[15] At the same time, there are areas in which 'attempts …[have been] made to keep the response to ECtHR case law as minimal as

[11] Pursuant to Art. 51(1) of the EU Charter, '[t]he provisions of … [the] Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' In the case *Åkerberg Fransson*, the Court of Justice of the European Union (CJEU) held that the phrase 'when they are implementing Union law' should be understood to mean 'acting within the scope of EU law'. CJEU 7 May 2013, ECLI:EU:C:2013:105, C-617/10.
[12] As explained in Luchtman & Widdershoven 2018 (n 7), p. 884.
[13] See e.g. M. Luchtman, 'Kroniek van het Europees strafrecht', *Nederlandse Juristenblad* 2018/1874.
[14] Gerards & Fleuren 2013 (n 3), p. 236.
[15] Gerards & Fleuren 2013 (n 3), p. 234.

possible'.[16] The right of access to counsel at the time of questioning, as provided for in the Grand Chamber's judgment in *Salduz v. Turkey*, is a case in point.[17] The same applies to another procedural right provided for under Article 6 of the ECHR, namely the right of the accused to examine or have examined witnesses against them – the right of confrontation. In January 2021, the Netherlands incurred state liability for violating Article 6 of the ECHR, on the basis that the national court in question, acting pursuant to the relevant legal framework provided for by the Supreme Court, had 'refused to call prosecution witnesses of decisive weight for the trial's outcome due to defence's failure to substantiate its request for their cross-examination'.[18] In matters of criminal procedure it seems, therefore, there may be more resistance to the influence of the ECtHR. To an extent this can be explained by the nature of the criminal justice system in place in the Netherlands, to which we now turn.

5.2 Institutional Framework: Criminal Justice System and National Actors

While acknowledging that caution is warranted in using 'ideal types' to depict criminal justice systems, in order to understand the institutional framework in place in the Netherlands for the investigation and prosecution of crime, it is nevertheless worth attempting to do so. While the Dutch criminal process is sometimes described as 'moderately adversarial' in nature, in the literature, it has been argued (in our view, rightly) that this descriptor is somewhat misleading, in that it does not reflect the strongly inquisitorial features of the Dutch criminal justice system. In a leading textbook on Dutch criminal procedure, the Dutch criminal process is rather depicted as 'an inquisitorial process with a view to adversarial argument'.[19] Characteristic of the Dutch criminal justice system is the strong focus on the pre-trial phase of criminal proceedings, while the purpose of the trial itself (*onderzoek ter terechtzitting*) is to 'verify' the results of the criminal investigation, i.e. the evidence obtained. In the Netherlands, therefore, trials are short. The Dutch criminal justice system is also characterised by a strong focus on the goal of truth-finding (although, as observed above, the notion of *individuele rechtsbescherming* constitutes an important constraint on this goal) and on efficiency. Indicative in this last regard is the reliance in legal practice on hearsay evidence in the form of witness

[16] Gerards & Fleuren 2013 (n 3), p. 234.
[17] ECtHR, 27 November 2008, *Salduz v. Turkey*, n. 36391/02.
[18] ECtHR 19 January 2021, *Keskin v. the Netherlands*, n. 2205/16. This is not the first time the Netherlands has incurred state liability in this context; see also ECtHR 10 July 2012, *Vidgen v. the Netherlands*, n. 29353/06.
[19] B.F. Keulen & G. Knigge, *Strafprocesrecht*, Deventer: Kluwer 2021, p. 40.

statements obtained by the police in the pre-trial phase of proceedings.[20] Indeed, witnesses are rarely heard at trial. This focus on the pursuit of truth-finding and efficiency goes some way to explaining the resistance in the Netherlands to the (full) recognition of certain procedural rights of suspects, most notably the right of access to counsel at the time of questioning and the right of confrontation. At the time of the aforementioned *Salduz* judgment being handed down, it should be noted, Dutch law did not expressly provide for the former right. As will be explained below, pursuant to the implementation of Directive 2013/48/EU, however, it is now provided for in the CCP.[21] As for the right of confrontation, it is questionable whether paying more heed to the ECtHR's case law will result in more witnesses being heard at trial. This is because Dutch criminal procedure provides for the possibility of witnesses being heard by the investigating judge, while the Dutch legislator has no intention of placing more emphasis on the trial stage of the proceedings. Quite the opposite: In the context of the modernisation project referred to above, it has been announced that the plan is to place more emphasis on the pre-trial phase, in order to ensure that by the time the case reaches the trial judge, the investigation is complete.

Turning now to the main actors involved in criminal investigation and prosecution, in the Netherlands, criminal investigation is conducted by the police (*politie*) under supervision of the public prosecutor (*officier van justitie*). Indeed, in the Netherlands, the public prosecutor is also considered to be an investigative authority (*opsporingsambtenaar*).[22] But given that the Public Prosecution Service (*Openbaar Ministerie*; PPS) also forms part of the judiciary (*rechterlijke macht*), the public prosecutor is *magistratelijk*, meaning among other things that while they are, in a sense, 'partial' on account of being charged with the investigation and prosecution of crime, they are also expected to fulfil their role with integrity and due regard for the rights of the suspect (and are under a duty to also gather exculpatory evidence and seek an acquittal if the evidence is too thin to found a conviction). Because, however, the PPS falls under the political responsibility of the Minister of Justice and Security, who may issue instructions (*aanwijzingen*) to the public prosecutor,[23] the public prosecutor cannot be considered to be independent.[24] Worth noting here is that prior to the CJEU's judgment of

[20] While at the time of introduction of the CCP the legislator appears to have envisaged a more 'immediate' form of evidence, almost immediately thereafter the Dutch Supreme Court issued a judgment which was to put evidence in Dutch criminal proceedings on a very different path: HR 26 december 1926, ECLI:NL:HR:1926:BG9435 (*'De auditu'*).
[21] It should be noted, however, that efforts were already underway to legislate on the matter of access to a lawyer in criminal proceedings without undue delay (pursuant to the *Salduz* judgment) when Directive 2013/48/EU was adopted; these efforts were, however, 'overtaken' by the need to implement the newly adopted Directive.
[22] See Art. 141 CCP.
[23] See Articles 127 and 128 of the Judiciary (Organization) Act (*Wet op de rechterlijke organisatie*).
[24] Keulen & Knigge 2021 (n 19), pp. 42-43.

27 May 2019,[25] it was the public prosecutor who was authorised to issue a European Arrest Warrant (hereafter: EAW) to the judicial authorities of another member state for the purpose of Dutch criminal proceedings. Pursuant to this judgment, however, the Surrender of Persons Act (*Overleveringswet*)[26] was amended as a matter of urgency to confer the power to issue an EAW on the investigating judge (*rechter-commissaris*).[27]

The more intrusive the criminal investigation measure, the more safeguards in place and the higher the authority that may decide on whether it may be used. Thus, while for the least intrusive measures the police themselves may so decide,[28] for the most intrusive measures, it is for a judge to determine.[29] For many measures, though, it is the assistant public prosecutor (*hulpofficier van jusititie*; in practice, a senior police officer, i.e. not a public prosecutor as such) or public prosecutor who is authorised to determine whether the measure may be used.[30] As to the cases in which it is the judge who may so determine, most often it is the investigating judge who does so. In addition to this responsibility for the use of certain criminal investigation measures (and for the issuing of warrants in this regard),[31] the investigating judge has the power to release the suspect from police custody if it is unlawful,[32] to order the pre-trial detention (*voorlopige hechtenis*) of the suspect,[33] and to conduct further investigations at a party or the trial court's request[34] and hear witnesses in the pre-trial phase of proceedings.[35] While the investigating judge therefore has significant powers, it is important to note that they do not have an overall supervisory role in respect of the investigation, a role which is reserved for the public prosecutor.

As to the trial judge, while on the one hand the aim of the trial is to verify the results of the investigation, on the other hand the trial judge has traditionally played an 'active role', which among

[25] CJEU 27 May 2019, *OG and PI*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.
[26] Entered into force on 12 May 2004. For the consolidated version, see https://wetten.overheid.nl/BWBR0016664/2021-05-07.
[27] See Article 44 Surrender of Persons Act.
[28] See e.g. Article 52 CCP, providing for the power to stop (*staandehouding*).
[29] See e.g. Article 63 and 65 CCP, providing for the power to order pre-trial detention (*voorlopige hechtenis*).
[30] See e.g. Article 57 CCP providing for the power to order police custody (*inverzekeringstelling*) and Article 126g CCP, providing for the power to order systematic surveillance (*stelselmatig observatie*).
[31] See e.g. Article 126m CCP, providing for the power to order a wiretap; the public prosecutor may only do so upon written authorisation by the investigating judge.
[32] See Article 59a CCP.
[33] See Article 63 CCP.
[34] See Articles 181, 182 and 316 CCP.
[35] See Articles 210-226 CCP. In principle, both the public prosecutor and defence counsel may be present during questioning ; see in this regard Articles 186-186a CCP.

other things means that they are responsible for the completeness of the investigation at trial and may in this regard order that further investigations be conducted if they deem it necessary. This role goes some way to explaining why the defence has traditionally had quite a marginal role in Dutch criminal proceedings, the active role of the trial judge (and the *magistratelijkheid* of the public prosecutor) being considered an important safeguard in the prevention of miscarriages of justice. However, with defence rights on the increase and, consequently, more reliance being placed on the defence to raise issues (coupled with higher substantiation requirements in this regard), including those going to the completeness of the investigation, concerns are being raised in the Dutch literature as to just how active the trial judge is nowadays and whether therefore the system is sufficiently protective of the accused.[36] As to other issues that the defence may wish to raise, i.e. the violation of standards governing the criminal investigation, such procedural violations may be raised with the investigating judge in the context of the arraignment/hearing held for the purpose of determining whether the arrest and/or police custody (*inverzekeringstelling*) was lawful, or before the trial judge under Article 359a of the CCP, the mechanism by which the judge in trial proceedings may attach legal consequences to procedural violations committed in the pre-trial phase of proceedings. It is fair to say that, overall (flagrant procedural violations aside), the framework created for the application of Article 359a CCP is heavily weighted towards not attaching legal consequences to pre-trial procedural violations. Moreover, heavy substantiation requirements rest on the defence in this regard. All of this has led to concerns being raised over the adequacy of the supervision of the investigation, in which the trial judge now only plays a marginal role.[37]

As a final preliminary remark, it should be noted that in setting out the Dutch law, the term 'suspect' in this report (as well as in the transposition and case law tables) may refer to the suspect or the accused, or both, depending on the context. This corresponds to the Dutch legal terminology, in which persons suspected of a crime are called 'suspects' (*verdachten*), both before and after indictment.

5.3 Implementation in the Netherlands of the EU Procedural Directives: General Observations

The purpose of this subsection is to provide context for the sections to follow in which for each directive an overview is provided of the legal framework implementing the rights contained therein,

[36] See e.g. L. van Lent, A. Smolders & M. Malsch, '"We kennen allemaal de stukken …". Pleidooi voor een debat over een onmiddellijker strafproces in Nederland', *Delikt en Delinkwent* 2020/38.
[37] See most recently M. Samadi, *Normering en toezicht in de opsporing: Een onderzoek naar de normering van het strafvorderlijk optreden van opsporingsambtenaren in het voorbereidend onderzoek en het toezicht op de naleving van deze normen*, Deventer: Kluwer 2020.

as well as relevant case law, by way of general observations regarding the approach of the legislator and courts in the Netherlands to the (implementation of the) EU Procedural Directives. A more thorough analysis of this approach is provided for in Section 12 of this report, by way of a comparative analysis of the similarities and differences in the implementation of the different directives, including case law.

Regarding the legislator's approach to the different directives, it should be noted that while some directives were considered to require explicit transposition in whole or in part, others were not considered to require this at all on the basis that they were already covered by existing law. For example, the implementation of EU Directive 2013/48 was accompanied by an extensive legislative process and significant changes to existing legislation through a separate (implementing) Act of Parliament (as observed above, the right of access to counsel prior to questioning and the right to have counsel present and participate during questioning up to that point not having formed part of Dutch criminal procedure). By contrast, EU Directives 2016/343 and 2016/1919 were implemented entirely through existing legislation.[38]

As to the courts' approach to the (implementation of the) EU Procedural Directives, as stated above, in legal practice, the CCP is the first point of reference in identifying the rules applicable to criminal proceedings. While the CCP provides for a number of rights covered by the directives, sometimes as a result of explicit transposition thereof into the CCP, courts do not always refer to the underlying directive in applying the relevant provisions of the CCP. Moreover, where there is overlap with the ECHR, courts may refer to the ECHR, while overlooking the underlying directive (and case law of the CJEU). In the literature, concerns have been raised as to whether courts (and other actors) are sufficiently 'clued-up' as to when it is that EU law is involved, with all that this entails.[39] This is not to say, however, that Dutch courts are unwilling to engage with and apply EU (criminal law) law; they are not. Indeed, there are cases in which courts have made use of the instruments available them to give precedence to EU law in circumstances in which (a provision of) an EU Procedural Directive has not been properly converted into national law: the instrument of consistent interpretation and the instrument of direct effect. Regarding the former instrument, in tax and private law cases the Supreme Court has held that it is the wording of the national legislation, and not the explanations provided or comments made during the legislative process (as set out in the drafting history), that is decisive in this regard. Only where such explanations or comments unequivocally give expression to an intention on the part of the legislator to deviate from the directive, may they be taken into account in this regard

[38] For the other directives, the truth lies somewhere in between. Thus, EU Directive 2010/64 has been implemented through a combination of 'tweaking' existing provisions and explicit references to existing ones.
[39] See e.g. Luchtman & Widdershoven 2018 (n 7) and more recently S.M.A. Lestrade, annotation under EHRC Updates 2020/92 (Spetsializirana prokuratura (verstekzitting), HvJ EU 13 februari 2020, zaak C-688/18, ECLI:EU:C:2020:94).

(a situation which is unlikely to occur in the Netherlands, it has been argued).[40] In the literature, this principle is assumed to apply to criminal cases also.[41] There have also been cases in which the courts have given direct effect to the relevant directive.[42] Finally, courts make use of the preliminary ruling procedure, although overall it is fair to say that courts, including the Supreme Court, are reluctant to do so, seemingly because it would impact on the efficiency of proceedings.[43]

5.4 Methodology

Finally, turning now to the methodology adopted in researching the implementation in the Netherlands of the EU Procedural Directives for the purposes of the online tool – the transposition and case law tables – as well as the current report, a first point is that our analysis of the national implementing legislation relies heavily on the information provided in the transposition tables attached to the explanatory memoranda (*memories van toelichting*) to the draft implementing legislation. However, while such information provided a useful starting point for researching the implementation in the Netherlands of the directives, it did not prevent further and independent scrutiny of the state and degree of implementation under national law.

As to the analysis of the case law, the focus in the case law sections of the chapters below is on the case law of the Supreme Court, on the basis that such case law may be said to be representative of 'the law in action' and, moreover, all case law of the Supreme Court is reported. Nevertheless, in some chapters, reference is also made to decisions of lower courts. In particular, we considered it necessary to expand the scope of our review whenever the case law of the Supreme Court on matters related to the implementation of the Directives is still scarce. The selection of cases was based on relevance and is not therefore exhaustive of the case law that can be said to involve the EU Procedural Directives, in particular as regards the decisions of lower courts. As stated above, in Dutch legal practice, the CCP is the first point of reference in identifying the rules applicable to criminal proceedings. Because not all of the provisions of the CCP implementing a directive are limited in

[40] See Luchtman & Widdershoven 2018 (n 7), pp. 887-888. See further J. Ouwerkerk, 'Indirect Effect of EU Law after *Kolpinghuis Nijmegen* (C-80/86): Consistent Interpretation in Dutch Criminal Courts', in: V. Mitsilegas, A. di Martino & L. Mancano (eds), *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis,* Oxford: Hart Publishing 2019.
[41] See e.g. Luchtman & Widdershoven 2018 (n 7), p. 888.
[42] See e.g. HR 30 mei 2017, ECLI:NL:HR:2017:968.
[43] See in this regard M. de Werd, 'Europees strafrecht vraagt om méér regie van rechters', *Nederlandse Juristenblad* 2017/1459, referring to the Supreme Court's judgment in HR 22 mei 2015, ECLI:NL:HR:2015:3608.

relevance to the directive, searching for case law on the basis of the relevant CCP-provisions would mean casting the net too wide. On the other hand, searching on the basis of the relevant directive would be too limited, given that courts do not always refer to the underlying directive in applying the relevant provisions of the CCP. Express reference to a directive was therefore not decisive for the selection of relevant case law.

In the following sections, for each EU Procedural Directive an overview is provided of the legal framework implementing the rights contained therein, as well as relevant case law. Thus, for each right provided for in the directive in question, the relevant legal framework and case law will be set out. More is said on the structure of these sections below, in the sections themselves. Regarding the legal framework in particular, we have, where instructive, reproduced the national provisions in whole or in part, while in other cases we have briefly described them. Where the national provision does not speak for itself, we have provided further explanation.

6 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

6.1 Legislation

Directive 2010/64/EU on the right to interpretation and translation (hereinafter 'the Directive') has been transposed by Act of 28 February 2013 on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.[1] The full title in Dutch is *Wet van 28 februari 2013 tot implementatie van richtlijn nr. 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolking en vertaling in strafprocedure*s (PbEU L 280). This Act contains a number of amendments to the Dutch Code of Criminal Procedure (CCP), which is the primary source of law in the Netherlands for the rules governing the investigation and prosecution of crime. The other national laws in which the rights and provisions of the Directive have found implementation are the Surrender of Persons Act, Criminal Cases Fees Act (*Wet tarieven in Strafzaken*), and Sworn Interpreters and Translators Act (*Wet beëdigde tolken en vertalers*, or *Wbtv*). As far as the right to interpretation is concerned, the implementing legislation is thought to codify existing Dutch practice,[2] though the introduction of new *ad hoc* provisions in the CCP contributes to enhance significantly this right especially in the early stages of a criminal proceeding (e.g. during police questioning). By contrast, with regard to the right to translation of essential documents, the Act implementing the 2010 Directive brings about substantial changes, as national practice in this area has traditionally been more restrictive.[3] Below we discuss the scope of application of the implementing Act (Section 6.1.1), before turning to the relevant provisions transposing the rights to interpretation (Section 6.1.2) and translation (Section 6.1.3) during criminal proceedings.

6.1.1 The scope of application (Art. 1 of the Directive)

Regarding the scope of application of the implementing Act, we turn first to the information provided by the explanatory memorandum. In detailing its choices for the implementation of the Directive, the government made clear that the scope of application of the new provisions is limited to criminal

[1] *Staatsblad* 2013, 85 (entry into force 1 October 2013).
[2] A. Boerwinkel, 'Versterking van de rechten van verdachten in de Europese Unie: het recht op vertolking en vertaling in strafzaken', *Ars Aequi* 2013, pp. 770-775.
[3] J. Boksem, Commentaar op Art. 32a Sv in *T&C Strafvordering 2019* (online, last updated 1 July 2020).

proceedings as defined under domestic legislation. In doing so, the explanatory memorandum seeks to rule out the possibility that the guarantees enshrined in the EU directive could apply to proceedings aimed at the imposition of administrative sanctions. This is a relevant exception since, in recent years, administrative punitive sanctions have proliferated in the Dutch legal system,[4] for example, in the context of municipal by-laws allowing for the imposition of fines for anti-social behaviour or public nuisance.[5] However, in its well-known case law on Articles 6 and 7 ECHR, the ECtHR has been consistently extending the scope of guarantees recognised in criminal proceedings to all administrative sanctions that are substantially punitive in nature.[6] Interestingly, the explanatory memorandum distinguishes between the notion of 'criminal charge' within the meaning of Article 6 ECHR, which the Strasbourg Court applies to proceedings for the imposition of administrative fines, and the concept of 'criminal proceedings' as referred to in Article 1(1), of the Directive. The government emphasises that the nuance between these two terms reflects a different understanding of the scope of procedural guarantees. In addition, the explanatory memorandum draws a further argument from Article 82(2)b of the Treaty on the Functioning of the EU (TFEU), on the basis of which Directive 2010/64/EU has been adopted. This provision of EU primary law refers to the adoption of minimum rules concerning the 'rights of individuals in criminal proceedings' that may be adopted to the extent necessary to promote 'judicial cooperation in criminal matters'. The government thus concluded that the scope of the Directive could not include punitive administrative measures and the relevant proceedings.[7]

The stance taken in the explanatory memorandum is at odds with the approach of the Dutch Supreme Court concerning the scope of procedural rights. While an extensive analysis of the case law in this area is carried out in the second section of this chapter, it is useful to mention the main findings in the jurisprudence of the Supreme Court on this point. In a recent case regarding a questioning conducted during custom checks at the airport of Schiphol, the Supreme Court has ruled that, regardless of the administrative nature of the controls carried out, authorities were not exonerated from the duty to inform the suspect of their right to silence under Article 29 CCP.[8] More broadly, it appears that a punitive sanction imposed as a result of an administrative proceeding may still qualify

[4] O. Janssen, 'Bestuurlijk en justitieel bestraffen in Nederland – op zoek naar (nog) meer eenheid' in: R.C. van Houten (ed.), *Economisch strafrecht en bestuurlijke boete*, Oisterijk: Wolf 2013, pp. 21-22.
[5] See Article 154 of the Municipalities Act (*Gemeentewet*).
[6] A. Andrijauskaite, 'Exploring the penumbra of punishment under the ECHR', *New Journal of European Criminal Law* 2013, pp. 363-375; A. Weyembergh, 'Punitive administrative sanctions and procedural safeguards: a blurred picture that needs to be addressed', *New Journal of European Criminal Law* 2016, pp. 190-209.
[7] *Kamerstukken II* 2011/12, 33355, 3, p. 19-20.
[8] HR 20 februari 2018, ECLI:NL:HR:2018:247 in *Milieu en Recht* 2018, pp. 398-402 annotation by A. Tubbing

as a criminal sanction if the criteria developed within the so-called *Engel* doctrine are met. [9] This case law has repercussions for EU law. A substantive understanding of the concept of 'criminal charge' is a common feature of both Article 6 ECHR and the corresponding provision of Article 47(2) EU Charter. Hence, the reference to Article 82 TFEU is not in itself sufficient to refute a broad reading of fair trial rights that encompasses administrative proceedings. As explained in the introduction to this report,[10] in matters of fundamental rights protection falling within the scope of EU law, the Charter should guide the interpretation of national law.[11] It is therefore reasonable to assume that relevant provisions adopted to transpose the Directive may be interpreted more broadly by national courts.[12]

6.1.2 The right to interpretation in criminal proceedings (Art. 2 of the Directive)

Article 2 of the Directive stipulates that suspects who do not speak or understand the language of the criminal proceedings should be provided, without delay, with the assistance of an interpreter. This principle has been reiterated by the implementing legislation with the introduction of an additional paragraph to Article 27 CCP. Article 27(4) now reads: 'the suspect who has no or insufficient command of the Dutch language is authorised to be assisted by an interpreter'.[13] Interestingly enough, the Dutch legislator has chosen to refer to a person's ability of mastering the language or 'command' (*beheersen*), instead of following the Directive which uses the term 'understanding'. This terminological option is highlighted in the explanatory memorandum as the expression of a duty of care towards the suspects. While 'understanding' the language would refer exclusively to a passive linguistic competence, i.e. the ability to understand a spoken foreign language, the notion of 'mastering' includes both active and passive language control.[14]

The Directive recognises the right to interpretation from a very early stage in the criminal process and during all hearings (including interim hearings) before any investigative or judicial authority.

[9] See again Boksem 2020 (n 3).
[10] See Chapter 5.
[11] Recital 32 of the Directive provides: 'The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case law of the European Court of Human Rights or the Court of Justice of the European Union'.
[12] See Court of Arnhem-Leeuwarden 19 april 2019, ECLI:NL:GHARL:2019:3501 which recognised the right to a free assistance of an interpreter within administrative proceedings according under Enforcement of Traffic Regulations Act (*Wet administratiefrechtelijke handhaving verkeersvoorschriften*).
[13] In keeping with the scope of application of the directive, this article refers to the whole criminal proceedings, form the first arrest to the last conviction when appeal is no longer possible, see the explanatory memorandum: *Kamerstukken II* 2011/12, 33355, 3, p. 28.
[14] *Kamerstukken II* 2012/13, 33355, 7, p. 14.

Article 2(1), in particular, sets out a right to obtain an interpreter during police questioning - while the CCP already contained a few provisions setting out the right to translation in general terms[15], and a set of articles fleshing out the same right during hearings before the investigating magistrate[16] and the trial court.[17] The code, however, did not provide explicit safeguards with respect to the assistance of interpreters during preliminary investigations and in the context of police interrogation. The access to an interpreter during those phases was entirely regulated by instructions issued by the Public Prosecution Service. The implementation of Directive 2010/64/EU has thus triggered a process of codification (previous rules are now provided for by a legislative source)[18] while expanding on the existing practice. Accordingly, the Act of 28 February 2013 has introduced Article 29b to the CCP which lays down the right to be assisted by an interpreter. In particular, Article 29b(1) reads as follows: 'In all cases where a suspect who does not speak the Dutch language or has insufficient command thereof is heard, the assistance of an interpreter shall be sought'. [19]

Unless otherwise provided by the law, it is incumbent on the officer conducting the interrogation to call on an interpreter. While this is clearly framed as a duty for the investigating officer, the suspect may file a request for the purpose of obtaining an interpreter. This prerogative can be derived from the general principle laid down in Article 27(4).[20]

In addition to Article 29b CCP, the existing provisions regarding the right to interpretation remain applicable. In particular, the suspect has a right to be assisted by an interpreter before the examining magistrate (Article 191 CCP) and during the court hearing (Article 275 CCP). Article 191 CCP stipulates that the examining magistrate is authorised to appoint an interpreter if the suspect does not speak the Dutch language or does not have sufficient command of it. Article 275(1) CCP lays down

[15] See in particular Article 23(4) CCP, which reads as follows: 'If the suspect has no or insufficient command of the Dutch language, the assistance of an interpreter shall be sought. The public prosecutor shall call in the interpreter. Article 276(3) shall apply mutatis mutandis.' Own translation; official translation not available.
[16] Article 191(1) CCP: 'If a suspect, witness or expert does not know the Dutch language or does not know it sufficiently, the examining magistrate may summon an interpreter'. Own translation; official translation not available.
[17] See, *inter alia*, Article 275(1): 'If a defendant is not or is not sufficiently fluent in the Dutch language, the hearing shall not be continued without the assistance of an interpreter'. Own translation; official translation not available.
[18] Boerwinkel 2013 (n 2), p. 772.
[19] Own translation; official translation not available.
[20] M. de Boer, E. Nieuwenhuizen, G. Walz, 'The right to interpretation and translation and the right to information in criminal proceedings in the EU, Country report: The Netherlands' May 2015, p. 4. Annex to FRA report on *The right to interpretation and translation and the right to information in criminal proceedings in the EU*, Vienna: FRA, 2016.

that the court hearing will not be continued if the suspect does not, or not sufficiently, master the Dutch language and if there is no interpreter available to provide linguistic assistance. Furthermore, an interpreter may be called upon during interim chamber hearings (*raadkamer*), e.g. during the hearing to decide on the remand in custody of a suspect (*bevel tot gevangenhouding)*.[21]

None of the national provisions mentioned thus far refer explicitly to the 'right' of suspects to obtain the assistance of an interpreter. As explained in the Introduction, in keeping with the language and the historical marginality of the defence in Dutch criminal proceedings, much of the safeguards transposing the Directive (which, in turn, speaks explicitly of rights of 'suspected and accused persons') are framed and construed as prescriptions addressing the authorities ('the assistance of an interpreter shall be sought'). Even more worryingly, the wording of these provisions seems to leave the initiative to substantiate the relevant right to prosecuting authorities. Unlike the choice of words used to transpose the right to translation (see below), Article 29b does not refer explicitly to the possibility of requesting the assistance of an interpreter. If anything, the suspect is regarded as the passive recipient of decisions being made by the prosecutors, judges and police officers.

To secure that the right in question is effectively protected, Article 2(2) of the Directive requires Member States to ensure that interpretation covers the most relevant exchanges between a suspect and their counsel. This is meant to safeguard the fairness of the proceeding in connection with any questioning or hearing and/or with lodging appeal or other requests (e.g. for the purposes of the bail hearing). This provision has been implemented by the introduction of an additional paragraph to Article 28 CCP. The new paragraph, under Article 28(5) CCP, now reads as follows:

> ***Article 28 CCP***
>
> *(5)The suspect who has no or insufficient command of the Dutch language may, for the purpose of conferring with his counsel, rely on the assistance of an interpreter. The counsel is responsible for summoning an interpreter.*[22]

It is therefore incumbent on the defence lawyer to call on an interpreter when needed to facilitate their communication with the suspect. Yet the possibility for suspects to avail themselves of an interpreter when communicating with counsel under this new provision is probably greater than what Article

[21] After an initial period of 14 days of pre-trial detention ordered by an investigating magistrate (*bewaring*) the prosecutor may request the court's bench to extend the period of detention for a period up to 90 days, see Article 65 CCP.
[22] Own translation; official translation not available.

2(2) of Directive seemingly allows[23] with its reference to a 'direct connection' with questioning and hearings.[24]

In its case law, the ECtHR made clear that judicial authorities are required to play an active role in determining the need for interpretation and translation.[25] Accordingly, Article 2(4) of the Directive requires Member States to set up a procedure or mechanism to ascertain whether the suspect can speak the language of the proceedings. A key moment is police interrogation, typically the first time when the authorities communicate directly with the suspect. Interestingly enough, in its explanatory memorandum the government concluded that the regulation of such mechanism would not be 'suitable for implementation' within the CCP or any other legislative source. The explanatory memorandum therefore maintains that such provision is indirectly transposed by the existing PPS's instruction 'on interpreters and translators in the investigation and prosecution of criminal offences' (*aanwijzing bijstand van tolken en vertalers bij de opsporing en vervolging van strafbare feiten*). This instruction provides guidance on how to assess a suspect's linguistic skills during the early stage of the proceeding, especially before police questioning. The PPS's instruction lays down the following procedure: in order to establish whether a suspect understands the Dutch language, the investigating officer needs to verify if the person concerned understands the questions asked and the statements communicated, if they are able to provide their reading of the events they are interviewed about and are capable of expressing nuances.[26] Evidently, the suspect can always claim not to have a sufficient command of the language. This creates a sort of presumption that the assistance of an interpreter is needed: if in doubt, the investigating authority should grant such assistance. In practice, however, the police can rebut the presumption by establishing that the person concerned does in fact understands the language, for example on the basis of the suspect's previous contacts with law enforcement.[27] In any case, the decision to refuse the assistance of an interpreter should be reported in the official record (*proces-verbaal*) of the interrogation. This allows the suspect to prove the absence of an interpreter in following litigation and/or appeals against subsequent decisions based on evidence collected during police interrogation.

[23] The implementing provision has a wider scope of application as the assistance of an interpreter can be invoked to obtain the oral translation of, *inter alia*, the statements given by witnesses at the trial hearing, see *Kamerstukken II* 2011/12, 33355, 3, p. 159.
[24] See S. Cras, L. De Matteis, 'The Directive on the Right to Interpretation and Translation in Criminal Proceedings', *European Criminal Law Associations Forum* 2010, p. 153-157.
[25] ECtHR 24 September 2002, *Cuscani v. United Kingdom*, n. 32771/96 § 38 and 39.
[26] See Paragraph 3.2. of the Instruction. If for example, the accused is only able to answer questions with 'yes' or 'no', it cannot be concluded that he has a sufficient command of the Dutch language. These guidelines are positively referenced by the FRA report (see above n 20, p. 33) as a 'promising practice'.
[27] See *Kamerstukken II* 2011/12, 33355, 3, p. 11.

If the officer and the suspect disagree about the necessity of obtaining the aid of an interpreter, the matter can be referred to an (assistant) public prosecutor (*de hulpofficier van justitie*) who makes a final decision.[28] The claim is handled exclusively by investigating officers, without an external judicial review of the decision (e.g. by an investigating magistrate). This procedure is the only complaint mechanism available to the suspect in order to challenge a decision consisting of the 'finding that there is no need for interpretation' as required by Article 2(5) of the Directive. It is worth mentioning that the explanatory memorandum does not refer explicitly to this complaint mechanism when discussing the implementation of Article 2(5) of the Directive.[29] This is all the more questionable given that it remains unclear whether the lack of independent judicial review on a decision refusing the assistance of an interpreter satisfies the requirements of an 'effective judicial remedy' under Article 47(1) EU Charter.[30] However, as the explanatory memorandum suggests, any following decision based on the evidence collected during such interrogation may be subject to an appeal process, on the basis of the general provisions of Article 404(1) and (2) CCP.[31] Still, it is clear that the statements given in the absence of an interpreter may bear on the overall fairness of the proceeding if not tackled without delay.[32] Arguably, even if the above provisions provide an 'effective remedy' (which is questionable), this may not guarantee entirely against a violation of other fair trial guarantees.

[28] Paragraph 3.5. of the Instruction 'on interpreters and translators in the investigation and prosecution of criminal offences'.
[29] J. Boksem, 'Recht op bijstand door een tolk tijdens verhoor. Commentaar op Art. 29b Sv' in T*&C Strafvordering 2019* (online, last updated 1 July 2020).
[30] FRA report (n 20), p. 56: 'Although the directive gives no further detail regarding the type of authority to hear these complaints, Article 47 of the EU Charter requires such complaints to be subject to effective judicial oversight'.
[31] Article 404(1) CCP: 'Appeals may be filed against judgments concerning serious offences, rendered by the District Court as final judgment or in the course of the hearing, by the public prosecutor with the court which rendered the judgment, and by the defendant who was not acquitted of the entire indictment'; Article 404(2) CCP: 'Appeals may be filed against judgments concerning minor offences, rendered by the District Court as final judgment or in the course of the hearing, by the public prosecutor with the court which rendered the judgment, and by the defendant who was not acquitted of the entire indictment, unless in this regard in the final judgment: a. under application of section 9a of the Criminal Code, a punishment or measure was not imposed, or b. no other punishment or measure was imposed than a fine up to a maximum – or, where two or more fines were imposed in the judgment, fines up to a joint maximum – of € 50.'
[32] However, recital 25 to the Directive makes clear that the right to challenge any such decision 'does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged'.

Additionally, Article 2(5) of the Directive sets out a right for suspects to challenge the quality of the interpretation.[33] For interpreters and translators who are listed in the register of sworn interpreters and translators (*Register beëdigde tolken en vertalers*, or *Rbtv*) or on the replacement list (*uitwijklijst*), such a complaint procedure is provided for in Articles 16 to 27 of the Sworn Interpreters and Translators Act (*Wet beëdigde tolken en vertalers*, or *Wbtv*). This set of provisions allows a suspect to lodge complaints before a specific committee, with claims that the interpreter's service has violated the professional code of conduct.[34] In any event, according to the explanatory memorandum, the quality of the interpreter can be contested at the court hearing. As observed by other commentators,[35] the quality of the provisions implementing Article 2(5) leaves much to be desired. In our view, the reception of the Directive is insufficient on two counts: one the one hand, the complaint mechanism mentioned above is unable to avoid procedural violations and secure an effective and timely redress for infringements of the person's right to a fair trial in an early stage of the proceedings; on the other hand, as observed by the Council for the Judiciary (*Raad van de Rechtspraak*) and the Legal Aid Board (*Raad voor Rechtsbijstand*) in their opinions, complaints cannot be filed with respect to unregistered interpreters.[36] Once again, one can argue that the lack of judicial scrutiny on the quality of interpretation may raise serious issues of effectiveness in light of Article 47 EU Charter.

One cannot conclude the overview on the right to interpretation without a reference to a few remaining provisions of the Directive: Article 2(6) stipulates that communication technology (such as videoconferencing, telephone or the Internet) may only be used if the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings. In the Netherlands, the assistance provided by interpreters over the telephone has been common practice during police interrogations long before the disruptions caused by Covid-19 pandemic. Yet as the explanatory memorandum suggests, a person's fair trial rights cannot be suitably guaranteed without the physical assistance of an interpreter during hearings before the examining magistrate or at trial. The presence of an interpreter is equally important during police questioning, especially in cases that cannot be dismissed as 'simple'.[37] While this principle is reiterated in the explanatory memorandum, to the best

[33] Article 2 (8) of Directive 2010/64/EU additionally provides that the suspect has the right to an interpretation of a quality sufficient to safeguard the fairness of the proceeding.
[34] If well-founded, these complaints may lead to a temporary disqualification of the interpreter, see *Kamerstukken II* 2011/12, 33355, 3, p. 19.
[35] See again Boksem 2020 (n 29) and de Boer, Nieuwenhuizen, Walz (n 20).
[36] In the latest version of the explanatory memorandum the legislator has indicated that it will consider extending the possibility of lodging complaints about unregistered interpreters and translators in further by separately amending the Wbtv (*Kamerstukken II* 2011/12, 33355, 3, p. 18-19).
[37] *Kamerstukken II* 2011/12, 33355, 3, p. 12.

of our knowledge no guidelines exist that allow to establish which cases should be deemed as 'simple'.[38]

Finally, Article 2(7) of the Directive stipulates that the safeguards regarding the right to interpretation should apply in the context of surrender proceedings. The Dutch legislator has explicitly transposed Article 2(7) of the Directive by adding a specific provision in the Surrender of Persons Act, the statutory legislation implementing Framework Decision 364/2002/JHA on the European Arrest Warrant. The new Article 30 of this statute now includes references to the relevant provisions that regulate the assistance of an interpreter before the trial court: in doing so, the amendment extends the relevant safeguards to hearings held in the context of a surrender proceeding.

6.1.3 The right to translation in criminal proceedings (Art. 3 of the Directive)

Article 3 of the Directive enshrines the right of a suspect (who does not speak the language of the proceeding) to obtain a written translation of all the documents which are essential to ensure the exercise of their right of defence and safeguard the fairness of the proceedings. In this perspective, the verification of a suspect's linguistic skills made at an early stage of the proceeding (e.g. before police questioning, see above *6.1.1.*) is key to verify the preconditions for the right to translation. To spell out this legal safeguard in general terms, Act of 28 February 2013 has introduced a new Article 32a to the CCP. Th first paragraph of Article 32a CCP lays down that a suspect who has no or insufficient command of the Dutch language may request that case documents to which he has been granted access and which he deems necessary for his defence be translated, in whole or in part, in writing into a language which he understands. As the provision goes on to add that a request to that effect 'shall be made in writing, shall state as clearly as possible the documents or parts of documents to which it relates and shall state the reasons on which it is based'.[39]

As for the first paragraph, the introduction of a general provision (previously lacking in the Dutch legislation) is consistent with the stance taken by the Directive, which goes beyond ECtHR case law on Article 6(3) ECHR to recognise a distinct, self-standing 'right' to translation; one that is separate from and additional to the right to interpretation, not alternative to it.[40]

[38] The explanatory memorandum refers to the pre-existing practice of police bodies (*politiepraktijk*) which may contact an intepreter providing their assistance over the phone (*tolkentelefoon*), but there is no mention to existing guidelines.
[39] Own translation; official translation not available.
[40] M. Fingas, 'The Right to Interpretation and Translation Challenges and Difficulties Stemming from the Implementation of the Directive 2010/64/EU', *European Criminal Law Review* 2019, pp. 178-890.

A first remark concerning the terminology chosen by the Dutch legislator is in order. While the Directive refers to all documents that are 'essential' to secure the right of the defence and the fairness of the proceeding, the Dutch implementing legislation has chosen a different nuance as Article 32a refers to the documents a suspect may deem 'necessary'. The original draft of the proposed amendment used an even broader expression, referring to the documents that suspects consider 'relevant for the defence': a terminology borrowed from the wording of Article 34 CCP (concerning the formation of the case file).[41] In a final version, the legislator opted for a wording deemed to be more aligned with Article 3(1) of the Directive, using the term 'necessary'.[42] The stance taken by the legislator has sparked some criticism: the Dutch Bar Association (*Nederlandse Orde van Advocaten*) has called the current implementation of Article 3 'minimalistic',[43] thereby suggesting that implementing legislation should include a general obligation to obtain a translation of all documents on which the PPS can rely to reach a finding of guilt.

In a similar vein, the choice of mentioning the inability to 'master' the Dutch language as a precondition to obtain a written translation of some procedural documents has attracted the critiques of the Public Prosecution Service. During the consultation phase, the PPS had proposed to limit the scope of application of Article 32a to suspects who are unable to 'understand' (*verstaan*) the language of the proceeding. Coherently with the terminological choice made with respect to the right to interpretation (Section 6.1.1.), the Dutch legislator has instead referred to one's ability to 'master' (*beheersen*) a language. The explanatory memorandum indicates that this wording is closer to the terminology in use within Dutch legislation.[44] More generally, the term chosen by the legislator encompasses a wider range of linguistic skills that cannot be exhaustively referred to with reference to the term 'understanding'. Arguably, the right to translation needs to be ensured particularly in cases where the suspect, despite their relative ability to speak in the language of the proceeding, has an insufficient command of the language to understand entirely the content of relevant documents.[45] This begs the question of how to assess the language skills of the suspect for the purpose of implementing this right. This is problematic as the implementing legislation fails to specify the criteria according to which this assessment must be carried out. In practice this absence can be easily

[41] Article 34(1) CCP: The suspect may request the public prosecutor to add to the case documents specifically described documents that he considers relevant for the assessment of the case. The request shall be made in writing and shall be reasoned.
[42] Kamerstukken II 2011/12, 33355, 3, p. 30.
[43] Kamerstukken II 2011/12, 33355, 3, p. 22.
[44] Kamerstukken II 2011/12, 33355, 3, p. 21.
[45] Boksem 2020 (n 29).

remedied by drawing on the set of criteria indicated by PPS's instruction 'on interpreters and translators in the investigation and prosecution of criminal offences' (see Section 6.1.1 above). As a result, whenever a suspect is declared in need of an interpreter, he or she will also be held eligible for obtaining a translation of the necessary documents.[46]

Article 3(3) of the Directive sets out a suspect's right to submit, at any stage of the criminal proceedings (within the meaning of Article 1 of the Directive) a 'reasoned request' to obtain the translation of documents. During criminal investigation this request may be handled by the prosecutor. Accordingly, Article 32a(2) CCP stipulates that a request to obtain the translated version of certain documents should be submitted with the prosecutor. Article 32a(2) also makes clear that, during any court hearing, a suspect may request the translation of relevant documents to the court before which the case is being heard (*het gerecht waarvoor de zaak wordt vervolgd*). As reminded above, the request needs to be submitted in writing. This needs to specify which documents (or the parts thereof) that are deemed 'necessary', with an indication of the reasons underpinning this request. At first sight this implementing provision seems in keeping with the wording of Article 3(3) of the Directive, which refers to a 'reasoned request' for this purpose. Yet both commentators and the explanatory memorandum seem to suggest that this request should always substantiate the reasons why an oral translation of the relevant documents would not be sufficient.[47] As will be explained below, in relation to relevant Dutch case law, this approach seems at odds with the idea of the right to translation as essentially distinct from, and additional to, the right to interpretation.

The translation of essential documents is not (always) automatic. Pursuant to Article 3(3) of the Directive, the competent authority decides on a case-by-case basis and may reject the request submitted to this effect by the suspect. However, Article 3(2) clarifies that the notion of 'essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment'. This rule has been operationalised by tweaking a number of different provisions within the CCP. In particular, the legislator has adjusted Articles 59 and 78 CCP, regarding police custody (*inverzekeringstelling*) and pre-trial detention (*voorlopige hechtenis*) respectively, by adding additional paragraphs. Article 59(7) CCP reads as follows: 'if the suspect does not speak Dutch or has an insufficient command of it, he will be informed in writing as soon as possible, and in a language that he understands, of the criminal act of which he is suspected, the reason for issuing the warrant and its period of validity' - while Article 78(6) CCP (regarding a decision of remand in custody) contains the following provision: 'if the suspect does not or not sufficiently master the Dutch language, he will be informed as soon as possible in writing and in a language that he understands of

[46] Boerwinkel 2014 (n 2) p. 772.
[47] Boksem 2020 (n 3).

the criminal offence in respect of which the suspicion has arisen, of the grounds for issuing pre-trial detention and of its period of validity'. This provision therefore requires that the parts of a pre-trial detention decision concerning the grounds justifying it (e.g. a risk of re-offending) are translated. This may not always be an easy task given that, in practice, these decisions are often characterised by a poor and stereotypical reasoning.[48]

Article 260(5) CCP further implements the Directive by stipulating the mandatory translation of certain 'relevant parts' of the summons (*dagvaarding*). Those relevant parts are 'the place, date and time that the suspect has to appear at trial, a short description of the criminal offence' and a number of important notifications. These include a reminder of the rights for the suspect, such as for example the indication to receive the assistance an interpreter, the possibility to file an objection against the summons and the possibility to summon witnesses or experts. The provision at issue therefore makes it optional for the PPS to provide an integral translation of the summons, one that includes a complete and detailed translation of the charges against the suspect. As the explanatory memorandum suggests, in practice the PPS would provide an integral translation of the charge only in particularly complex cases.[49] More frequently, the prosecutor may decide to provide a translation including only 'a short description of the offence'. It is unclear whether this practice complies with the general principles underlying the right to translation of 'essential documents'.[50] The CJEU's case law made clear that the right to translation provided for under Article 3 of the Directive is 'designed to ensure that the persons concerned are able to exercise their right of defence and to safeguard the fairness of the proceedings'.[51] The translation of the indictment, within the meaning of Article 3(2) of Directive 2010/64, serves the purpose of informing the suspect of the 'accusation against him'.[52] Yet whether a summary description of the offence, without any indication of the relevant incriminating evidence,[53] can ensure an adequate exercise of the rights of the defence is questionable.

[48] J. Crijns, B. J. G. Leeuw, H. T. Wermink, *Pre-trial detention in the Netherlands. Legal principles versus practical reality*, Den Haag: Eleven 2016, p. 17.
[49] Kamerstukken II 2011/12, 33355, 3, p. 14.
[50] J. Brannan, 'Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law', *Journal of Specialised Translation*, 2017, 17, p. 57.
[51] CJEU 15 October 2015, *Covaci*, C-216/14, EU:C:2015:686, paragraph 43; CJEU 12 October 2017, *Sleutjes*, C-278/16, ECLI:EU:C:2017:757, paragraph 32.
[52] CJEU 12 October 2017, *Sleutjes*, C-278/16, ECLI:EU:C:2017:757, paragraph 30.
[53] See in this respect the concerns expressed by the Dutch Bar Association about the proposed legislation: Kamerstukken, II 2011/12, 33355, 3, p. 22.

Finally, Articles 365 and 366 CCP have been amended to transpose Article 3(2) of the Directive in so far as it lays down a right to obtain the written translation of 'any judgement'. Pursuant to Article 365 CCP, a copy of the judgement may be requested if the suspect was absent at trial but knew (or could have known) when the hearing would take place. The service of a notification of the judgement (*vonnismededeling*) by the prosecutor is mandatory when the suspect was absent but did not know or could not have known when the judgment would be delivered (see Article 366 CCP). In order to implement Article 3(2), the Dutch legislator has established that both the above communications need to be translated in a language that the suspect understands. In accordance with the newly amended Article 365(6) CCP the information communicated to a suspect should include the following aspects: 'a. the decision based on Article 349 CCP or the decision to convict, acquit or dismiss; b. if a sentence has been passed or if all charges have been dropped, the name of the offence constituting the proven offence, together with an indication of where and when the offence was committed; c. if a sentence or measure has been imposed, the sentence or measure imposed and the statutory provisions on which it is based.'[54] In any case, when a suspect was present at the hearing where the verdict has been pronounced the current legislation does not recognise the right to a written translation. This is predicated on the idea that a defendant may receive the assistance of an interpreter during trial and can thus be provided with an oral translation of the judgement pursuant to Article 362(3) CCP.[55] After all, Article 3(7) allows the authorities to provide an oral translation or an oral summary of certain 'essential documents' when it appears that this does not prejudice the fairness of the proceeding.[56]

The implementation of Article 3(2) was described as 'too limited' by the stakeholders (*adviesorganen*) consulted by the government when drafting the bill. In particular, both the Council for the Judiciary and the Dutch Bar Association have criticised the changes introduced to Articles 365 and 366 CCP for not allowing a translation of further elements of the judgement, such as the decision on the arguments raised by the defence (*weerlegging van de verweren*) or the reasoning behind the sentencing decision. In addition, criticisms have been raised for the lack of appropriate safeguards that evidentiary materials, and decisions made by a court in this respect, are not subject to mandatory translation. This would hinder significantly a suspect's ability to file an appeal against a judgement on the merits.[57] The final version of the amendments, discussed above, rejects those

[54] The information included in the translation provided for under Article 365(6) correspond to those included in the notice of the judgement under the terms of Article 366 CCP.
[55] This provision reads as follows: 'The judgment shall be interpreted for the defendant who had the assistance of an interpreter during the court hearing and is present at the pronouncement of judgment'.
[56] This provision in the Directive incorporates pre-existing ECtHR case law on Article 6(3), see *inter alia* ECtHR, 18 October 2006, *Hermi v. Italy*, n. 18114/02, § 70: 'the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself'.
[57] As noted (Boksem 2020, n 29), these provisions do not ensure the translation of Supreme Court's decisions as Article 444 (which governs the notification of the Supreme Court's judgements) has not been amended by

criticisms in light of a different (and somewhat narrower) understanding of the notion of 'essential documents'. In addition, Article 3(4) of the Directive makes clear 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 is questionable whether the elements described above could be effectively regarded as 'irrelevant' for the purpose of exercising the right of defence. In any case, it has been suggested that the interpretation of this provision might be brought to the attention of the CJEU with a preliminary ruling.[58]

To conclude this overview, it should be recalled that Article 3(5) of the Directive demands Member States to put in place an effective complaint mechanism to challenge a decision to refuse the translation of certain documents, after a reasoned request has been submitted in accordance with Article 3(3). According to Article 32a(3) CCP, when a decision to this effect is made by the prosecutor the suspect shall be notified in writing of the refusal. The person concerned has fourteen days to submit a notice of objection with the investigating magistrate. Both the suspect and the prosecutor have to be heard in council chamber before the judge can make a final decision on the request. Unlike the complaint mechanism provided for to enforce the right to interpretation, Article 32a(3) CCP seems *prime facie* consistent with the requirements laid down by Article 47(1) of the Charter. Further provisions implemented by the Dutch legislator include Article 3(6) (which has been transposed by Article 23(3) of the Surrender Act) according to which the person subject to a surrender proceeding shall be given a translated copy of the European Arrest Warrant, when it appears that he or she does not understand the language in which this document is drawn up.[59] By contrast, the Dutch legislator has preferred not to avail itself of the possibility of introducing specific provisions allowing a waiver of the right to translation (as provided for under Article 3(8) of the Directive).

6.1.4 Costs and quality of the interpretation and translation

including a reference to Article 366(6): a consistent interpretation of the relevant provisions would however suggest that this lack of coordination can be remedied by extending the obligation of Article 366(6) to judgements pronounced by the Supreme Court, see below 6.1.2.

[58] Boksem 2020 (n 29).

[59] Article 23(3) of the Surrender Act reads as follows: 'A copy of the request made as per paragraph 2, with annexed copy of the European arrest warrant, translation and any supplementary information, shall be served on the requested person. The first sentence shall also apply if the public prosecutor receives another European arrest warrant later which leads him to supplement or amend his request. The requested person shall be informed of the receipt of supplementary documents, which shall be added to the file. If the person arrested has no or insufficient command of the language in which the European arrest warrant is drawn up or the language of the corresponding translation, a written translation of at least the relevant parts of the European arrest warrant shall be provided to him in a language which he understands. Relevant elements shall be the Member State in which the warrant has been issued, the decision on which the arrest warrant is based and the length of the sentence to be served or a short description of the offence on which the warrant is based'.

The Dutch legislator has transposed Article 4 and 5 of the Directive, which concern the costs and quality of interpretation and translation respectively. As regards the costs of the translation and the interpretation which, pursuant to Article 4 of the Directive, should be met by the Member States the implementing provision referred to in the explanatory memorandum provides an addendum to existing rules regarding the costs of criminal procedure and legal aid. As a matter of fact, the main provision relied upon by the Dutch legislator is a new paragraph added to Article 1 of the Criminal Cases Fees Act (*Wet tarieven in Strafzaken*). Article 1(4) of this statute stipulates that if the judicial authorities have summoned an interpreter or a translator (*ex officio* or upon request of the suspect) the costs are borne by the State treasury. The same provision applies when an interpreter is summoned for the purpose of conferring with his or her counsel under Article 28(5) CCP. According to the explanatory memorandum,[60] the implementing provision departs from the general provision of Article 1(3) of the same statute which previously made it possible for defendants to be charged for interpretation and translation services they requested.

As for the quality of interpretation and translation, as indicated above, the legislator has secured the implementation of the qualitative standard requested by the Directive through the Sworn Interpreters and Translators Act (*Wet beëdigde tolken en vertalers*). As explained, this statute provided for a register of sworn interpreters and translators. The detailed regulation of this register has however been introduced through a Legislative Decree (*Besluit beëdigde tolken en vertalers*). The names of the registered sworn interpreters and translators are collected in a national database managed by the Bureau for Sworn Interpreters and Translators (*Bureau beëdigde tolken en vertalers*). Registration in the Register is subject to a number of quality and integrity conditions (e.g. a recent certificate of conduct, *verklaring omtrent het gedrag)* as provided by the Sworn Interpreters and Translators Act. The Bureau is a department of Dutch Legal Aid Council (*Raad voor Rechtsbijstand*) and is entrusted by the Ministry of Security and Justice with various implementation tasks in respect of the Sworn Interpreters and Translators Act (*Wet beëdigde tolken en vertalers*).[61] Interpreters and translators who meet all the conditions listed in the statute but who are unable to prove a foreign language proficiency because of the absence of training courses or the absence of independent experts who can test the knowledge or are unable to demonstrate the required language proficiency in the source or target language, can be included on an alternative list (*uitwijklijst)*.[62] Interestingly, the online database contains both the personal information of interpreters and translators as well as their specialisation, e.g. in criminal cases.

The quality and independence of translators and interpreters can be upheld by means of remedies available against the assistance and services provided to a person suspected within criminal

[60] Kamerstukken II 2011/12, 33355, 3, p. 14.
[61] de Boer, Nieuwenhuizen, Walz (fn 20), p. 27
[62] The legal basis of the Alternative List is the Decree Alternative List Wtbvv (*Besluit Uitwijklijst Wbtv*)

proceedings. As explained above, according to the relevant statute anyone involved in a proceeding can file a complaint against a registered interpreter or translator when they believe that quality, integrity or independency are being questioned. The complaints are being handled by an independent committee, established by law. The committee can advise the Bureau Sworn Interpreters and Translators, so that the registration concerned can be scrapped.[63] In practice, after removing registration a period up to ten years may be established in which the interpreter or translator cannot re-apply for registration. The law is not specific regarding the groups or persons affected: anyone can file a complaint. An individual can also file a complaint about the way a registered interpreter of translator has behaved towards a third person.[64]

6.2 Case-law

We now turn to the case law on the subject-matter of the current Directive, focusing on the main decisions in this regard. Unlike other case law sections in this report, in this section we have included a few decisions by lower courts to offer a more comprehensive insight into the interpretation and implementation of the Directives under national law.[65]

We therefore begin with the case law of lower courts. In ECLI:NL:GHARL:2019:3501,[66] the question of the scope of application of the right to interpretation and translation under Article 1 of the Directive was brought to the fore. In the case at issue, the suspect was appealing against a decision made by a subdistrict court (*kantonrecther*) which rejected an appeal against an administrative sanction for a traffic violation on the basis of Articles 6:5, paragraph 3 of the General Administrative Act on grounds that such an appeal was filed in the person's language (Polish) and not in Dutch. The Court of Appeal was therefore confronted with the question whether the right to free assistance by an interpreter could apply to proceedings involving the imposition of administrative sanctions. While these proceedings are not formally based on a 'criminal charge' they qualify as substantially 'criminal' for the purposes of Article 6 ECHR[67] and therefore require Member States to ensure the respect of the right to the free assistance of an interpreter, as provided for in Article 6(3)e ECHR.[68] While Directive 2010/64/EU

[63] de Boer, Nieuwenhuizen, Walz (n 20), p. 28
[64] de Boer, Nieuwenhuizen, Walz (n 20), p. 28
[65] Regarding the selection of case law for the purposes of this report, see section 5.4 above.
[66] Court of Appeal Arnhem-Leeuwarden, 19 april 2019, ECLI:NL:GHARL:2019:3501.
[67] This assessment is carried out by the ECtHR in accordance with the so-called *Engel* criteria (ECtHR, 8 June 1976, *Engel and others v the Netherlands*, n. 5100/71, § 82) The criteria are as follows: classification under domestic law, the nature of the offence and the degree of severity of the penalty.
[68] See, however, ECtHR 23 November 2006, *Jussila v. Finland*, n. 73053/01 in less severe administrative

has not been implemented to cover explicitly proceedings like those described above, a national court is under a duty to engage in a consistent interpretation that reads these safeguards in light of the wording and purpose of a directive that applies in the area concerned.[69] Arguably, the Court of Appeal espoused a broad interpretation of Article 1 of the Directive in that, contrary to what the explanatory memorandum suggests (see Section 6.1 above), it did not endorse a narrow and formalistic notion of 'criminal proceeding'. This interpretation draws on the provision of Recital 16 of the Directive, according to which the safeguards of interpretation and translation shall apply 'in relation to traffic offences which are committed on a large scale and which might be established following a traffic control'.

A further question in the same case was whether the right to obtain the free assistance of an interpreter (as per Article 6 ECHR) implies the translation, free of charge, of the act of appeal filed against an administrative sanction. The Court of Appeal argued in favour of this interpretation, in light of the overarching right to a fair trial. According to the Court of Appeal, obtaining a written translation of the act of appeal is instrumental to (or a necessary condition for) a person's right of defence. In particular, this act allows the suspect to put forward his version of the facts to the court, as required by the ECtHR in its case law.[70] Therefore, the right to interpretation extends to a translation free of charge of an appeal in proceedings such as the one in question. In light of the above considerations, the Court of Appeal concluded that Articles 6:5, paragraph 3 of the General Administrative Law Act (*Algemene wet bestuursrecht*) should be interpreted in such a way as to require that, if the applicant did not submit a translated version of the appeal, this translation has to be taken care of by the registrar of the Court of Appeal.

The case law of lower courts also deals with more substantive aspects of the rights to interpretation and translation. In ECLI:NL:RBNHO:2014:5861, a case decided by the District Court of North Holland[71] the question at issue concerned how a request for a written translation should be substantiated. As explained above, this is one of the requirements laid down by Article 32a CCP, which demands the suspect to indicate 'as clearly as possible the documents or parts of documents' to be translated and 'state the reasons' on which this request is based. In the case decided upon by the District Court, the defence had requested to translate a number of essential documents, most notably the records of the interrogations of the suspect and his co-defendants. The District Court rejected this

sanctions are different from 'hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'.

[69] CJEU 13 November 1990, *Marleasing*, C-106/89, ECLI:EU:C:1990:395.

[70] ECtHR 17 May 2001, *Güngör v. Germany* (dec.), n. 31540/96.

[71] Rechtbank Noord-Holland, 28 april 2014, ECLI:NL:RBNHO:2014:5861.

request on grounds that the defence did not explain why an oral translation of these documents, provided by an interpreter at the hearing or during the meetings with the defence lawyer, would not suffice to guarantee the person's right to a fair trial. In cases where the case file is particularly 'voluminous', the District Court argued, it would run against the principle of 'good procedural order' (*goede procesorde*) to allow the translation of a wide number of documents without a specific reason. The defence is therefore required to indicate precisely which statements need to be translated and why their oral interpretation would not suffice. As indicated above, this stance – while partly in keeping with the Article 3(3) of the Directive[72] – seems to identify the lack of oral interpretation (or the inadequacy thereof) as a precondition to obtain a written translation of essential documents. While this stance may be in keeping with ECtHR case law,[73] it appears at odds with the choice made by EU law to treat the right to written translation as an autonomous right.[74]

The different question of the need for an oral interpretation in the mother tongue of the accused was dealt with in a case decided by the Court of Appeal of the Hague in ECLI:NL:GHDHA:2018:3725.[75] The defence complained that the suspect, after his arrest on charges of drunk driving, did not receive the assistance of an interpreter in his mother tongue (Slovak language) during police questioning. As a result, according to the defence, he lacked a complete understanding of the outcomes of the breath-test analysis. It however appeared from the official records, that the suspect had a sufficient command of the German language and was then able to interact with the interrogating officer in that language. On this basis, the Court of Appeal concluded that the judgement delivered by the court in first instance had not violated Article 6 ECHR. Interestingly, in this case both the Court of Appeal (and significantly, the defence in their appeal) failed to refer to Directive 2010/64/EU.

More recently, questions concerning the interpretation of the right to a written translation of documents have reached the Supreme Court of the Netherlands. Two cases stand out most notably. In HR 21 april 2020, ECLI:NL:HR:2020:770, NJ 2020/326, a suspect claimed that the judgement

[72] This provision stipulates that 'suspected or accused persons or their legal counsel may submit a reasoned request to that effect'.
[73] After all the Strasbourg court has extracted this right from Article 6(3)e, which merely provides for the right to obtain the assistance of an interpreter in court. What is more the ECtHR has often admitted that, as the text of the relevant provisions in the ECHR refer to an 'interpreter', not a 'translator', oral linguistic assistance may satisfy the requirements of the Convention, see ECtHR, 24 February 2005 (dec.) *Husain v. Italy*, n. 18913/03: see also J. Brannan, 'Raising the standard of language assistance in criminal proceedings: from the rights under Article 6(3) ECHR to Directive 2010/64/EU', *Cyprus Human Rights Law Review,* 2012, pp. 128-156.
[74] J. Brannan, 'Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law', *Journal of Specialised Translation*, 2017, pp. 43-57.
[75] Gerechtshof Den Haag, 20 december 2018, ECLI:NL:GHDHA:2018:3725

rendered in first instance had not been notified along with an ad hoc written translation of the notice of the judgment (rendered by a District Court) in a language that he could understand, contrary to the newly amended Article 366(4) CCP (see above 6.1.2): as a result of this lack of translation he was not able to lodge an appeal with the Court of Appeal against the judgement mentioned above within the period of fourteen days since the actual knowledge of the verdict. A derogation from this rule is only admissible when the delay can be regarded as 'reasonable'. In the case at hand, the delayed submission by the suspect could not be regarded as reasonable; this, despite the lack of notification of the translated judgement, because it appeared that before the court of first instance the suspect had received a translated version of summons, along with a leaflet, indicating the possibility of appeal and the applicable time limits. The Supreme Court,[76] however, found the reasoning of the Court of Appeal to be ill-founded. In particular, according to the Supreme Court, the provisions of Article 32a CCP need to be interpreted in light of the ultimate aims of Directive 2010/64/EU which requires translating the judgment notice) namely 'to ensure that also the defendant who does not or insufficiently master the Dutch language is informed of those parts of the judgment which are important with a view to the possibility of lodging an appeal'.

In HR 8 oktober 2020, ECLI:NL:HR:2019:1534.,[77] the Supreme Court found that the lack of notification of the judgement in a written translation pursuant to Article 366(4) CCP imperilled the right to a fair trial of suspect who could not challenge a lower court's decision within fourteen days and had his appeal declared inadmissible. In this case, the Court found that the simple fact of having contact with a lawyer in specialised in immigration law[78] did not offer reasons to believe that the person was aware of the contents of the appealed judgement. With these decisions the Dutch Supreme Court seems to break away from its existing case law.[79] The knowledge of a decision for the purposes of applying the time limit to lodge an appeal does not arise automatically from the mere receipt of the notification of the judgment but instead from an effective understanding of its contents. It is noteworthy that the Supreme Court does not seem to follow the same line of reasoning when it comes to the lack of translation of summons (and the corresponding indictment) when in the subsequent trial hearings, the person concerned has been assisted by a lawyer or when it can be deducted that the person was aware of the trial.[80] This approach betrays a limited understanding of the rationale behind the right to a written translation of the summons or indictment: this is not, as the Supreme Court

[76] HR 21 april 2020, ECLI:NL:HR:2020:770, *NJ* 2020/326.
[77] HR 8 oktober 2020, ECLI:NL:HR:2019:1534.
[78] With whom the person had been in touch in the assumption that the document received related to his residence status.
[79] J.W. Ouwerkerk, noot aan HR 21 april 2020, ECLI:NL:HR:2020:770, *NJ* 2020/326.
[80] HR 8 oktober 2019, ECLI:NL:HR:2019:1541.

seems to suggest, exclusively geared to inform the suspect of the trial hearing. Rather, it serves the purpose of allowing suspects prepare their defence for the sake of fair trial.

7 Directive 2012/13/EU: Right to information in criminal proceedings

7.1 Legislation

7.1.1 Introduction

Directive 2012/13/EU (hereafter: the Directive) was implemented into Dutch law through the Act of 5 November 2014, *Staatsblad* 2014, 433 (entry into force 1 January 2015, *Staatsblad* 2014, 434).[1] In this report, however, reference is made to the consolidated version of the applicable laws into which the Directive has been implemented, not to the implementing Act itself.

The rights and provisions of the Directive can be found in the Dutch Code of Criminal Procedure (hereafter: CCP) and the Surrender of Persons Act, as well as delegated legislation in the form of a Legislative Decree (*algemene maatregel van bestuur*). While certain rights of the Directive required (some) explicit transposition into national law (Articles 3, 4, 5, 6(1) and (2), 8(1)), others already had a basis in national law (Article 6(3) and (4), 7, 8(2)). The relevant national provisions are set out below, per right of the Directive.[2]

Regarding the scope of application of the Directive, as set out in Article 2 thereof, it should be noted that the required scope of the right to information follows from the various provisions implementing Articles 3 to 7 of the Directive, each of which are addressed below. In this regard it is worth noting that the main provision implementing the Directive – Article 27c CCP – can be found in Title II of the First Book of the CCP, titled *'De verdachte'*.[3] This title is applicable to criminal proceedings in their entirety, i.e. all stages thereof. As for the exception provided for in the second paragraph of Article 2 allowing the national legislator *not* to apply the right to information to criminal proceedings through which minor offences are settled out of court, the legislator opted not to do so and to apply the rights of the Directive to any person suspected or accused of a crime. The reason for this is that

[1] The underlying parliamentary dossier is numbered 33871 and publicly available on zoek.officielebekendmakingen.nl.
[2] In addition, Articles 4, 5, 8 and 9 of the Directive are addressed separately.
[3] As stated in the Introduction, is an idiosyncratic Dutch term which encompasses both the person against whom there are reasonable grounds to suspect they have committed a criminal offence and the person against whom criminal proceedings have been initiated, as apparent from Article 27 CCP; see section 5.2.

at the time of arrest, often it will not yet have been determined whether or not the case will be settled out of court.

7.1.2 Right to information about rights and Letter of Rights on arrest (Artt. 3 and 4 of the Directive)

According to the legislator, Article 3 of the Directive finds implementation in Articles 27c(1) and (2) and 29(2) of the CCP (which provides for the right to remain silent[4]), Article 27c having been introduced into the CCP for the specific purpose of implementing the Directive. Article 4 of the Directive also finds implementation in Article 27c CCP, specifically paragraphs 3 and 4 thereof, as well as in delegated legislation in the form of a Legislative Decree – Decree on information about rights in criminal proceedings (*Besluit mededeling van rechten in strafzaken*) – and the Official instruction for the police, the royal gendarmerie and other investigating officers (*Amtsinstructie voor de politie, de Koninklijke Marechaussee en andere opsoringsambtenaren*).[5]

Articles 3 and 4 of the Directive both required explicit transposition into the Directive, since prior to the introduction of Article 27c, the CCP did not provide for the right to be informed of certain fundamental rights promptly, and while in practice suspects were provided with information on certain rights (for example, this was already standard practice in respect of suspects to have been arrested), this did not occur in all situations envisaged by the Directive, or in respect of all of the rights stipulated by the Directive in this regard.[6] In this regard it should be noted that prior to the ECtHR's judgment in the case of *Salduz v. Turkey*,[7] Dutch law did not provide for the right to consult a lawyer prior to police questioning, i.e. for access to a lawyer without undue delay.[8]

[4] It will receive no further attention in this chapter.
[5] The decree and instruction are only relevant to Art. 4(2)(c) of the Directive: the requirement that the Letter of Rights contain information about the right of access to urgent medical assistance. Article 27c(3)(i) CCP (see the text at n **Error! Bookmark not defined.**) refers to additional rights that arrested suspects must be informed of, as set by legislative decree. That decree is the Decree on information about rights in criminal proceedings, which in Article 1(c) thereof provides that the Letter of Rights as per Article 27c(3) CCP shall also include 'what follows from the Official instruction for the police, the royal gendarmerie and other investigating officers'. The Official instruction, in turn, stipulates how the investigative authorities are required to act when the detainee is in need of medical assistance. The decree and instruction will receive no further attention in this chapter.
[6] See in this regard the explanatory memorandum to the implementing Act (see Section 7.1.1 above): *Kamerstukken II* 2013-2014, 33871, 3, p. 16-18.
[7] ECtHR 27 November 2008, *Salduz v. Turkey*, n. 36391/02.
[8] More is said about this right below, in Chapter 8.

Like the Directive, Article 27c CCP distinguishes between arrested and non-arrested suspects as regards the moment from which the required information about rights must be provided, as well as the rights that the suspect must be informed of. Article 27c(1) provides that '[u]pon being stopped or arrested, the suspect shall be informed of which criminal act he is suspected of having committed. The suspect who was not stopped or arrested shall be informed of the accusation at the latest preceding the first interrogation'. Paragraph 2 applies only to suspects not have been arrested, while paragraph 3 applies only to arrested suspects. Overall, Article 27c appears to comply with Articles 3 and 4 of the Directive, but there is critical discussion in this regard (and in our view understandably so). A particular point of discussion in the legislative process (which has now made its way to the case law, as will be seen below in Section 7.2) concerns Article 27c(1), pursuant to which suspects must be informed of 'which criminal act' (*'welk strafbaar feit'*) they are suspected of having committed. The Council of the Judiciary (*Raad voor de rechtspraak*) argued that upon arrest, solely informing the suspect of which criminal act they are suspected, without reference to the particular facts and circumstances underlying the suspicion, was insufficient, and that even at this early stage of the proceedings more detailed information should be provided on the accusation. The legislator disagreed however, referring to Recital 28 of the Directive, thereby relying on the words 'taking into account the stage of the criminal proceedings when such a description is given' and pointing the case law of the European Court of Human Rights, which provide that upon deprivation of liberty of the suspect, the more time that passes, the more that is required by way of substantiation of the suspicion.[9] In our view (and that of the Council of the Judiciary), however, merely informing the suspect of which criminal act they are suspected, for example merely referring to the provision in the Criminal Code or elsewhere, is at odds with the remaining text of Recital 28, i.e. that '[a] description of the facts, including, where known, time and place, relating to the criminal act … and the possible legal classification of the alleged offence should be given in sufficient detail'. A further point concerns Article 4(1) of the Directive: The second sentence ('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') has not been transposed.

As to Article 3(2) of the Directive, due to the nature of this provision, which merely deals with matters of enforcement, the legislator considered implementation unnecessary. In this regard reference was made to Recital 38 of the Directive's preamble, where it was acknowledged that 'a practical and effective implementation of some of the provisions such as the obligation to provide suspects or accused persons with information about their rights in simple and accessible language could be achieved by different means including non-legislative measures'.

[9] See in this regard the explanatory memorandum: *Kamerstukken II* 2013-2014, 33871, 3, p. 15.

Finally, it is worth noting here that the legislator opted not to implement the Indicative model Letter of Rights provided for in Annex I of the Directive, deciding instead to develop one of its own.[10]

7.1.3 Letter of Rights in European Arrest Warrant proceedings (Art. 5 of the Directive)

According to the legislator, Article 5(1) of the Directive finds implementation in Articles 17(3) and 21(1) of the Surrender of Persons Act, the Act implementing Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. As to Article 5(2) of the Directive, according to the legislator, due to the nature of this provision, which merely deals with matters of enforcement, implementation was considered unnecessary (again, by reference to Recital 38 of the Directive's preamble).

Whereas Article 17 of the Surrender of Persons Act concerns the provisional arrest of a requested person on the basis of an alert, Article 21 concerns arrest on the basis of a European Arrest Warrant (and declares that Article 17(3) applies mutatis mutandis). Article 17(3) provides that '[u]pon arrest, the requested person shall be promptly informed in writing about a number of rights, including the right to receive a copy of the EAW, the right of access to a lawyer and the possibility to request the appointment of a lawyer in the issuing Member State, the right to interpretation, the right to translation, and the right to be heard. Worth noting here is that the legislator initially proposed to include in the Letter of Rights in EAW proceedings only the rights of access to a lawyer, the rights to interpretation and translation and the right to be heard. But following the suggestion of the Dutch Association for the Judiciary (*Nederlandse Vereniging voor Rechtspraak*), it also added the right to receive a copy of the EAW itself (as soon as it has been provided by the issuing Member State). In this regard it was mentioned that in those situations where the requested person has been arrested on the basis of an alert (usually an alert in the Schengen Information System), the EAW will not be available immediately.

Finally, it is worth noting here that the legislator opted not to implement the Indicative model Letter of Rights provided for in Annex II of the Directive, deciding instead to develop one of its own.[11]

7.1.4 Right to information about the accusation (Art. 6 of the Directive)

According to the legislator, Article 6 of the Directive finds implementation in various provisions of the CCP. Specifically, paragraphs 1 and 2 find implementation in Article 27c(1), which was newly

[10] They can be found online in various languages as well as in audio versions: https://www.rijksoverheid.nl/documenten/brochures/2014/10/20/mededelingen-van-rechten-aan-de-verdachte.
[11] See in this regard the text above at the end of Section 7.1.2.

introduced into the CCP for the purpose of implementing the Directive, and Articles 59(2) and 78(2), which were already in place. Paragraphs 3 and 4 also find implementation in CCP-provisions that were already in place.

Regarding Article 6(1) and (2) of the Directive, Article 27c(1) CCP covers both arrested and non-arrested persons. To arrested persons, information about the accusation must be provided upon arrest (first sentence); to non-arrested persons, information about the accusation must be provided at the latest prior to the first police interrogation (second sentence). Although the official position of the legislator is that the provision has been fully implemented, as noted above, there was (and continues to be) critical discussion in this regard, in particular as regards the degree of detail in which the authorities are required to inform the suspect about the criminal act. According to the legislator, in the determination of how detailed information should be, the police may take into account the stage of proceedings; in the very first stage of arrest, very detailed information is not automatically required, whereas closer to indictment, sufficient details are increasingly required in order to enable the suspect to prepare his defence.

Regarding Article 6(2) of the Directive as it relates to the state of *detention* in particular, Articles 59(2) and 78(2) of the CCP provide for the right to be informed about the accusation in the context of police custody (*inverzekeringstelling*) and pre-trial detention (*voorlopige hechtenis*), respectively.[12]

Article 6(3) and (4) of the Directive were implemented entirely through existing legislation. According to the legislator, Article 6(3) of the Directive finds implementation in Articles 258 and 261(1) and (2) CCP. Whereas Article 258 CCP determines that for a criminal trial to begin, a summons must have been served, Article 261(1) to (2) CCP stipulates that such a summons must include the offence underlying the summons, the time and place of the alleged crime, the applicable statutory provisions, and the circumstances under which the offence has allegedly been committed. Article 6(4) of the Directive finds implementation in Article 265, 313 and 314 of the CCP. Together, these provisions cover the rights envisaged in Article 6(4) of the Directive. Article 265 CCP concerns

[12] Article 59(2) CCP provides that the police custody order or its extension 'shall specify as precisely as possible the criminal offence, the grounds on which it is issued and the specific circumstances that led to the assumption of these grounds'. Article 78(2) CCP provides that the pre-trial detention order or its extension 'shall specify as precisely as possible the criminal offence in regard of which the suspicion has arisen and the facts or circumstances on which the serious suspicions against the suspect are based, as well as the conduct, facts or circumstances which show that the conditions set in Section 67a [CCP] have been met'. Both translations are borrowed from: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf (unofficial translation; official translation not available).

the minimum amount of days that must expire as of the day on which the summons has been served and the actual court session. This term also applies (i.e. restarts) upon amendment of the indictment, thereby ensuring timely notification to the subject on any changes. Articles 313 and 314 deal with amendments to the indictment after the start of the trial stage.

7.1.5 Right to access to the materials of the case (Art. 7 of the Directive)

According to the legislator, Article 7 of the Directive finds implementation in various pre-existing provisions of the CCP which together make up the legal framework regulating access to the materials of the case (in Dutch: *kennisneming van processtukken*). Put differently, no explicit implementation was required, because the law already in place was compliant with the requirements of Article 7 of the Directive.

Specifically, the following provisions are cited as implementing Article 7 of the Directive: Articles 30(1), 33, 34(4), 137, 149a(2) and 149b of the CCP, and Article 7(2) of the Decree on case materials (Besluit processtukken). Article 30(1) provides for access of the suspect to the 'materials of the case' which is then defined (broadly) in Article 149a(2). Materials may be withheld from the suspect, but pursuant to Article 33 CCP only in the phase preceding the issue of the summons to appear before the court of first instance or of a punishment order. However, this is subject to Article 149b CCP, which provides for an exception to the rule that from a certain point, the suspect must have access to the materials of the case. The grounds on which access may be denied can be found in Article 187d(1) CCP and are: that granting access would cause serious inconvenience to the witness or seriously hinder him in the performance of his office or profession, would prejudice a compelling investigative interest, or would prejudice the interest of state security. In order for the public prosecutor to be able to withhold information pursuant to Article 149b(1), they must obtain authorisation from the investigating judge.

Regarding Article 7(1) of the Directive, which according to the official position finds implementation in Article 30(1) of the CCP, one of the stakeholders to have been consulted in an early stage of the legislative process of implementing Directive 2012/13/EU – the Dutch Bar Association – pointed out that whereas the Directive compels Member States in more general terms to ensure that case materials 'are made available', the Dutch provisions regarding access to case materials (including Article 30(1)) express a system in which the defendant or his lawyer must first submit a request for that purpose.

Another issue that was raised in the context of Article 30(1) CCP, relates to the definition of 'case materials' (in Dutch: *processtukken*) in Article 149a(2) CCP (a provision that is considered to establish a de facto implementation of paragraphs 2 and 3 of Article 7 of the Directive, in particular). In Article 149a(2), case materials are defined as 'all materials which could reasonably be relevant to

court decisions to be taken during trial proceedings'. According to the Dutch Association for the Judiciary, this definition does not necessarily, or evidently, encompass the documents necessary in order to be able to challenge the lawfulness of arrest or detentions, such that this might lead to discussion in practice. In response to the Association's remarks, however, the legislator stated that the fact that the case file is prepared with a view to the trial stage of proceedings meant that logically, documents relevant to the lawfulness of arrest and detention, should make up the case file.

Regarding Article 7(4) of the Directive, which concerns derogations from the right of access to the case materials, a discrepancy was observed in the legislative process between the interests that qualify for derogation under the Directive and the interests that qualify for derogation under the CCP. Both the Council of State (*Raad van State*) and the Dutch Association for the Judiciary pointed out that under both Articles 34(4) and 149b CCP, a derogation from the right of access to case materials is, inter alia, permitted if access to the materials would cause serious inconvenience to the witness or seriously hinder them in the performance of their office or profession. They then argued that this ground to refuse access to the case file is broader than that which is permitted under Article 7(4) of the Directive, especially when compared to the refusal ground that granting access to certain materials may lead to 'a serious threat to the life or fundamental rights of another person'. According to the legislator, however, there is no discrepancy in this regard, despite their differences in wording.[13]

7.1.6 Verification and remedies (Art. 8 of the Directive)

According to the legislator, Article 8 of the Directive finds implementation in Article 27c(5) of the CCP – again, Article 27c having been introduced into the CCP for the purpose of implementing Directive 2012/13/EU – as well as several pre-existing provisions of the CCP. Thus, the official position is that for the most part, Article 8 of the Directive did not require express transposition into national law, the only new provision having been adopted in this regard being Article 27c(5) CCP, which lays down the obligation to record the very communication of rights (flowing from Article 8(1) of the Directive). All other provisions that de facto implement Article 8(1) of the Directive – Articles 25(1), 57(3), 152(1), 172(1), 326(1) and 589 CCP[14] – were already in force and each concern (a broader obligation to officially record in) a different stage of the proceedings.

[13] See in this regard explanatory memorandum: *Kamerstukken II* 2013-2014, 33871, 3, p. 10.

[14] The provisions in question can be read here: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf (unofficial translation; official translation not available).

Article 8(2) of the Directive, meanwhile, finds implementation in Articles 30(4) and 404 of the CCP. Article 30(4) CCP provides a mechanism by which the suspect may object to the incompleteness of the case file before the investigating judge. Article 404 CCP provides for a general right to appeal.

Interestingly, the legislator does not refer to Article 359a of the CCP, the mechanism by which the judge in trial proceedings may attach legal consequences to procedural violations committed in the pre-trial phase of proceedings. At the same time, however, and as can be read below, violation of the right to be informed of the accusation need not lead to any such consequences. Noticeable in any case is the absence of timely and effective (judicial) remedies in respect of (imminent) breaches of the rights provided for in the Directive, none of the remedies cited in this regard (and the remedy provided by Article 359a CCP) providing for a remedy without undue delay. The assumption appears to be that unfairness in the pre-trial stage can always be remedied at a later stage of the proceedings.

7.1.7 Training (Art. 9 of the Directive)

According to the legislator, due to the nature of Article 9 of the Directive, which merely deals with matters of enforcement, implementation was not necessary. As put forward in the explanatory memorandum to the proposed implementing act, in the course of educating and training the police, the judiciary and other relevant authorities sufficient attention exists for those aspects that ensure achieving the objectives of Directive 2012/13.[15]

7.2 Case-law

We now turn to the case law on the subject-matter of the current Directive, focusing on the main decisions in this regard. Here decisions issued by the Supreme Court offer a sufficient body of case law to reflect on the interpretation and implementation of the Directive.[16]

The first decision concerns the information to be provided to the suspect upon arrest about the accusation, while the second decision concerns the use of statements obtained in violation of the right to information about rights.

In HR 20 april 2021, ECLI:NL:HR:2021:593, the question was whether the suspect's right to information about the accusation against them can be considered to have been observed where the suspect has only been informed of the number of the applicable legal provision (i.e. the applicable criminal prohibition) without further details to clarify the accusation. According to the Court of

[15] See in this regard explanatory memorandum: *Kamerstukken II* 2013-2014, 33871, 3, p. 13
[16] Regarding the selection of case law for the purposes of this report, see section 5.4 above.

Appeal, the right envisaged in Article 6 of Directive 2012/13/EU does not require more detailed information to be provided at the time of arrest. In this regard the Court of Appeal refers to Recital 28 of the preamble to the Directive, pursuant to which in providing information about the accusation, the authorities may take into account the interests of ongoing investigations and stage of the proceedings. Accordingly, only providing the number of the applicable legal provision complies with the minimum requirements set out in Article 6(1) of the Directive. On appeal in cassation, the Supreme Court upheld the Court of Appeal's ruling, observing that the Court of Appeal had made this ruling on the basis that at the first round of questioning (but after the suspect had consulted his lawyer), the suspect had been provided with more information regarding the accusation, which the suspect said he understood. To this the Supreme Court added that even in circumstances in which the information provided upon arrest did not put the suspect in a position to understand the accusation against them, this need not automatically entail a restriction of the right of access to a lawyer prior to questioning or the right to have a lawyer present and participate during questioning. The approach of the Supreme Court echoes the formalistic approach adopted by the legislator to this matter, as set in Section 7.1.2 above. There we questioned whether such an approach can really be said to be in line with Recital 28 of the Directive, given that Recital 28 also provides that '[a] description of the facts, including, where known, time and place, relating to the criminal act … and the possible legal classification of the alleged offence should be given in sufficient detail'.

HR 30 mei 2017, ECLI:NL:HR:2017:968 deals with the question of whether evidence must be excluded when obtained during police questioning prior to which the defendant had not been fully informed of their right to consult a lawyer free of charge prior to such questioning. As follows from the established facts of the case, the suspect had indeed been informed of his right to consult a lawyer prior to police questioning, but he had wrongly been told that he would have to bear the costs of exercising this right himself. Upon this notification, the suspect waived his right to consult a lawyer prior to police questioning. In lodging an appeal in cassation, he claimed that the Court of Appeal had been wrong in ruling that his right to information had not been violated and that the evidence obtained should therefore not be excluded. On appeal in cassation, and unlike the Court of Appeal, the Supreme Court was of the view that the suspect's right under Article 3(1)(b) of Directive 2012/13/EU had been violated, given that he had wrongly been told that consultation of a lawyer prior to questioning would be at his own expense. At the same time, however, the Supreme Court ruled that no consequence need be attached to the violation (such as the exclusion of evidence obtained thereby, as provided for under Article 359a of the CCP), since the procedural violation had not caused the suspect any harm (he had waived his right and did not claim that he would not have waived his right had he been notified correctly). This last aspect of the Supreme Court's judgment in this case is, it should be noted, exemplary of its approach to the question of how to address procedural violations committed in the

pre-trial stage of the proceedings, which heavily restricts the ability of the trial judge in criminal proceedings to attach consequences to such violations.

8 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

8.1 Legislation

8.1.1 Introduction

Directive 2013/48/EU (hereafter: the Directive) was implemented into Dutch law through the Act of 17 November 2016, *Staatsblad* 2016, 475 (entry into force 1 March 2017, *Staatsblad* 2017, 66).[1] In this report, however, reference is made to the consolidated version of the applicable laws into which the Directive has been implemented, not to the implementing Act itself.

The rights and provisions of the Directive can be found in various laws, but principally the Dutch Code of Criminal Procedure (hereafter: CCP). The other national laws in which such rights and provisions can be found are the Surrender of Persons Act, the Custodial Institutions (Framework) Act (*Penitentiaire beginselenwet*),[2] the Young Offenders Institutions (Framework) Act (*Beginselenwet justitiële jeugdinrichtingen*)[3] and the Dutch Civil Code (*Burgerlijk Wetboek*), as well as delegated legislation in the form of a Legislative Decree (*algemene maatregel van bestuur*).

As stated in the Introduction,[4] the implementation of Directive 2013/48/EU was accompanied by an extensive legislative process and significant changes to existing legislation (principally the CCP) in order to incorporate it into national law. Most notably, certain aspects of the right of access to a lawyer in criminal proceedings provided for in Article 3 of the Directive – access to a lawyer without undue delay and access to a lawyer at the time of *police* questioning – required explicit transposition into national law. Other rights of the Directive to have been explicitly transposed are the right to have a lawyer attend certain investigative or evidence-gathering acts provided for in Article 3; the right to have a third person informed of the deprivation of liberty provided for in Article 5; the right to communicate with consular authorities provided for in Article 7; and the right of access to a lawyer

[1] The underlying parliamentary dossier is numbered 34157 and publicly available on zoek.officielebekendmakingen.nl.
[2] Entered into force on 1 January 1999. For the consolidated version, see https://wetten.overheid.nl/BWBR0009709/2021-07-01.
[3] Entered into force on 1 September 2001. For the consolidated version, see https://wetten.overheid.nl/BWBR0011756/2021-01-01.
[4] Specifically, Section 5.3.

in European arrest warrant proceedings provided for in Article 10. The remaining (aspects of the) rights of the Directive – the right of access to a lawyer at the time of *judicial* questioning and the right to meet in private and communicate with the lawyer representing them provided for in Article 3 and the right to communicate, while deprived of liberty, with third persons provided for in Article 6 – did not require explicit transposition, however, since such rights already had a basis in national law. As to other provisions of the Directive, while Article 4 of the Directive on the confidentiality of communication between suspects or accused persons and their lawyer already had a basis in national law, Article 8 on the general conditions for applying temporary derogations and Article 9 on the waiver were explicitly transposed. Regarding the 'exceptions' provided for in the Directive, while the Dutch legislator opted to make use of the exceptions provided for in Articles 2(4)(a), 3(6) and 5(3) and expressly transposed them into national law, it opted not to make use of the exceptions provided for in Articles 2(4)(b) and 3(5) thereof. The relevant national provisions are set out below, per right of the Directive.[5]

8.1.2 The scope of application

As a preliminary observation regarding the scope of the Directive as a whole, most of the provisions incorporated into, or amended in, the CCP for the purposes of implementing Articles 3 to 9 of the Directive can be found in Title II of the First Book of the CCP, titled *'De verdachte'* (which, as stated in the Introduction, is an idiosyncratic Dutch term which encompasses both the person against whom there are reasonable grounds to suspect they have committed a criminal offence and the person against whom criminal proceedings have been initiated, as apparent from Article 27 CCP). This title is applicable to criminal proceedings in their entirety, i.e. all stages thereof.

Regarding the (scope of the) right of access to a lawyer in criminal proceedings in particular, it was necessary to change existing law to ensure compliance with the Directive in terms of its scope (and, in particular, the stipulation that the Directive applies 'from the time when ... [the suspect or accused is] made aware by the competent authorities ... that they are suspected or accused of having committed a criminal offence'), by 'bringing forward' the moment from which the suspect is entitled to exercise this right. Prior to implementation, the law provided that the suspect was entitled to have a lawyer present during the hearing/arraignment held for the purpose of determining whether to order police custody (*inverzekeringstelling*) (although, according to the legislator, it rarely came to this in practice, since the law did not require the authorities to take active steps to make it possible for the suspect to have access to a lawyer immediately following their arrest; it only required the authorities to do so once police custody had been ordered), whereas pursuant to the CCP, suspects should be made aware of any such suspicions or accusations when they are 'stopped' (*staandegehouden*) or arrested (Article

[5] In addition, Articles 4, 9 and 12 of the Directive are addressed separately.

27c(1) CCP), which precedes that hearing. Under current law, the authorities are required to take active steps to make it possible for the suspect to have access to a lawyer immediately following their arrest (see Article 28b CCP). According to the Dutch legislator, of all of the 'points in time' provided for in Article 3(2) of the Directive, in the Netherlands, arrest is the earliest. In the Netherlands, therefore, the earliest point in time at which the authorities are required to take active steps to ensure that the suspect may exercise their right of access to a lawyer is immediately after arrest. To this end, Article 28b was newly introduced into the CCP.

A further point in this regard is that Article 2(1) of the Directive provides that the Directive, and the right of access to a lawyer in criminal proceedings provided for therein, 'applies to suspects or accused persons in criminal proceedings ... irrespective of whether they are deprived of liberty'. While the Dutch legislator recognises that the right of access to a lawyer in criminal proceedings also applies to the suspect who has *not* been deprived of their liberty, it did not consider it necessary to expressly provide for this right in the CCP (suspects not to have been deprived of their liberty being free to contact a lawyer if they so wish, a principle implicit in the CCP). Indeed, the legislator only considered it necessary to provide for this right in the CCP insofar as its exercise is dependent on the authorities taking active steps in this regard. Thus, while the CCP now makes express provision for the right of the suspect to have been deprived of their liberty (i.e. to have been arrested) to consult a lawyer prior to questioning (see Article 28c CCP), it does not do so for the suspect not to have been deprived of their liberty, on the basis that such persons are in a position to arrange consultation with a lawyer prior to questioning themselves (although pursuant to Article 27c(2) CCP, the authorities are required to inform such persons of their right to consult a lawyer prior to questioning). Prior to implementation, Article 28 CCP already provided for a right – or more accurately, a power (*bevoegdheid*) – of the suspect to be assisted by counsel (pursuant to the Directive, this provision was amended, but the general power – or, as the provision now reads, right – of the suspect to, in criminal proceedings, be assisted by counsel was preserved). As the right to have a lawyer present and participate during questioning would always seem to require active steps on the part of the authorities, the relevant provision in the CCP (Article 28d CCP) applies to suspects to have been deprived of their liberty, and those who have not, alike. In a sense, therefore, Dutch law does distinguish between suspects who have been deprived of their liberty, and those who have not, as regards the right of access to a lawyer (at least as regards the right to consult a lawyer prior to questioning). For this position, it relies on Article 3(4), second sentence, of the Directive, and on Recitals 27 and 26 thereof.

Article 2, paragraphs 2 and 3 were also expressly transposed into national law, in Article 43a of the Surrender of Persons Act and Article 27d of the CCP, respectively. For the former provision, the reader is referred to Section 8.1.9 below, while regarding the latter, it is worth noting that prior to implementation, it was already accepted practice to suspend questioning when in the course thereof

the witness became a suspect, or to inform the person concerned that they are not obliged to answer before proceeding with questioning. However, in order to ensure that such persons are able to fully exercise the rights in the Directive, the legislator deemed it necessary to introduce a new provision into the CCP – Article 27d – providing, on the one hand, that the law enforcement officer is obliged to inform the person being questioned whether they are being heard as a witness or a suspect (which had not been common practice prior to implementation), and on the other hand, that when in the course of questioning a witness becomes a suspect, the law enforcement officer is obliged to inform the person concerned of their rights, including the right of access to a lawyer. Regarding the latter obligation, Article 27d(2) CCP provides that the law enforcement officer is only obliged to inform the person concerned of their rights where it is intended to continue the questioning.

A final point regarding the scope of the Directive is that, as stated above, the Dutch legislator opted to make use of the exception provided for in Articles 2(4)(a) thereof, pursuant to which []. The reason for this was it had become apparent that the applicability of the right of access to a lawyer 'on the street' was giving rise to enforcement problems. By way of illustration, the legislator referred to the situation of a person caught urinating in public insisting on seeing a lawyer (having been informed of his right of access to a lawyer without undue delay and despite having to cover the costs thereof himself) in order to avoid having questions put to him regarding his involvement in the offence, there and then. Law enforcement officers would then either have to arrest him (which may not be necessary or proportionate in the circumstances), or arrange to meet with him at a later date, at a 'place of questioning' (which may not be available), in order to put questions to him. According to the legislator, this situation was unworkable. Article 28ab was therefore introduced into the CCP, which is applicable to minor offences in respect of which the law prescribes disposal by means of a penal order issued by the public prosecutor (*strafbeschikking*). To this end, delegated legislation (in the form of a Legislative Decree) has been drawn up stipulating which minor offences fall under this category (see the *Besluit beperking rechtsbijstand bij overtredingen*, although it does not seem to have come into effect yet).

8.1.3 The right of access to a lawyer in criminal proceedings (Art. 3 of the Directive)

Before addressing the various aspects of Article 3 of the Directive,[6] as a matter of context it should first be noted that prior to the ECtHR's judgment in the case of *Salduz v. Turkey*,[7] Dutch law did not provide for the right to consult a lawyer prior to police questioning or the right to have a lawyer present and participate during such questioning. It did, however, provide for the right to have a lawyer present and participate during questioning by the *judicial* authorities. Regarding the right to have a

[6] See in this regard section 8.1.1 above.
[7] ECtHR 27 November 2008, *Salduz v. Turkey*, n. 36391/02

lawyer present and participate during questioning by the judicial authorities, according to the Dutch legislator, this right was already provided for in the CCP, albeit impliedly, at the time of implementation, and no amendments or supplements were necessary in this regard in light of the Directive.[8] Regarding the right to have a lawyer present and participate during questioning by the *police* however, the situation was very different. Pursuant to the *Salduz*-judgment, the Dutch Supreme Court recognised the right of the suspect who has been arrested to consult a lawyer prior to questioning in its case law, but declined to recognise a right to have a lawyer present and participate during questioning, on the basis that the ECtHR's case law was not unequivocal in this regard.[9] This was followed in 2010 by the adoption by the Board of Procurators General (*College van procureurs-generaal*; the body in charge of the Dutch Public Prosecution Service) of 'instructions' (*Aanwijzing rechtsbijstand politieverhoor*) – internal policy – setting out the procedure to be followed by the police in guaranteeing the right recognised by the Dutch Supreme Court. On several occasions since the *Salduz*-judgment was handed down (most recently in December 2016), the Dutch Supreme Court had pointed to the need for a more general set of rules on the right of access to a lawyer in the investigative phase, while simultaneously arguing that it was not for the Supreme Court, but for the legislator, to do so. At the time of adoption by the Council and the European Parliament of the Directive, draft legislation aimed at incorporating the *Salduz*-jurisprudence into the CCP (and answering the Supreme Court's calls for general rules to be put in place) was being circulated, but this draft legislation was abandoned when the Directive was adopted. New draft legislation was drawn up for the purpose of implementing the Directive, which has since come into effect.

8.1.3.1 The right of access to a lawyer without undue delay and of access to a lawyer at the time of police questioning

The right of access to a lawyer without undue delay and of access to a lawyer at the time of police questioning are laid down in Articles 28, 28b, 28c, 28d and 489 of the CCP. The relationship between these provisions can be summarised as follows. Article 28 CCP provides for a general right of access to a lawyer in criminal proceedings, 'in the manner stipulated in the CCP', and is applicable to criminal proceedings in their entirety. Article 28b provides for the right of access to a lawyer without undue delay after deprivation of liberty, i.e. arrest. Article 28c CCP provides for the right of the suspect to have been deprived of their liberty (arrested) of access to a lawyer prior to police

[8] In making this finding, the legislator referred to the ability of the investigating judge to put questions to the suspect in the context of police custody, pre-trial detention (*voorlopige hechtenis*) and the investigating judge's own investigations, and of the trial judge in the course of the trial proceedings. According to the legislator, the relevant provisions in the CCP (Articles 28, 57(2), 59a(2), 63(4), 65(1) in conjunction with 23(3), 86(2), 186a and 331(1)) imply the presence and participation of the suspect's lawyer.
[9] See HR 30 juni 2009, ECLI:NL:HR:2009:BH3079 and HR 1 april 2014, ECLI:NL:HR:2014:770.

questioning and for whom, pursuant to Article 28b CCP, a lawyer is available. Articles 28b and 28c should therefore be read together. Article 28d CCP provides for a general right of the suspect to have a lawyer present and participate during police questioning, regardless of whether they have been deprived of their liberty. Finally, Article 489 CCP applies when the suspect to have been arrested is a child. While some of these provisions are reproduced in whole or in part, others are briefly described.

Article 28 CCP

(1) The suspect shall have the right to be assisted by defence counsel in accordance with the provisions of this Code.

(2) Legal assistance shall be provided to the suspect in accordance with the manner provided by law, by an assigned defence counsel or defence counsel of his choice.

(3) In special cases and upon reasoned request by the suspect, more than one defence counsel may be assigned.

(4) On each occasion that he requests to speak to his defence counsel, the suspect shall be given the opportunity to do so as much as possible.[10]

Article 28b CCP

(1) If a vulnerable suspect or suspect of a crime punishable by twelve years' imprisonment or more has been arrested, the assistant public prosecutor to have ordered their detention for investigation at the arraignment shall notify the governing body of the Legal Aid Board of the arrest immediately, in order that the governing body assign a lawyer. This notification need not take place if the suspect has chosen a lawyer and this lawyer or their replacement is available promptly.

(2) If a suspect of a crime in respect of which pre-trial detention is permitted to have been arrested has, in reply to a question put to him, requested legal assistance, the assistant public prosecutor to have ordered his detention for investigation at the arraignment shall inform the governing body of the Legal Aid Board of the arrest immediately, in order that the governing body assign a lawyer. The second sentence of the first paragraph shall apply mutatis mutandis.

[10] Own translation; official translation not available.

(3) If a suspect of a crime in respect of which pre-trial detention is not permitted to have been arrested has, in reply to a question put to him, requested legal assistance, he shall be given the opportunity to contact a lawyer of his own choice.

(4) If the assigned lawyer is not available within two hours of the notification referred to in the first, second or third paragraph being given, and if the chosen lawyer is not available within two hours of the contact with the suspect pursuant to the first, second and third paragraph, the assistant public prosecutor may, if the suspect waives his right to legal assistance in connection with the questioning, decide to commence the questioning of the suspect.[11]

Article 28c CCP

(1) The suspect to have been arrested and in respect of whom a lawyer is available pursuant to Article 28b, shall be given the opportunity to consult with their lawyer prior to the first round of questioning for a maximum of half an hour. If this time-limit appears to be insufficient, the assistant public prosecutor may, upon the request of the suspect or their lawyer, extend it for a maximum of half an hour, unless it would be contrary to the interests of the investigation to do so. The consultation may also take place by telecommunication.

(2) The suspect as per Article 28b(1), may only waive the consultation provided for the in the first paragraph, after he has been informed by a lawyer of the consequences thereof.[12]

Article 28b CCP provides for the right of access to a lawyer without undue delay after deprivation of liberty, i.e. arrest. As observed above,[13] according to the Dutch legislator, of all of the 'points in time' provided for in Article 3(2) of the Directive, in the Netherlands, arrest is the earliest. Arrest is therefore the earliest point in time at which the authorities are required to take active steps to ensure that the suspect may exercise their right of access to a lawyer. To this end, Article 28b was newly introduced into the CCP. Article 28c CCP was also newly introduced into the CCP for the purpose of implementing Article 3 of the Directive. It provides for the right of access to a lawyer prior to police questioning in respect of suspects who have been arrested and for whom, pursuant to Article 28b CCP, a lawyer is available. For the suspect *not* to have been deprived of their liberty, the right is considered to be implicit in the CCP and was therefore not expressly transposed.

[11] Own translation; official translation not available.
[12] Own translation; official translation not available.
[13] See Section 8.1.2.

As apparent from Article 28b CCP, in the Netherlands, what is required on the part of the authorities by way of active steps to ensure that the right of the suspect of access to a lawyer prior to questioning may be exercised (see regarding such active steps Section 8.1.2 above), is dependent on the seriousness of the crime of which the person concerned is suspected as well as the vulnerability of the person concerned (the more serious the crime and the more vulnerable the person concerned, the more is required by way of active steps on the part of the authorities). Neither Article 28b(1) nor Article 28b(2) obliges the suspect to make use of a legal aid lawyer, however; if they wish to make use of their own lawyer, they may do so, on the understanding that they finance such assistance themselves and provided that the lawyer is available promptly. Pursuant to Article 28b(3) CCP, in respect of arrested persons suspected of crimes for which pre-trial detention is not permitted, the authorities are required to give them the opportunity to contact a lawyer themselves (i.e. not through the Legal Aid Board), but only if, in reply to a question put to them, they have requested legal assistance.

While the Dutch legislator's position is that this set up is in compliance with the Directive, the Dutch Bar Association in particular was critical in this regard during the legislative process. In particular, it was critical of the half hour maximum. In response to this criticism, the legislator observed that, thus far, this had not been especially problematic in practice, and that the Directive did not preclude Member States from setting a time frame in this regard.

Moving on to Article 28d CCP, this provision sets out a general right of the suspect to have a lawyer present and participate during police questioning, regardless of whether they have been deprived of their liberty:

> ***Article 28d CCP***
>
> *(1) Upon request of the suspect to have been arrested and the suspect to have been invited to a place of questioning, the lawyer may attend the questioning and participate therein. The request shall be addressed to the officer conducting the questioning or the assistant public prosecutor. The officer conducting the questioning may deny a request by the suspect or their lawyer to suspend questioning to confer among themselves, if by granting repeated requests in this regard the order or progress of the questioning would be disrupted.*
>
> *(2) During questioning not attended by a lawyer, the suspect may request that it be suspended in order to consult with a lawyer. The officer conducting the questioning shall give him the opportunity to do so as much as possible, unless by granting repeated requests in this regard the order or progress of the questioning would be disrupted.*

(3) The decision denying requests as per the first and second paragraph shall apply for the remainder of the period of questioning and shall be noted in the official report of the interview, thereby specifying the grounds on which it was made.

(4) Further rules regarding the format of, and the preservation of order during, questioning, may be set by Legislative Decree.[14]

Pursuant to Article 28d(1) CCP, the authorities are required to take active steps to make exercise of the right to have a lawyer present and participate during questioning possible, regardless of whether the suspect has been deprived of their liberty. At the same time, under this provision, the authorities – the interrogating officer – are only required to allow a lawyer to be present and participate during questioning when the suspect has requested them do so. The interrogating officer may refuse a request on the part of the suspect to consult with their lawyer during questioning, if granting repeated requests in this regard would be result in disruption.

Pursuant to Article 28d(4) CCP, which provides for the adoption of delegated legislation in the form of a Legislative Decree concerning the format of, and the preservation of order during questioning, the Decree on Format of and Order During Police Questioning (*Besluit inrichting en orde politieverhoor*) was adopted. According to the Dutch legislator, regulation of the participation of a lawyer during police questioning was necessary, given that in the Netherlands, such participation is a relatively new phenomenon. For this position, the Dutch legislator relied on Recital 25 of the Directive, pursuant to which Member States are permitted to regulate the participation of a lawyer during police questioning, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. While there was broad consensus during the legislative process that the participation of a lawyer during police questioning should be regulated, the manner of participation was (and continues to be) the subject of (sometimes heated) debate in the Netherlands. While the police envisaged a more passive role for the lawyer, the Dutch Bar Association envisaged a more active role in this regard. The Decree aims to strike a balance between the two positions. Nevertheless, there continues to be – in our view *legitimate* – discussion as to the compatibility of the Decree with the Directive and the case law of the ECtHR in this regard. Such discussion centres on the limitations placed on the lawyer during questioning (for example, the lawyer may not answer questions on behalf of the suspect, unless the officer conducting the questioning and the suspect consent to him doing so), as well as the somewhat distrustful tone of the Decree. At the same time, it should be noted that the picture to emerge from practice is that of a working method that is more

[14] Own translation; official translation not available.

accommodating (and less 'sceptical') of the role of defence counsel during questioning than the Decree itself would imply.

Finally, Article 489 CCP applies when the suspect to have been arrested is a child. Among other things, it provides that upon arrest of a (child) suspect, the public prosecutor or assistant public prosecutor to have ordered their detention for investigation is required to notify the Legal Aid Board of the arrest immediately, in order that it assign a lawyer (but they need not do so if the suspect has chosen a lawyer and this lawyer or their replacement is available promptly). More is said on the right of juvenile suspects of access to a lawyer below, in Chapter 9.

8.1.3.2 The right to have a lawyer attend certain investigative or evidence-gathering acts

Another aspect of the right of access to a lawyer in criminal proceedings provided for in Article 3 of the Directive to have required express transposition into national law is the right of the suspect to have their lawyer attend certain investigative and evidence-gathering acts. While some aspects of this latter, more specific, right already had a basis in national law, others did not. In particular, the right had to be transposed for identity parades and confrontations.

Regarding identity parades, this investigative act was already provided for under national law, in Articles 61a(1)(c), 62(2) and 76 CCP. Further rules on this measure were provided for in delegated legislation, specifically, the Decree on the Application of Measures in the Interests of the Investigation (*Besluit toepassing maatregelen in het belang van het onderzoek*). The aforementioned CCP-provisions do not provide for the right of the suspect to have counsel attend the identity parade, but the Decree does. While originally, Article 9 of the Decree only allowed for counsel to make comments regarding the selection of persons beforehand, it now allows also for counsel to 'follow' (remotely), i.e. monitor, the identity parade, alongside the ability of counsel to make comments beforehand. According to the Dutch legislator, amendment of this provision was necessary to ensure compliance with the Directive, which speaks of the right to have counsel 'attend'. According to the Dutch legislator, the Directive does not, however, require that counsel be allowed to be present at the identity parade (which in the legislator's view was not an option, given the risk of the witness being distracted or unduly influenced by their presence).

Regarding confrontations, this investigative act, as defined in Recital 26 of the Directive, is not expressly provided for in the CCP. It may, however, be applied in the context of other investigative acts which are expressly provided for therein, for example, the *schouw*, i.e. the 'site inspection', as provided for in Articles 151, 192, 193 and 318 CCP, the first three provisions providing for the *schouw* in the investigative phase, the latter providing for the *schouw* in the trial phase), in which context the suspect was already entitled to legal assistance (the relevant provisions are Articles 151(2)

and (3), 193 and 318; the latter provision does not provide for the right of legal assistance, but for the 'temporary relocation' of the trial to another site than the court building, during which time the accused present (at trial) is entitled to the same legal assistance/representation as they are in the court building). According to the Dutch legislator, no amendments or supplementing was required in this regard. Regarding the power of the authorities to deny the suspect and their lawyer access to the *schouw*, the Dutch legislator points to Recital 26 of the Directive, pursuant to which '[s]uspects or accused persons have the right for their lawyer to attend investigative or evidence-gathering acts … in so far as the suspects or accused persons are required or permitted to attend'.

Another context in which the 'confrontation' envisaged by the Directive may be applied is the questioning of a witness at trial, at which the accused will normally be present. Insofar as this qualifies as a confrontation in the aforementioned sense, the right of the accused to have their lawyer attend the confrontation flows from Article 28(1) CCP, which provides for the right of the suspect to legal representation at all stages of criminal proceedings, including the trial stage. According to the Dutch legislator, the 'single confrontation' (*enkelvoudige confrontatie*, not be confused with the *meervoudige confrontatie*, i.e. the identity parade, addressed above), an investigative act entailing the observation by a witness of the suspect's appearance in order to ascertain whether that person was involved in the crime also falls under the definition of confrontation in the Directive, for which purpose it was necessary to amend the Decree on the Application of Measures in the Interests of the Investigation to allow for counsel to be able to 'follow', i.e. monitor, the single confrontation.

As for the 'reconstructions of the scene of the crime' envisaged by the Directive, this investigative act, as defined in Recital 26 of the Directive, is not expressly provided for in the CCP. It may, however, be applied in the context of another investigative act (which is expressly provided for therein), i.e. the *schouw*, as referred to above. As the right of the suspect to have their lawyer attend was already provided for in the context of the *schouw*, explicit transposition was not required.

8.1.3.3 The right of access to a lawyer at the time of judicial questioning and the right to meet in private and communicate with the lawyer representing them

As stated above, certain aspects of the overarching right provided for in Article 3 of the Directive did not require express transposition into national law, given that they already had a basis in national law. Turning first to the right of access to a lawyer at the time of *judicial* questioning, we refer to the comments made above, at the beginning of Section 8.1.3.[15] According to the Dutch legislator, the relevant provisions of the CCP imply the presence and participation of the suspect's lawyer.[16]

[15] See in particular n 8 and accompanying text.
[16] See in particular n 8 and accompanying text.

Regarding the right of the suspect to meet in private and communicate with the lawyer representing them, according to the Dutch legislator, this right was already protected under Dutch law, specifically, under Articles 28(4) (as reproduced above) and 45 CCP (which provides for the free and confidential access of defence counsel to the suspect to have been deprived of their liberty[17]), Articles 36, 37, 38(7) and 39(4) of the Custodial Institutions (Framework) Act (which provide for the right in respect of suspects who are detained in a custodial institution)[18] and Articles 41, 42, 43(7) and 44(4) of the Young Offenders Institutions (Framework) Act (in respect of suspects who are detained in a young offenders' custodial institution).[19] Insofar as these provisions may be said to restrict the right, the Dutch legislator points to Recitals 22 and 23 thereof, pursuant to which Member States are permitted to make practical arrangements concerning, among other things, the duration and frequency of meetings and communication and the means of communication, and to ensure safety and security. According to the legislator, the restrictions of the right provided for in the aforementioned instruments should be understood in this light, and interpreted by the authorities in such a way as to ensure compliance with the Directive.

8.1.3.4 Temporary derogation from application of Article 3 of the Directive

Worth recalling here in the context of this right is that while the Dutch legislator did not opt to allow for the temporary derogation from application of Article 3 of the Directive provided for in paragraph 5 thereof, it did opt to allow for the temporary derogation envisaged in paragraph 6. Article 28e was newly introduced into the CCP for this purpose. Paragraph 1 sets out the exceptional circumstances (in the pre-trial phase) in which the authorities may temporarily derogate from the right of access to

[17] It provides that: 'The defence counsel shall have free access to the suspect to have been deprived of his liberty by law, and may confer with him in private and exchange letters with him which may not be inspected or read by others, under the required supervision and subject to the internal rules and regulations, and such access may not cause any delay in the investigation.'

[18] Article 36 of the Custodial Institutions (Framework) Act provides for the right of prisoners to send and receive letters and items by post, subject to supervision; Article 37 exempts certain letters and items from supervision by the governor, including those from the prisoner's lawyer (see Article 37(1)(i)); Article 38(7) provides for the access of certain persons and bodies to the prisoner – including their lawyer – subject to prison rules; and Article 39(4) allows the prisoner to have phone contact with those same persons and bodies 'if the necessity and opportunity exist for this'.

[19] Article 41 of the the Young Offenders Institutions (Framework) Act provides for the right of juveniles to send and receive letters and items by post, subject to supervision; Article 42 exempts certain letters and items from supervision by the governor, including those from the prisoner's lawyer (see Article 42(1)(i)); Article 43(7) provides for the access of certain persons and bodies to the juvenile – including their lawyer – subject to prison rules; and Article 44 allows the juvenile to have phone contact with those same persons and bodies 'if the necessity and opportunity exist for this'.

a lawyer in criminal proceedings, while paragraph 2 sets out the grounds on which an exception, as meant in the first paragraph, may be made: the compelling reasons provided for in the Directive. Paragraph 3 provides that temporary derogation from the right in the circumstances set out in Article 28e(1)(b), (c) and (d) is only possible upon authorization of the public prosecutor (*officier van justitie*). Requiring prior authorization of the public prosecutor in the circumstances set out in Article 28e(1)(a) was considered unworkable. According to the Dutch legislator, any decision taken by the assistant public prosecutor (*hulpofficier van justitie*) to derogate from the rights, regardless of whether it has been authorized by the public prosecutor, is subject to judicial review by the trial court.

According to the Dutch legislator, Article 28e CCP also complies with Article 8 of the Directive, which sets out the conditions for applying the temporary derogations under Article 3(5) or (6) (the former not having been transposed into national law) and Article 5(3) thereof. With respect to the implementation of both Articles 3(6) and 5(3) (in Articles 28e and 27e(3) CCP, respectively), the Dutch legislator observed that the requirement under Article 8(1) that any 'temporary' derogation be 'strictly limited in time', is reflected (arguably more implicitly) in the requirement in Articles 28e(2) and 27e(3) that derogation is only possible 'insofar and for as long as justified in light of' the compelling reasons provided for therein (which in turn correspond to those provided for in the Directive). No explicit mention is made in the legislative history of the other conditions provided for in Article 8(1) of the Directive in this regard, but conditions (a) and (d) would appear to be implicit in the aforementioned requirement of the CCP-provisions, while in neither of those provisions is the (temporary) derogation made exclusively dependent on the type or seriousness of the alleged offence (c). Arguably, therefore, none of the conditions provided for in Article 8(1) of the Directive are expressly provided for in the relevant CCP-provisions. They are, however, implicit therein (some being more implicit than others). Here it should be noted that both Articles 28e and 27e(3) CCP were newly introduced into the CCP for the purpose of implementing the Directive, while there is no indication that the legislator saw fit to depart from any of the conditions set forth in Article 8 of the Directive (and appears to have sought to implement Article 8(1) 'as a whole').

As to Article 8(2) of the Directive, paragraphs 3 and 4 of Article 28e CCP are of particular relevance in this regard. For the purposes of Article 8(2) of the Directive, pursuant to which temporary derogations under Article 3(6) of the Directive authorised by a competent authority other than a judicial authority must be subject to judicial review, the Dutch legislator also cites (the pre-existing) Article 359a CCP. In this regard it points to Recital 38 of the Directive, which provides that: 'Member States should ensure that where a temporary derogation has been authorized under this Directive by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.' Article 359a CCP is the mechanism by which the judge in trial proceedings may attach legal consequences to procedural

violations committed in the pre-trial phase of proceedings. Decisions taken pursuant to Article 28e CCP, whether or not pre-authorised by the public prosecutor, are subject to judicial review under Article 359a CCP.

8.1.4 Confidentiality (Art. 4 of the Directive)

According to the Dutch legislator, explicit transposition of Article 4 of the Directive was not required on account of it already being implemented in Dutch law, specifically, Articles 45, 98, 126aa(2) of the CCP, Articles 37(1)(i), 38(7) and 39(4) of the Custodial Institutions (Framework) Act and Articles 42(1)(i), 43(7) and 44(4) of the Young Offenders Institutions (Framework) Act.

Article 45 CCP provides for free access of lawyers to their clients who have been deprived of their liberty. Article 98 provides for a general ban on the seizure of letters or other documents which are subject to the duty of secrecy of persons who have the right to assert privilege, unless with their consent, and for the procedure for determining whether the documents fall under said duty. Pursuant to Article 126aa CCP and the Decree on storage and destruction of documents not added to the case file (*Besluit bewaren en vernietigen van niet-gevoegde stukken*), data which has been obtained by the use of special investigative powers (*bijzondere opsporingsbevoegdheden*), for example by wiretapping, and which fall under the lawyer-client privilege, should be destroyed immediately. According to the Dutch Supreme Court, as a result, any communication between a suspect and their lawyer, may not be used in evidence, insofar as such correspondence does not form part, or could not have assisted the commission, of a criminal offence.[20] Nor may data not obtained by the use of special investigative powers, e.g. written correspondence (for example, letters) seized from a lawyer, be used in evidence, except where such correspondence forms part, or could have assisted the commission, of a criminal offence or the exceptional circumstances of the case warrant giving primacy to the truth-finding pursuit over the interests served by the lawyer-client privilege. In respect of data (falling under the lawyer-client privilege) not obtained by the use of special investigative powers, the rule that it may not be used in evidence flows from Article 359a CCP.[21]

8.1.5 The right to have a third person informed of the deprivation of liberty (Art. 5 of the Directive)

As stated above, Article 5 of the Directive was expressly transposed into Dutch law. According to the Dutch legislator, while national law already prescribed in Article 27(1) of the Official instruction for the national police corps, the royal gendarmerie and other investigating officers (*Ambtsinstructie voor*

[20] See e.g. ECLI:NL:HR:2010:BK3369.
[21] See e.g. ECLI:NL:HR:2013:BY5321.

de politie, de Koninklijke marechaussee en andere opsporingsambtenaren) that, insofar as the CCP does not dictate otherwise (as it may in case of the application of 'measures in the interests of the investigation' pursuant to Articles 61a(1), 62(2) or 76 CCP), police are required to inform a relative or household member of the suspect's deprivation of liberty as soon as possible. The same provision states that where the person taken into custody is a minor, the authorities should do so of their own accord, while where they are of age, the authorities should only do so upon that person's request. As this provision did not fully 'cover' Article 5(1) of the Directive, in that Dutch law did not provide that the suspect themselves could nominate whom to inform, a new provision was introduced into the CCP – Article 27e – the first paragraph of which now so provides (while Article 27(1) of the Official instruction referred to above continues to apply).

Article 5(2) of the Directive finds implementation in Article 488b(1) CCP, which provides that '[i]n derogation of Article 27e(1), the assistant public prosecutor to have ordered the suspect's detention for investigation at the arraignment shall notify the parents or guardian of the deprivation of liberty and the reasons for it as soon as possible', and that the parents or guardian should also receive a notification of the rights provided for in Article 488aa of the CCP.[22] According to the legislator, the obligation pursuant to Article 488b(1) to inform the 'parents or guardian' of the child is consistent with Article 5(2) of the Directive (and the words 'unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed'), given that the situation in which informing the parents *or* guardian would not be in the best interests of the child is a hypothetical one.

As stated above, in implementing the Directive, the Dutch legislator opted to allow for the temporary derogation envisaged in Article 5(3), in Article 27e(3) CCP. While prior to implementation, Dutch law already recognized that there were circumstances under which the requirement that the authorities inform a relative or household member of the suspect's deprivation of liberty as soon as possible could be temporarily derogated from (see the comments made above with respect to Article 27(1) of the Official instruction for the national police corps, the royal gendarmerie and other investigating officers) the Dutch legislator nevertheless considered it necessary to incorporate Article 5(3) of the Directive into the CCP (especially given that, pursuant to Article 5(1) of the Directive, the suspect may themselves nominate the person to be informed of the deprivation of liberty).

Regarding Article 5(4) of the Directive, it finds implementation in Article 488b(3) CCP, although it provides for this safeguard only implicitly. Article 488b(3) CCP provides that in case of derogation (whether or not temporary) from the obligation of the authorities to inform the parents or guardian of

[22] Own translation; official translation not available. Article 488b can be found in the Second Chapter of Title II of the Fourth Book of the CCP, titled 'Criminal procedure in cases concerning persons who have not yet reached the age of eighteen'.

the suspect of their deprivation of liberty (pursuant to Article 488b(2) CCP), the notification of the child's rights (set out in Article 488aa CCP – including the right of the child to be accompanied by their parents, guardian or a trusted representative (*vertrouwenspersoon*) at police questioning - and which in normal circumstances should be given to the parents or guardian (as soon as possible); see Article 488b(1) CCP) should be given to a trusted representative or, in the absence thereof, to the Child Care and Protection Board (*raad voor de kinderbescherming*). Article 488b CCP applies where an order has been made for the suspect to be detained for investigation (*opgehouden voor onderzoek*), which in turn is only possible in respect of persons to have been arrested (see Article 56a CCP). A (young) suspect to have been arrested must be notified of certain rights (see Article 488aa(1) CCP). The notification of rights provided for in Article 488b(3) CCP will therefore necessarily entail a notification that the (young) person concerned has been deprived of their liberty. Moreover, in order for the Board to be able to visit the child, notice will also have to be given of the deprivation of liberty itself.

According to the Dutch legislator, Article 27e(3) CCP also complies with Article 8 of the Directive. Regarding the first paragraph of Article 8, the reader is referred to the relevant comments in Section 8.1.3.4 above with respect to Article 28e CCP. Regarding the third paragraph, the Dutch legislator again refers to Article 359a CCP, the mechanism by which the judge in trial proceedings may attach legal consequences to procedural violations committed in the pre-trial phase of proceedings.

8.1.6 The right to communicate, while deprived of liberty, with third persons (Art. 6 of the Directive)

According to the Dutch legislator, explicit transposition of Article 6(1) of the Directive was not required on account of it already being implemented in Dutch law, specifically, Articles 490(3) and 62(1) of the CCP, Articles 36(1), 38(1) and 39(1) of the Custodial Institutions (Framework) Act (in respect of suspects who are detained in a custodial institution, including for the purpose of pre-trial detention) and Articles 41(1), 43(1) and 44(1) of the Young Offenders Institutions (Framework) Act (in respect of suspects who are detained in a youth custodial institution, again, including for the purpose of pre-trial detention).

The general picture to emerge from these provisions is that suspects to have been deprived of their liberty may, under the necessary supervision and with due regard for internal rules (*huisregels*), have contact with the outside world (sending and receiving post, receiving visitors and making and receiving phone calls), unless measures taken in the interests of the investigation or preserving order (temporarily) militate against such contact. There is some ambiguity, however, as to whether and to what extent the Custodial Institutions (Framework) Act and Young Offenders Institutions (Framework) Act apply to police custody (*inverzekeringstelling*). Although the legislator does not

refer to it, for police custody, the picture sketched above would appear to follow implicitly from Article 62(1) of the CCP, which provides that no other restrictions may be placed on the suspect to have been deprived of their liberty than those strictly necessary in the interests of the investigation or preserving order (the power to take measures in such interests is addressed below, under Article 6(2) of the Directive).

8.1.7 The right to communicate with consular authorities (Art. 7 of the Directive)

As stated above, Article 7 of the Directive was expressly transposed into Dutch law. According to the Dutch legislator, because Dutch practice is already in compliance with Article 36 of the Vienna Convention on Consular Relations, which corresponds to Article 7 of the Directive, express transposition of the latter provision was not necessary.[23] In this regard the legislator observed that pursuant to Article 7(3) of the Directive, exercise of this right need not be regulated by law; regulation is possible through practical measures also. Despite this, the legislator opted to provide for the right of the suspect who is a non-national and who has been deprived of their liberty to have the consular authorities of their State of nationality informed of the deprivation of liberty, in the CCP, specifically, in the provision providing for the right of the suspect to have been deprived of their liberty to inform a third person thereof (Article 27e). Given that the legislator was already going to provide for the latter right, it made sense to incorporate the former right into the provision concerned.

8.1.8 Waiver

Article 9 of the Directive was expressly transposed into national law and can be found in Article 28a CCP. Because the requirement that the suspect or accused be informed of the content of the right concerned is already provided for under Article 27c(2) and (3) CCP, explicit provision of this aspect of Article 9 of the Directive was not considered necessary.

Article 28a(1) CCP provides that the suspect 'may voluntarily and unequivocally waive the right to be assisted by a lawyer as per Article 28(1), unless this Code provides otherwise'. As the words

[23] Here it should be recalled that under Article 93 of the Dutch Constitution, treaties to which the Netherlands is a party, as well as resolutions of international organisations, are directly applicable, i.e. have direct effect, in the Netherlands. Article 94 thereof provides that: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' (Official translation, available at: https://www.legislationline.org/download/id/4824/file/Netherlands_Const_2008_eng.pdf). See also Section 5.1 above.

'unless this Code provides otherwise' suggest, in certain cases it will only be possible to waive the right once the suspect has been informed of the consequences thereof by a lawyer.[24]

8.1.9 The right of access to a lawyer in European arrest warrant proceedings (Art. 10 of the Directive)

According to the Dutch legislator, while Dutch law was already largely in conformity with the Directive as regards the rights of persons who are the subject of a EAW in surrender proceedings, express transposition of certain aspects thereof was nevertheless necessary, by supplementing the Surrender of Persons Act. In particular, it was necessary to implement the right of persons to have been arrested in the Netherlands pursuant to a EAW to appoint a lawyer in the requesting state, and to ensure that Dutch law reflected the requirement that such persons have the same rights as those arrested in the context of national criminal proceedings. The right of such persons of access to a lawyer is now concentrated in one provision – Article 43a of the Surrender of Persons Act – which was newly introduced for the purpose of implementing the Directive. Among other things, this article declares (in the first paragraph) that certain provisions of the CCP providing for the right of access to a lawyer in criminal proceedings apply mutatis mutandis to surrender proceedings.

Article 43a implements paragraphs 1, 2 and 3 of Article 10 of the Directive alongside other provisions of the Surrender of Persons Act (sometimes newly introduced or amended for the purpose of implementing the Directive, sometimes pre-existing), and/or the Custodial Institutions (Framework) Act and Young Offenders Institutions (Framework) Act, or the Constitution. Paragraphs 4, 5 and 6 find implementation in other provisions of the Surrender of Persons Act newly introduced for this purpose, paragraph 4 in Article 17(3), paragraphs 5 and 6 in Article 21a and 48a. According to the Dutch legislator, this provision of the Directive finds implementation in Articles 21a and 48a of the Surrender of Persons Act, which were newly introduced therein for the purpose of implementing the Directive.

Article 21a provides that it is in relation to the surrender proceedings (and not the criminal proceedings in respect of which the European arrest warrant was issued) that the lawyer in the issuing state is to provide assistance. Unlike Article 10(5) of the Directive, Article 21a does not limit the right provided for in the former provision to persons who do not yet have a lawyer in the issuing state. In this regard, the legislator observed that persons who already have a lawyer in the issuing state are

[24] See Article 28c(2) in conjunction with Article 28b(1) CCP, which in the context of the right of access to a lawyer prior to questioning, affords special protection to the suspect to have been arrested and who is deemed to be vulnerable or suspected of a crime punishable by twelve years' imprisonment or more. Pursuant to Article 489(2) CCP, moreover, children may not waive the right to consult a lawyer prior to questioning. It declares Article 28a CCP inapplicable where the suspect concerned is a child.

unlikely to make a request for a lawyer to be appointed, and that incorporating this limitation would require the public prosecutor to, in each case, determine whether the requested person already has a lawyer in the issuing state, which is impracticable. Finally, according to the legislator, if, after the public prosecutor has informed the competent authority in the issuing Member State of the requested person's wish for a lawyer to be appointed in that state, the competent authority does not respond, this is not a reason to defer the surrender proceedings. Article 21a expressly provides that the right contained therein is without prejudice to the time-limits that apply to the EAW.

Article 48a of the Surrender of Persons Act applies where the Netherlands is the issuing state, i.e. is seeking surrender of the person concerned. Upon being informed, by the competent authority in the executing state, of the requested person's request for legal assistance in the issuing state, the public prosecutor to have issued the European arrest warrant is required to provide the requested person with the necessary information in this regard (which they may do through the competent authority in the executing state).

8.1.10 Remedies (Art. 12 of the Directive)

According to the Dutch legislator, national law already complied with Article 12(1) of the Directive at the time of implementation. In respect of criminal proceedings, the legislator points to the ability of the defendant to bring (alleged) breaches of the right of access to a lawyer in the investigative phase to the trial court's attention (as apparent from Articles 358(3) and 359(2), second sentence, CCP), the ability of the trial court to attach legal consequences to pre-trial procedural violations under Article 359a CCP (see in this regard the comments made below, with respect to Article 12(2) of the Directive), and the ability of the defendant to challenge any decision taken by the district court (*rechtbank*) on the right of access to a lawyer, on appeal (before the court of appeal (*gerechtshof*)).

In respect of surrender proceedings, the legislator points to the ability of the requested person to bring (alleged) breaches of the right of access to a lawyer to the attention of the court ruling on the surrender. Here the legislator observes that an effective remedy need only be available in the context of the surrender proceedings before the court and within the time limits set by Framework Decision 2002/548/JHA. In addition, the legislator points to the ability of the requested person to bring preliminary relief (*kort geding*) proceedings by reason of unlawful act (*onrechtmatige daad*) before the civil courts, on the basis of Article 6:162 of the Dutch Civil Code, which must also be done within the aforementioned time limits.

Regarding Article 12(2) of the Directive, according to the legislator, the CCP already provided for a mechanism by which the rights of the defence and the fairness of the proceedings can be protected, in circumstances in which statements have been obtained in breach of the right to a lawyer or a

derogation to this right was authorized in accordance with Article 3(6) of the Directive. Article 359a CCP is the mechanism by which the judge in trial proceedings may attach legal consequences to procedural violations committed in the pre-trial phase of proceedings, when it appears that those violations are not reparable, and the consequences of such violations are not otherwise prescribed by the law. Those consequences are: declaring the prosecution inadmissible (a procedural step akin to a stay of proceedings), excluding evidence obtained unlawfully and sentence reduction (in addition, the Dutch Supreme Court has held that a simple declaration that a pre-trial procedural violation has occurred may suffice). It is apparent from the Supreme Court's case law that the need to ensure the right of the suspect/accused to a fair trial within the meaning of Article 6 ECHR is the primary rationale for attaching legal consequences to pre-trial procedural violations in the Netherlands, in which context the Supreme Court adheres closely to the ECtHR's Article 6-case law with respect to the use in criminal cases of evidence obtained in violation of Convention rights.

In particular, the legislator points to the case law of the Supreme Court on the exclusionary remedy, pursuant to which statements obtained in breach of the right of access to a lawyer prior to questioning (and any evidence obtained as a direct result of this statement, i.e. any 'poisonous fruits') are subject to automatic exclusion.[25] However, where non-exercise of the right was due to the suspect/accused waiving it, or the existence of compelling reasons to derogate from it, automatic exclusion need not follow. At the time of implementation, the Supreme Court had not ruled on the use of statements obtained in breach of the right to have a lawyer present and participate during questioning. In 2015, however, the year in which it recognised the right of all suspects to have been arrested to legal assistance during questioning (except where there are compelling reasons to restrict that right), the Supreme Court observed that a breach of the right to legal assistance prior to questioning will as a rule be more serious than a breach of the right to have a lawyer present and participate during questioning and that such statements are not subject to automatic exclusion; other judicial responses, such as sentence reduction or a simple declaration, may suffice.[26] In a later decision, it ruled that the determination of whether a breach of the right to have a lawyer present and participate during questioning (which was not due to the existence of compelling reasons to restrict it) has rendered the trial unfair under Article 6 ECHR, is dependent on various factors, including those set out by the Grand Chamber in *Ibrahim and Others v. UK*.[27] If on this basis it is concluded that the breach has not rendered the trial unfair, exclusion of the statement obtained by the breach need not follow.

[25] In particular, HR 30 juni 2009, ECLI:NL:HR:2009:BH3079 and HR 19 februari 2013, ECLI:NL:HR:2013:BY5321.
[26] HR 22 december 2015, ECLI:NL:HR:2015:3608.
[27] HR 17 december 2019, ECLI:NL:HR:2019:1985, referring to *Ibrahim and Others v. UK* (ECtHR, n. 50541/08, 50571/08, 50573/08 and 40351/09).

Noticeable in the context of Article 12 of the Directive is that the remedies cited by the legislator are available at trial and on appeal; while the national legislation now provides for access to a lawyer without undue delay, it does not provide for a remedy without undue delay. The thinking appears to be that unfairness in the pre-trial stage can be remedied at the trial and appeals stages of the proceedings. In respect of the right of access to a lawyer prior to questioning, this reasoning is understandable, with breaches of the right leading to the automatic exclusion of the evidence obtained thereby (which may reasonably be assumed to have a deterrent effect, moreover). With respect to the right to have a lawyer present and participate during questioning, however, the absence of a timely (judicial) remedy in case of (an imminent) breach is in our view more problematic; evidence obtained by such a breach is not subject to automatic exclusion, it should be recalled, while it is questionable whether the remedies that are envisaged in this regard – sentence reduction or a simple declaration – are capable of ensuring observance of the primary norm: effective legal assistance during questioning. All the more need, it would seem, for a timely remedy in respect of (imminent) breaches of the right to have a lawyer present and participate questioning.

8.2 Case-law

We now turn to the case law on the subject-matter of the current Directive, focusing on the main decisions – those of the Dutch Supreme Court – in this regard. Again, here decisions issued by the Supreme Court offer a sufficient body of case law to reflect on the interpretation and implementation of the Directive.[28]

Three decisions concern the use of statements obtained in violation of the right of access to a lawyer without undue delay. Two decisions concern the (applicability of the) right itself; it is to these decisions that we first turn.

In HR 6 November 2018, ECLI:NL:HR:2018:2056, the question was when 'questioning' within the meaning of the right to consult a lawyer prior to questioning may be said to be taking place. According to the Supreme Court, 'questioning' within the meaning of this right may be said to be taking place when the police put questions to the suspect regarding their involvement in the offence of which they are suspected, and it is prior to this moment that the suspect should be notified of the right. In so holding, the Supreme Court set aside the Court of Appeal's findings in this regard, entailing that because questioning could not be said to be taking place (since when the police officers asked the suspect whether he had a hemp farm in his home – having seen a trail of sand and leaves on the floor, and in light of the strong hemp odour in the house – they had not yet discovered the hemp farm, so

[28] Regarding the selection of case law for the purposes of this report, see Section 5.4 above.

that the questions put to the suspect could not be said to pertain to an established offence), the suspect was not entitled to consult a lawyer prior to those questions being put to him. In this regard the Supreme Court pointed to Article 27(1) of the CCP, which provides that before prosecution has been initiated, a person shall be regarded as a suspect when a reasonable suspicion that he is guilty of having committed a criminal offence can be derived from the facts or the circumstances.[29] According to the Supreme Court, that suspicion may pertain not only to the fact that an offence has been or is being committed, but also to the involvement of a person therein. Accordingly, even when it has not yet been established that an offence has been or is being committed, there may be a reasonable suspicion within the meaning of Article 27(1) of the CCP, and questioning may be said to be taking place, with all that this entails. Not every question put to a suspect qualifies as questioning (with all that this entails), however, as apparent from a decision issued shortly thereafter. In HR 12 maart 2019, ECLI:NL:HR:2019:341, the Supreme Court upheld the Court of Appeal's ruling that although the questioning had already begun when the suspect was notified of his right to consult a lawyer, the notification had been given before any substantive questions had been put to him. It is worth noting here that upon being informed of this right, the suspect waived it. In neither of these cases does the Supreme Court refer to Directive 2013/48/EU as such. In both cases, however, it does refer to the implementing Act implementing the Directive.

HR 12 maart 2019, ECLI:NL:HR:2019:341 also addresses the question of whether a suspect already being detained on other grounds than the grounds on which they are now being questioned, should be given the opportunity to consult with a lawyer prior to questioning in respect of this other offence (i.e. should be treated in the same manner as a suspect to have been arrested). In the decision, the Supreme Court affirmed an earlier ruling in which it answered this question in the affirmative, with all that this entails, i.e. automatic exclusion of the statement obtained from the suspect without them having had an opportunity to consult with a lawyer prior to questioning pursuant to Article 359a of the CCP (unless this omission was due to the suspect waiving this right or the existence of compelling reasons to restrict the right in question).[30] In this regard the Supreme Court noted that the right to consult a lawyer prior to questioning, and the obligation of the authorities to inform the suspect thereof, was now provided for by law (the former in Article 28c in conjunction with Article 28e of the CCP, the latter in Article 27c(3) thereof).

Finally, this case also deals with the question of whether the use of statements obtained without the accused having been assisted by a lawyer during questioning violates the right to a fair trial enshrined in Article 6 ECHR, where such statements were obtained prior to the recognition in Dutch law of the

[29] Unofficial translation borrowed from: http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf.
[30] See HR 3 juli 2012, ECLI:NL:HR:2012:BW9264.

right to have a lawyer present and participate during questioning, i.e. prior to 22 December 2015.[31] In the present judgment (and in earlier judgments[32]), the Supreme Court answered this question in the negative. Later on, however, the Supreme Court departed from this stance. In HR 17 december 2019, ECLI:NL:HR:2019:1985, the Supreme Court ruled that in light of the ECtHR's judgment in *Beuze v. Belgium* (in which the Grand Chamber held that the right of access to a lawyer also entails 'that suspects have the right for their lawyer to be physically present during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings'[33]), in relation to statements obtained (without the accused having been assisted by a lawyer during questioning) prior to 22 December 2015 also, the question may arise as to whether the fact that the suspect did not have the benefit of legal assistance during questioning has rendered the trial unfair under Article 6 ECHR. According to the Supreme Court, if there are no compelling reasons to restrict the right to have a lawyer present and participate during questioning, this question shall be answered by taking into account among other things the factors cited in the case law of the ECtHR, including in particular those cited in the case of *Ibrahim and Others v. UK*. If on this basis it is determined that Article 6 ECHR has not been violated, exclusion of the statement need not follow (in which respect the Supreme Court refers to its judgment setting out the law on the exclusion of unlawfully obtained evidence, in which the need to ensure the accused's right to a fair trial forms the only category of mandatory exclusion[34]). Earlier on in the judgment the Supreme Court cites Directive 2013/48/EU as one of the driving forces behind its judgement of 22 December 2015 recognising the right of all suspects to have been arrested to legal assistance during questioning (except where there are compelling reasons to restrict that right), from that moment onwards.

In HR 20 maart 2018, ECLI:NL:HR:2018:368, the question under consideration was how statements obtained from the suspect not to have been deprived of their liberty, after the authorities failed to notify them of their right of access to a lawyer (and their right to legal assistance prior to questioning) as per Article 27c(2) of the CCP, should be treated. According to the Supreme Court, upon failure of the authorities to inform the suspect (not to have been arrested) of their right to legal assistance, (upon application of the defence) any statement obtained should as a rule be excluded in order to ensure the right to a fair trial within the meaning of Article 6 ECHR, unless the suspect has not been prejudiced by this failure. Prior to this judgment, there was some discussion as to whether the rules that apply to the suspect to have been deprived of their liberty (providing for the opportunity to consult a lawyer prior to questioning, the obligation of the authorities to inform the suspect of this right *and* the

[31] See in this regard HR 22 december 2015, ECLI:NL:HR:2015:3608.
[32] See e.g. HR 4 juli 2017, ECLI:NL:HR:2017:1233 and HR 6 september 2016, ECLI:NL:HR:2016:2018.
[33] ECtHR, 9 November 2018, *Beuze v. Belgium*, n. 71409, § 134.
[34] See in this regard HR 19 februari 2013, ECLI:NL:HR:2013:BY5321.

automatic exclusion of statements obtained in breach thereof), as laid down in HR 30 juni 2009, ECLI:NL:HR:2009:BH3079, also apply to suspects not to have been deprived of their liberty. In earlier judgments, the Supreme Court appears to have answered this question in the negative.[35] In implementing Directive 2013/48/EU, however, the point of departure was that the right to consult a lawyer prior to questioning applies not only to suspects to have been deprived of their liberty, but also to suspects not deprived of their liberty (although, again, it is only in respect of the former category of suspects that the authorities are obliged to take active steps to make it possible for the suspect to have access to a lawyer, while in respect of the latter category of suspects, the authorities are nevertheless obliged to inform the suspect of their right to legal assistance as provided for in the CCP (see in this regard Article 27c(2) thereof), prior to the first round of questioning at the very latest. Moreover, the judgment of 20 March 2018 would appear to answer the question of whether the same rules apply to suspects not to have been deprived of their liberty in the affirmative.[36]

In the final decision to be addressed here – HR 4 juli 2017, ECLI:NL:HR:2017:1233 – the question was whether and to what extent a defence application for the exclusion of a statement obtained in breach of the right to consult a lawyer prior to questioning need to be substantiated, in order for the court to consider it.[37] According to the Supreme Court, while defence applications for the exclusion of evidence obtained by a procedural violation committed in the pre-trial phase of the proceedings as a rule need to be substantiated, with reference to the weighing factors referred to Article 359a CCP (the interest that the violated provision purports to protect, the seriousness of the violation and the prejudice caused by it), this does not apply where the pre-trial procedural violation in question concerns the breach of the right to consult a lawyer prior to questioning. This is because statements obtained by such a breach are subject to automatic exclusion.[38] Worth noting here is that the Supreme Court does not explicitly cite Directive 2013/48/EU in this judgment, although it addresses a matter that is covered by the Directive.

8.3 Critical analysis

Having set out the national legislation implementing the Directive and the most notable case law on the subject matter thereof, we now turn to the main points of criticism in this regard. It is important

[35] See e.g. HR 9 november 2010, ECLI:NL:HR:2010:BN7727 and HR 11 juni 2013, ECLI:NL:HR:2013:CA2555.
[36] Accordingly, the Supreme Court's 2010 and 2013 rulings may be said to be outdated.
[37] Regarding this case, see also n 32 and accompanying text.
[38] In this regard, the Supreme Court referred to two earlier rulings from which this follows: HR 30 juni 2009, ECLI:NL:HR:2009:BH3079 and HR 22 december 2015, ECLI:NL:HR:2015:3608.

to recall here that prior to the ECtHR's judgment in the case of *Salduz v. Turkey*, Dutch law did not provide for the right to consult a lawyer prior to police questioning or the right to have a lawyer present and participate during such questioning. Of the six Procedural Directives, it is undoubtedly this Directive that has caused the most 'upheaval', i.e. the most significant changes to national legislation and practice and the most heated discussions. Those discussions centre on the role of defence counsel in criminal proceedings and the notion of effective defence in a system focused on truth-finding and efficiency, and in which great reliance is placed on the statement of the suspect.[39] The fact that Dutch law did not provide for certain aspects of the right of access to a lawyer in criminal proceedings goes some way to explaining the formalistic nature of some of the legislation expressly transposing the Directive. What is meant by this is that the legislation does not fully capture the protective nature of the right, i.e. what stands to be gained in effectuating it in terms of fairness, effective defence and equality of arms.[40] Thus, while the CCP provides for a general right of access to a lawyer in criminal proceedings (in Article 28 thereof), the right of access to a lawyer without undue delay, i.e. as soon as possible in the investigative stage of proceedings, is not expressed as such – as something from which the suspect stands to benefit and as essential to its effectiveness. While in certain cases presence of a lawyer is mandatory, otherwise the impression is one of a complicated and technical provision addressed to the authorities rather than the suspect, and setting out when the authorities are required to take active steps to make it possible for the suspect to have access to a lawyer immediately following their arrest. Indeed, the right is only provided for insofar as its exercise is dependent on the authorities taking active steps in this regard.

The provision setting out the right to consult a lawyer prior to questioning – Article 28c CCP – is also addressed to the authorities and only provides for the right insofar as its exercise is dependent on the authorities taking active steps in this regard. It does not provide for the right in respect of suspects not to have been deprived of their liberty, on the basis that such persons are in a position to arrange consultation with a lawyer prior to questioning themselves (although, again, the authorities are required to inform such persons of their right to consult a lawyer prior to questioning; see Article 27c(2) CCP). Rather than presenting consultation with a lawyer prior to police questioning as a fundamental right of the suspect, Article 28c appears to treat it more as a formality: the authorities are required to give the suspect the 'opportunity' to consult their lawyer prior to questioning, while in principle this consultation is limited to 30 minutes. The provision setting out the right to have a

[39] See e.g. M.J. Borgers, 'Een nieuwe dageraad voor de raadsman bij het politieverhoor?', *NJB* 2009, p. 88-93; T. Spronken, 'Ja, de zon komt op voor de raadsman bij het politieverhoor!', *NJB* 2009, p. 94-100; P.H.P.H.M.C. van Kempen, 'Verdedigingsrechten in het vooronderzoek in Nederland', Strafblad 2011, p. 14-15.
[40] We refer in this regard to Recital 12 of the Directive, which gives expression to the constitutional dimension of the right of access to a lawyer, as well as its connection with the notions of fairness and effective defence.

lawyer present and participate during questioning – Article 28d – is similarly formalistic in nature. While unlike Article 28c, Article 28d is not limited in scope to suspects to have been deprived of their liberty (seemingly because the right to have a lawyer present and participate during questioning would always seem to require active steps on the part of the authorities), it does make observance of the right dependent on the suspect's request. The uneasiness with this right – again, prior to *Salduz*, Dutch law did not provide for this right, which was moreover only formally recognised in 2015 – is further apparent from the express reference in Article 28d to the potential for disruption in admitting counsel to questioning, as well as from the delegated legislation further regulating (and restricting) this right, and the toothlessness of the remedy proposed in respect thereof. In short, the relevant national provisions speak of a reluctance to effectuate this right, which in turn can be explained by their history.

The national legislation may therefore be criticised on the grounds that while it was introduced for the specific purpose of implementing the Directive, it does not speak for itself, in terms of giving expression to the right of access to a lawyer in criminal proceedings and in the investigative phase in particular. Indeed, understanding it requires some (inside) knowledge of the legislative history, including the reason for introducing these provisions into national law in the first place: the Directive. It is therefore unfortunate that in ruling on matters falling within the scope of the Directive, the Supreme Court does not always refer to the Directive or engage (rigorously) with its subject matter, focusing instead on the national provisions implementing it. While we acknowledge that traditionally, the CCP has been conceived of as a system of powers rather than a system of rights,[41] and that there are also drawbacks to construing it (solely or predominantly) in terms of rights, in our view construing access to counsel in criminal proceedings as a fundamental right of the suspect, i.e. as something from which they stand to benefit in terms of fairness, effective defence and equality of arms – whether through legislation or case law – is important. This is particularly so in the Netherlands, where the defence has long had a marginalised role, the notion of the right of access to a lawyer without undue delay is relatively new, while the effectuation of procedural rights is increasingly dependent on the defence itself raising issues (and higher substantiation requirements) in this regard. While the formalism of the legislative framework in this regard could be counterbalanced in individual cases by ensuring that the suspect is informed by the authorities of their right of access to a lawyer (in those terms and including its 'protective' aspects) – in which respect we refer to the provisions of the CCP providing for the right to information in criminal proceedings, as set out in Chapter 7 – if the right is to become embedded more firmly in Dutch criminal procedure, clear legislation in this regard is

[41] See Section 5.1 above.

important.[42] Finally, the legislation may be criticised for the limitations it places on the right of access to counsel, in particular on the right to have a lawyer present and participate during questioning, which potentially undermine the effectiveness of the right. At the same time, we acknowledge that legal practice may be more accommodating of the role of defence counsel during questioning than the national legislation would imply.

[42] Important to note here is that the protective nature of the national legislation in terms of the right of access to a lawyer in criminal proceedings does find expression in the literature addressing (and criticizing) it.

9 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

9.1 Legislation

Directive (EU) 2016/800/EU on the procedural safeguards for juvenile defendants has been implemented into Dutch law through the Act of 15 May 2019, *Staatsblad* 2019, 180 (entry into force 1 June 2019, *Staatsblad* 2019, 181).[1]

The rights and provisions of the Directive can be found in various laws, but principally the Dutch Code of Criminal Procedure (hereafter: CCP). The other national laws in which such rights and provisions can be found are the Surrender of Persons Act and the Young Offenders Institutions Act.

Interestingly, the adoption of the implementing legislation has been nurtured by a climate of debate about the overall lack of adequate safeguards for juveniles in Dutch criminal procedure. It is worth mentioning that in the context of the so-called Modernisation of the Dutch CCP (see above in the introduction[2]), the relevant Minister called repeatedly for the strengthening of juvenile defendants' procedural rights.[3] In addition, the Dutch Ombudsman for Children (*Kinderombudsvrouw*) stressed the importance of new legislation to address the lack of focus on the 'best interest' of the child in the context of police custody and deprivation of liberty.[4] For this reason, the Ombudsman recommended that safeguards should be given to ensure that juveniles undergo deprivation of liberty in a child-friendly environment (i.e. in a context other than a police station) at every stage of the criminal investigation and have right to free legal aid.

[1] The full title in Dutch of this implementing Act is *Wet van 15 mei 2019 tot wijziging van het Wetboek van Strafvordering en de Overleveringswet ter implementatie van richtlijn nr. 2016/800/EU van het Europees Parlement en de Raad van 11 mei 2016 betreffende procedurele waarborgen voor kinderen die verdachte of beklaagde zijn in een strafprocedure* (PbEU L 132).
[2] See Chapter 5.
[3] Vaststellingswet Boek 6 van het nieuwe Wetboek van Strafvordering (Bijzondere regelingen), explanatory memorandum, p. 7.
[4] 'Kinderombudsvrouw: positie minderjarigen in strafrecht moet beter', *Nederlandse Juristenblad* 2019, p. 1379; Rapport Stop! van de Kinderombudsman d.d. 21januari 2019 en Rapport Hoeveel nachtjes nog? van de Kinderombudsman d.d. 18 april 2019.

In this context, the implementing legislation picks up on the idea that efforts need to be made to secure the right to a fair trial for juvenile defendants.[5] The starting point, which reflects the main goal of the Directive,[6] is that juveniles belong to a class of vulnerable defendants and thus need to receive special support in achieving their right to a fair trial. The vulnerability of children should be removed by means of compensatory measures, thereby requiring a series of (supplementary) provisions for children that integrate and expand on existing procedural safeguard applicable to adults. In keeping with the structure of the Directive, the implementing Act strengthens a series of procedural rights for children: the right to information for the child (Article 4 of the Directive); the right to information for the parents or persons responsible for parental responsibility (Articles 4 and 5 of the Directive); the right to legal assistance (Article 6 of the Directive); the right to an individual and medical assessment (Articles 7 and 8 of the Directive); the right to respect for privacy (Article 14 of the Directive); the right to be present at trial for the child and his/her parents (Article 15 Directive). In the following sections we analyse these provisions in order. The relevant national provisions are set out below, per right of the Directive.

9.1.1 The Scope of Application (Art. 2 of the Directive)

Book 4 of the CCP envisages in Title II a number of provisions that specifically apply to criminal proceedings against minor suspects. This Title begins with Article 488 CCP, which stipulates in paragraph 1 that the provisions of the CCP shall apply insofar as no explicit derogation have been provided for, and, secondly in paragraph 2 that the provisions in this title apply to suspects below the age of 18 at the time of the commission of the offence. As will follow from the following sections, explicit implementing provisions have been added to this title. As such, Article 488 CCP concerns an indirect implementation of Article 2(1) of the Directive. Most notably, Article 488(2) reads as follows: The provisions of this Chapter shall apply to persons who, at the time of the commission of the offence, had not yet reached the age of eighteen years, insofar as the provisions of this Chapter do not derogate therefrom.' It is worth noting that this provision has been regarded as an indirect implementation of the above-mentioned provision in the Directive. By avoiding any further implementing provision in this respect, the Dutch legislator has implicitly decided to forego the derogation provided for under Article 2(3) of the Directive, pursuant to which Member States may decide not to apply the rights of the Directive when the person concerned has reached the age of 21. Individuals that are younger than 18 at the start of a proceeding therefore remain subject to the legal framework provided for in Title II until a final judgement is handed down.[7] Choosing to exercise the

[5] See the explanatory memorandum: *Kamerstukken II* 2018/19, 35116, p. 1.
[6] Directive 2016/800/EU, Recital 1.
[7] See *Kamerstukken II* 2018/19, 35116, 3, p. 4.

derogation outlined in the Directive would have resulted 'in an undesirable restriction of rights compared to the existing situation'.[8]

Once again, a terminological clarification is in order: while the Directive (along with other international sources in this area)[9] speaks of 'children' (see Article 3(1) of the Directive) as legal subjects of specific safeguards in the context of criminal proceedings, pre-existing Dutch legislation is more broadly defined as 'juvenile criminal procedure'.[10] This terminological choice speaks to the wide scope of application of the procedural safeguards covered in Title II of Book 4. As explained above, these provisions apply to all individuals who are younger than 18 at the material time, i.e. when they allegedly committed an offence and can therefore hardly qualify as 'children'. On the other hand, the Directive refers to the notion of 'parental responsibility' as a broad umbrella-concept covering all rights and duties relating to a 'child' (his person and his property) deriving from a law or agreement having legal effects. The Directive thus includes the notion of 'holder of parental responsibility'. Instead, Dutch law refers under Article 488(3) to the categories of 'parents' and 'guardians'. These notions are believed to be substantially in line with the broader term holder of parental responsibility' used in the Directive.[11]

9.1.2 The Right to Information of Juvenile Suspects and Holders of Parental Responsibility (Artt. 4 and 5 of the Directive)

Article 4 of the Directive lays down specific safeguards to ensure that youth suspects are effectively granted the right to information. In doing so, Article 4(1) refers to Directive 2012/13/EU and requires that suspects are informed of their rights. The obligation of providing this information covers both the rights listed under Directive 2012/13/EU and the youth-specific guarantees laid down by Directive 2016/800/EU. In addition, juvenile suspects shall receive specific information about general aspects of the conduct of the proceedings.[12] Article 488aa CCP lays down a comprehensive implementation

[8] See *Kamerstukken II* 2018/19, 35116, 3, p. 13.
[9] See, *inter alia*, Articles 37 and 40 of the International Convention on the Rights of the Child and Articles 18(4) and 24 of the International Covenant on Civil and Political Rights.
[10] See for an analysis of the relevant historical developments, J. uit Beijerse *Jeugdstrafrecht: Beginselen, wetgeving en praktijk*, Antwerp: Maklu 2017, pp. 47-49.
[11] See *Kamerstukken II* 2018/19, 35116, 3, p. 14.
[12] This contested provision is explained in the recitals as requiring 'a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case.' See S. Cras, 'The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings Genesis and Descriptive Comments Relating to Selected Articles', *EUCrim*, 2016, p. 113.

of the safeguards provided for under Article 4 of the Directive. These relate to different segments of the criminal proceeding and should be provided when the suspect engages for the first time with the prosecuting authority. To begin with, Article 4(1) stipulates that information about certain rights must be shared with children 'promptly' when they are 'made aware that they are suspects or accused persons'. Accordingly, Article 488aa(1) CCP requires that the suspect shall immediately upon arrest be informed that 'a) his parents or guardian will be notified of his deprivation of liberty, if ordered; b) of his right to be accompanied by his parents or guardian, or by a confidant, during stages of the proceedings other than court hearings, pursuant to Article 488ab; c) of the possibility to make audio-visual recordings of hearings, pursuant to Article 488ac; d) of the right to a medical examination, pursuant to Article 489a; e) of the right to an advice on his personality and living conditions, pursuant to Article 494a.[13]'

While paragraph 1 only relates to the rights that shall be communicated upon arrest, remaining paragraphs in Article 488aa cover further safeguards that might be taken to benefit of a suspect at different stages, e.g. when the youth suspects are summoned for questioning before the prosecutor with a view to impose a penal order (par. 2), the moment in which they are summoned to be questioned with a view to a decision regarding pre-trial detention (par. 3), and, finally at the moment of being summoned to a trial hearing (par. 4). It is worth noting that most of these safeguards are now legally codified but were previously provided for only by means of PPS instructions.[14]

Overall, Article 488aa (para. 1-4) covers all the information that Article 4(1) makes mandatory at the moment in which a juvenile acquires the status of suspect or defendant. In addition, this article seems to fulfil the necessary requirements about the information of the rights mentioned in Article 4(2) and (3) which should be communicated, respectively, 'at the earliest appropriate stage in the proceedings' or 'upon deprivation of liberty'. Although the newly introduced article in the CCP follows a structure other than that outlined in the Directive, the texture of its implementing provisions does not seem to leave significant gaps in the protection of procedural rights. Possibly, the only aspect which does not appear to align completely with the standards of the Directive concerns the suspect's right to privacy. As follows from Article 488aa(4)(b) of the Dutch Code of Criminal Procedure, a juvenile will only have to be informed about his right to court hearings behind closed doors. The explicit implementation of other aspects of the right to privacy (as envisaged in Article 14 of the Directive) was not considered necessary.

[13] Own translation; official translation not available.
[14] M. Jeltes, 'De rechtspositie van aangehouden minderjarige verdachten in de eerste fase van het strafrechtelijk onderzoek', *Boom Strafblad* 2020, pp. 20-26.

The right to information is complemented with a duty to provide information to a suspect's holder of parental responsibility as per Article 5 of the Directive.[15] This Article in essence stipulates that Member States shall ensure that the holder of parental responsibility is provided, as soon as possible, with the information that the child has a right to receive in accordance with Article 4 (see above). To implement this safeguard fully, the Dutch legislator has modified Article 488b CCP. Under this provision, it is incumbent on the assistant public prosecutor to notify the parents or guardian of the deprivation of liberty and the reasons for it as soon as possible (Article 488b(1)). More generally, the assistant prosecutor shall notify the parents or guardian of the information prescribed under Article 4 of the Directive. In line with the exceptions provided for under Article 5(2) of the Directive, Article 488b(2) sets out that the rights referred to in paragraph 1 are withheld if this would be in conflict with the interests of the suspect, or if the parents or guardian cannot be reached after reasonable effort, or if they are unknown. A conflict with a suspect's interests may arise, for example, if the home situation is not safe. In addition, as indicated in the explanatory memorandum, the notification can be postponed, pursuant to the already existing Article 27e(3) CCP, on grounds of serious negative consequences for the safety of third parties or significant damage to the investigation.[16] In these cases, the information should be provided to a confidant nominated or the Child Care and Protection Board (*Raad voor de kinderbescherming*). Finally, Article 488b(4) CCP implements Article 5(3) of the Directive, which stipulates that when the circumstances giving rise to one the exceptions cease to exist, the information is to be duly notified to a parent or guardian.

9.1.3 The Right to Access to a Lawyer for Juvenile Suspects (Art. 6 of the Directive)

In accordance with Article 6 of the Directive, Member States should ensure that children are assisted by a lawyer, especially prior and during police questioning as well as in the context of some sensitive evidence-gathering activities and during detention. For the implementation of this provision, the Dutch legislator could rely to a significant extent on the implementation of Directive 2013/48/EU on the right of access to a lawyer. The provisions implementing that Directive also apply in criminal proceedings where suspects are children (this follows from Article 488 CCP). The implementing

[15] The rationale behind this provision is twofold: on the one hand, this person can be expected to appoint a defence lawyer for the suspect thereby enabling the exercise of defence rights; on the other hand, the holder of parental responsibility must also be informed because he or she is legally responsible for the child and can be held civilly liable, see Cras (n 12), p. 113.

[16] One might think of situations in which a risk exists that the parents or guardian or other members of the household or family would conceal evidence or inform co-defendants, thereby causing considerable damage to the investigation, see M.J.M. Verpalen, 'Kennisgeving van vrijheidsbeneming en mededeling rechten aan ouders of voogd. Commentaar op Artikel 488b Sv' in *Tekst en Commentaar Strafvordering 2019* (online, last updated 1 March 2021).

provisions of Directive 2013/48/EU that the Dutch legislator could rely on for implementing Article 6 of the Directive are Articles 28, 28b, 28c, 28d, and 28e CCP as well as, additionally the Decree on Format of and Order During Police Questioning (*Besluit inrichting en orde politieverhoor*). However, in order to fully meet the requirements of this newer provision, a number of additional implementing provisions have been introduced. The reference goes, in particular, to Articles 489 and 491 CCP.

As for the provisions already introduced to implement Directive 2013/48/EU they are of relevance to assess the actual implementation of Article 6(3) of the Directive which solemnly enshrines the right of juvenile suspects to receive the assistance of a lawyer. Article 28 CCP provides for a general right of access to a lawyer in criminal proceedings, 'in the manner stipulated in the CCP'; Article 28b provides for the right of access to a lawyer without undue delay after deprivation of liberty, i.e. arrest;[17] and Article 28c provides for the right of the suspect who have been deprived of their liberty (arrested) to access a lawyer prior to police questioning (and which should be read in conjunction with Article 28b CCP)[18]. According to the Dutch legislator when implementing Article 3 of Directive 2013/48/EU, of all the 'points in time' provided for in Article 3(2) of the Directive, in the Netherlands, arrest is the earliest. As a result, under the current Dutch legislation, the earliest point in time at which the authorities are required to take active steps to ensure that the suspect or accused may exercise their right of access to a lawyer is immediately after arrest. To this end, Article 28b was introduced into the Dutch Code of Criminal Procedure when Directive 2013/48/EU was implemented.

Turning now to the provisions adopted with respect to juvenile suspects, Article 489 CCP has been added in order to meet the implementing requirements of the Directive at hand, i.e. Directive 2016/800/EU. This provision was originally left out the legislation implementing Directive 2013/48/EU, among other things because the principles established by the ECtHR in the notorious cases *Salduz* and *Panovitis* (which effectively concerned the right of juvenile suspects to be assisted by a lawyer during police interrogation)[19] had already been transposed into the PPS instructions for legal assistance in police interrogation of 15 February 2010. Article 489 CCP has acquired its current form with the adoption of Act of 15 May 2019, thus stipulating the mandatory assistance of a counsel for juvenile suspects after their arrest. This text corresponds to Article 28b(1) CCP on vulnerable suspects. Most notably, Article 489 operationalises the right to legal assistance by laying down an

[17] As follows from the transposition table with respect to Article 2(1) of Directive 2013/48/EU, the CCP does not expressly provide for the right of the suspect or accused not deprived of their liberty to access a lawyer prior to questioning; see in this regard also the comments made with respect to Article 3(4) of Directive 2013/48/EU.
[18] See the comments made with respect to Article 3(2)(a) of Directive 2013/48/EU.
[19] S.E. Rap, 'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused Reflections on the Directive on Procedural Safeguards for Children who are Suspects or Accused Persons in Criminal Proceedings', *European Journal of Crime, Criminal Law and Criminal Justice*, 2018, 110-131.

obligation for a public prosecutor or assistant public prosecutor to notify the governing body of the Legal Aid Board of the arrest. This notification need not take place if the suspect or accused person has chosen a lawyer and this lawyer or their replacement is available promptly.

In addition, the newly amended provision introduces an adjustment to the overall rules for adult suspects by making clear that the right to obtain legal assistance cannot be waived (see Article 489(2)). This provision reflects the choice of treating juveniles as 'vulnerable suspects' and draws on the unequivocal lack of references in the Directive to the possibility for children to waive their right to access a lawyer.[20] In accordance with the overarching principle that children should not be kept in custody before their interrogation and can only be questioned once they have spoken to their lawyers, the implementing legislation has stipulated specific rules to secure legal aid in case a counsel cannot be appointed promptly. Article 489(3) in particular provides that legal aid to assist juveniles with a lawyer during police interrogation should be provided even when these suspects are sent home awaiting for interrogation. It is submitted that the access to a lawyer for juvenile suspects entails, as for adults, both a consultation with the defence lawyer as well as the active participation thereof within police interrogation.[21]

Article 491 further implements Article 6 of the Directive with respect to juvenile suspects who have not been detained. In particular, this Article (at paragraph 1) lays down that this category of vulnerable suspects should be given when the prosecutor initiates a proceeding before a court (other than a subdistrict court). In addition, paragraph 2 contains a similar provision for a prosecution by means of a penal order imposing a community service of more than 32 hours or an obligation to pay more than EUR 200. In such cases, the Legal Aid Board is informed of the intended prosecution and a counsel may be appointed. It is worth noting that the limitations described above (such as those relating to the remit of sub-district courts or regarding some forms of out-of-court settlement) implement indirectly the provisions of Article 2(6) of the Directive which allows to avoid the application of its safeguards in relation to 'minor offences'.[22] Article 491 includes two additional paragraphs providing legal aid to juvenile convicted in connection with a hearing in the context of a Public Prosecutor's request for an extension of the measure of placement in a juvenile correctional institution or otherwise in the context of the enforcement of a sanction. This includes, for example, decisions on changing the

[20] Cras (n 12), p. 114.
[21] M.J.M Verpalen (n 16)
[22] In particular: 'where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or where deprivation of liberty cannot be imposed as a sanction'.

probation period or the special conditions as well as the order to enforce a sentence that was initially not enforced or the revocation of a conditional release.

9.1.4 The right to individual assessment (Art. 7 of the Directive)

The Directive includes (under Article 7 of the Directive) an obligation for individual assessment of children who are suspected or accused in criminal proceedings. This assessment is specifically required to gauge the needs of children concerning protection, education, training and social integration are taken into account. The safeguards outlined in the Directive in this respect were to a large extent already present within the legislation. As a result, implementation of Article 7 is mostly indirect and relies, to a large degree, on instruments such as the pre-sentence reports and other report (the so-called *pro-Justitia-rapportages*) drafted by the Child Protection Board or by the Probation Service (*Reclassering*). In keeping with the terminology used by pre-existing legislation, the current provisions implementing the right to 'individual assessment' speak of 'behavioural expert opinion' or 'behavioural expert advice' (*gedragsdeskundig advies* or *gedragsdeskundige advisering*). This has a slightly different nuance from the term used in the Dutch version of the directive (*individuele beoordeling*) in that it places emphasis on the suspect's behaviour and its implications for a well-suited criminal justice response. After all, the right to an individual assessment within the meaning of the Directive is based on the idea that the administration of justice is tailor-made, and that the personality of the suspect should be accorded special importance in all case-settling decisions.[23]

As far as a sentencing decision is concerned, when sanctions involving a deprivation of liberty are proposed, a tailor-made report is a necessary condition for the imposition of that sanction.[24] This flows from Article 77w(1) CC which requires a reasoned, dated and signed recommendation from the Child Protection Board, supported by at least one or two behavioural expert(s). These reports comply with Article 7(7) of the Directive in that they are supported by a set of expert advices which combine different expertise in a multi-disciplinary way. More broadly, in the Netherlands, decision-making regarding the justice-involved juveniles relies on the National Instrument for the juvenile justice system (*Landelijk Instrumentarium Jeugdstrafrechtsketen*) that is used to collect information about the young person and his or her living environment in a structured way (e.g. to predict the risk of re-offending). According to Article 494 CCP, in particular, the prosecutor who decides to carry out investigation against a juvenile must request the information on the personality and circumstances of

[23] See in this respect *Kamerstukken II* 2018/19, 35116, 3, p. 22.
[24] This is the case, for example, with the measure aiming at reforming the behaviour of juveniles (also called behavioural influencing measure or GBM) or the placement in a juvenile correctional institution (or PJI measure).

the suspect from the Child Protection Board.[25] A similar request can be filed by the investigating magistrate.

The broad provision of Article 494 CCP seems to implement the equally general principle laid down under Article 7(5) of the Directive, pursuant to which the individual assessment shall be carried out 'at the earliest appropriate stage of the proceedings and, subject to paragraph 6, before indictment'. Although Article 494 CCP does not mention exact moment in which such an assessment should be carried out, it appears from its wording (as well as the fact that it is either the public prosecutor of the investigating judge who should ask for such an assessment) that this should be in any case carried out prior to an indictment. Pursuant to Article 7(8) of the Directive the assessment should be dynamic in nature, in that the contents of the report should be updated in light of the change of the elements at the basis of the assessment. It appears, however, that no adequate provision exists under the current legislation that enables this adaptation throughout the criminal proceedings.

To further implement the provisions of Article 7 of the Directive, the Dutch legislator has introduced a new article 494a in the Code. According to article 494a(1) CCP to follow up on the request submitted by the investigating magistrate for the purposes of Article 494, the Child Protection Board provides an advice on the suspect. In addition, this Article fleshes out the contents of the advice regarding the suspect. Article 494a(2) CCP makes clear that 'when drafting the advice, the occurrence of specific vulnerabilities must be mentioned'.[26] The subsequent paragraph, however, stipulates that 'an advice need not be drafted if such advice about the suspect has already been drafted at least one year prior to police custody.' This provision falls within one of the exceptions to the right of individual assessment indicated under Article 7(3) of the Directive which allows to avoid the submission of an advice since the early stage of a proceeding 'when child has, in the recent past, been the subject of an individual assessment.'

Article 7(4) of the Directive lists the key moments in the procedure where the advice on the personality and the circumstances of the child must be carried out: these include any measure to the benefit of the juvenile, the assessment about the suitability of a precautionary measure (such pre-trial detention or bail), and all decisions defining the course of the proceeding (including the sentencing decision). This provision is generally implemented though to a large extent implicitly. As mentioned above, Articles 77s(2) and 77w(2) CC clearly express that the required advice must be present when imposing sanctions. As regards other sentencing options, as conditional imprisonment, it is common practice that judges are given this advice, precisely with a view to determining which conditions

[25] Following the implementation of Directive 2016/800/EU this provision is now applicable to all types of prosecution including those before a sub-district court and for the purpose of imposing a penal order.
[26] Own translation; official translation not available.

should be attach to the suspended sentence. This practice is however not codified.[27] As a way of explicit implementation, the legislator has added an additional Article 494b CCP, pursuant to which 'when an advice about the suspect, as referred to in Article 494a, has been submitted, the penal order shall mention how it was taken account of in the determination of a sanction or in the choice for a measure pertaining to the conduct'.[28] The wording of Article 494b stipulates that the advice (given pursuant to Article 494 CCP) must serve the authorities in taking a decision on sentencing within a final judgement or in the context of a penal order issued by the prosecutor.

9.1.5 The right to medical examination (Art. 8 of the Directive)

Prior to the adoption of the Directive, Dutch law on criminal procedure did not provide for a general right to medical examination for children who were deprived of liberty. With the entry into force of the Implementing Act, such a general right has now been provided for under Article 489a CCP. Article 489a stipulates that the assistant public prosecutor who orders that the suspect be detained for investigation, can order the investigation. This makes the assistant public prosecutor the 'competent authority' within the meaning of the Directive. The assistant prosecutor's order to detain the suspect for investigation marks the moment in time where the right to a medical examination becomes of application. The medical examination may be ordered either *ex officio*, or upon request of the suspect, his lawyer, his parent or guardian, or his confidant, with a view to the determination of his capacity to be subjected to questioning or an investigative act. This complies with the requirements listed under Article 8(3) of the Directive. Article 8 of the Directive it was left to national law how to deal with a wrongful refusal of medical examination. As was pointed out in the explanatory memorandum to the proposed implementing act, such cases are subject to the legal framework regarding procedural errors and its consequences (Article 359a CCP).[29]

Article 489a (1) reiterates, in accordance with the Directive, that medical examination should assess the overall mental and physical condition of the suspect. This provision also echoes the very wording of the Directive by restating the principle that this examination shall be as non-invasive as possible.

The second paragraph of article 489a CCP stipulates that the medical examination is carried out by a physician or under the responsibility of a physician. This ensures that the assessment is carried out by a qualified professional, as prescribed in the Directive, see Article 8(2). Examination under the responsibility of a physician refers to situations in which the young person is initially seen and

[27] *Kamerstukken II* 2018/19, 35116, 3, p. 22.
[28] Own translation; official translation not available.
[29] *Kamerstukken II* 2018/19, 35116, 3, p. 20.

assessed by, for example, a nurse or a medical assistant who reports his or her findings to the physician.

Article 489a(3) CCP deals with the possible consequences of the investigation. The outcome of the investigation could be a reason to postpone an interrogation or a planned investigation. However, this postponement is not necessary. The Directive offers room on this point where it is prescribed that the outcome of the medical examination 'takes into account' the extent to which the suspect is able to undergo an interrogation or any other investigative act. In order to prevent the suspect from having to undergo a medical examination unnecessarily, an optional provision has also been chosen when transposing the Directive.

Article 489a(4) CCP, stipulates that the conclusion of the medical examination is recorded in a report. This paragraph implements article 8(4) of the Directive, which stipulates that the conclusion(s) of the medical examination must be recorded in writing. The provision deviates from Article 88 of the Individual Healthcare Professions Act (Wet BIG) which stipulates that anyone practising a profession in the field of individual healthcare has the duty to keep confidentiality on what has been entrusted to him in the practice of his profession.

9.1.6 The requirement of audio-visual recording of police questioning (Art. 9 of the Directive)

A further important innovation brought about by the implementation of Directive 2016/800/EU is the duty for Member State's authorities to ensure the audio-visual recording of police questioning. As recital 42 makes clear 'in order to ensure sufficient protection of such children, questioning by police or by other law enforcement authorities should therefore be audio-visually recorded where it is proportionate to do so, taking into account, inter alia, whether or not a lawyer is present and whether or not the child is deprived of liberty'. While the Directive does not equally impose that questionings before a court or a judge are recorded,[30] this provision is a key instrumental safeguard to ensure that other procedural guarantees (including the right to legal assistance) are effectively complied with.

The regulation of this important safeguard was not codified in the Dutch Code of Criminal Procedure until the entry into force of the implementing act.[31] However, under the Decree 'on auditory and audio-visual recording of questioning declarants, witnesses and suspects'[32] it was standing practice to ensure the right to audio-visual recording of the questioning of children as provided for in the

[30] See Directive 800/2016/EU, recital 42.
[31] Jeltes (n 14) p. 22.
[32] *Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten*. Adopted in November 2018, as of 1 May 2021 no longer in force.

Directive. With the entry into force of the Implementing Act, this practice has now been codified under Article 488ac CCP. which now stipulates that the investigating officer shall audio-visually record the questioning if the seriousness of the crime or the personality of the suspect so requires. [33]

Evidently, this provision incorporates the proportionality test envisaged by Article 9(1) of the Directive. This also corresponds with the aforementioned Decree on auditory and audio-visual recording of questioning declarants, witnesses and suspects. However, in contrast to the Directive, audio-visual recording of the questioning has not been made dependent on whether a lawyer is present or not. According to the explanatory memorandum, it was argued that such an exception to the rule of audio-visual recording would have entailed a change of current practice and, furthermore, that the right to have a lawyer present constitutes a fundamental point of departure for children in criminal proceedings and should not provide a reason not to audio-visually record the questioning of a child.[34]

Article 9(2) of the Directive concedes that in the absence of audio-visual recording, questioning shall be at least recorded in another appropriate manner, for example by written minutes to be duly verified. In this connection, the official position of the Ministry of Justice and Security (as reflected in the explanatory memorandum), is that the requirement of Article 9(2) of the Directive follows from Article 29a(1) CCP which was already in force prior to the adoption of the Directive. Article 29a(1) CCP stipulates that written notes are made up in a police record (*proces-verbaal*) of all questionings, and that such a record must also state whether audio-visual recordings have been made.

9.1.7 Special safeguards for detained juveniles

Directive 2016/800/EU includes a long list of procedural safeguards geared to reduce the impact of arrest and detention on juvenile suspects. Article 10, in particular, poses constraints on the use and length of pre-trial detention. Article 10(1) requires Member States to ensure that deprivation of liberty is limited to 'the shortest appropriate period of time'. This general principle has been restated via an amendment to Article 493 CCP, which lays down additional rules for criminal proceedings where the suspect is a child. In particular Article 493(1) CCP requires remand detention to be determined at the shortest appropriate period of time. In any event, this provision makes mandatory for the court ordering the pre-trial detention of a suspect to consider whether the enforcement of this order may be suspended, either immediately, or after a specific period of time. To this end, the court may entrust a foundation or the probation service to carry out the supervision of conditions imposed on a juvenile. Additionally, Article 493(7) transposes the second sentence of Article 10(1) by requiring that a judge

[33] Own translation; official translation not available.
[34] *Kamerstukken II* 2018/19, 35116, 3, p. 26

ordering pre-trial detention 'take account of the age and the person of the offender, and of the circumstances under which the alleged offence has been committed'. [35]

Although Article 10 of the Directive stipulates further important rules as regards the use of pre-trial detention against juveniles, the transposing legislation has been fairly limited in this respect and concentrates around a few changes to Article 493. For the remaining part, the official position of the Ministry of Justice and Security – expressed in the explanatory memorandum – is that the existing provisions on pre-trial detention already meet the requirements of Article 10 of the Directive. In particular, the principle of using detention as a last resort and further safeguards for juvenile and adult defendants (a reasoned decision, subject to judicial review) are indirectly implemented by means of Articles 58, 59a, 64, and 65 CCP. These provisions have been made applicable to criminal proceedings initiated against children by virtue of Article 488 CCP. They concern various stages of remand proceeding: Articles 58 and 59 CCP concern the first stage of police custody (*inverzekeringstelling*); Article 64 concerns the second stage of remand in custody (*inbewaringstelling*); Article 65 concern the stages of remand detention (*gevangenhouding*) or arrest (*gevangenneming*). Prior to any decision taken, suspects must always be heard by the competent court. Such hearings provide the opportunity for the suspect or their lawyer to apply for release.

The above-mentioned provisions in the Code are also thought to provide indirect implementation to Article 11 of the Directive pursuant to which Member States shall ensure that, where possible, the competent authorities have recourse to measures alternative to detention (alternative measures). Most notably, the rule stipulated in Article 493(1) CCP that suspension of pre-trial detention must be considered immediately after having been order expresses the last resort character of deprivation of liberty in the pre-trial stage of criminal proceedings against children, and therefore the obligation to consider alternatives to deprivation of liberty. As explained above, the remaining part of Article 493 CCP envisages in more detail how the procedure of suspension and the imposition of conditions shall take place.

Finally, Article 12 of the Directive sets out specific rules of treatment for children while in detention. The explanatory memorandum makes clear that these rules are to a large extent already incorporated within Dutch legislation, most notably in the Young Offenders Institutions Act as well as in the regulations provided for under rules adopted on the basis of this Act. The applicable provisions and rules have been set out below. Article 12(1) of the Directive enshrines the principle of separation between adults and children in detention. This principle had already been implemented within legislation by Article 8(1) of the Act previously mentioned, which reads as follows: 'persons who have been ordered into pre-trial detention insofar at the time of the offence they allegedly committed

[35] Own translation; official translation not available.

they did not yet reach the age of 18, and persons who have been ordered into pre-trial detention insofar as the time of the offence they allegedly committed they did not yet reach the age of 23 and the public prosecutor has the intention to demand that justice will be administered in accordance with Article 77c of the Criminal Code.' This provision must be read in conjunction with Article 9 of the Custodial Institutions Act (*Beginselenwet justitiële inrichtingen*), which determines that general custodial institutions provide cells for adult suspects and adult offenders.

Article 12(5) of the Directive in particular requires Member States to take appropriate measures to protect a number of rights of people in detention, including the right to health and mental/physical development, the right to education and training, the right to family life, the prospects of social reintegration and the freedom of religion and belief. All these safeguards are already covered by a wide array of provisions within the Young Offenders Institutions Act. In particular, Article 2(2) of this statute encapsulates the goal of reintegration for juvenile suspects While other fundamental rights of persons deprived of liberty are covered by Articles 43, 46, 47, 48 and 52 of the Young Offenders Institutions Act.

Article 12(6) of the Directive stipulates that children deprived of liberty can meet with holders of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements. The official position of the Dutch Ministry of Justice and Security is that existing legislation already meets the requirement under this Article. Article 490(3) of the Dutch Code of Criminal Procedure (CCP) declares that in criminal proceedings against children, Article 45 CCP applies with respect to the parents and the guardian of the child. Article 45 CCP deals with free access of lawyers to their clients who have been deprived of their liberty. Pursuant to Article 490(3) CCP, parents and guardians have free access too. However, because Article 490(3) CCP does not apply to suspects kept in youth offender institutions, the question arises whether and to what extent Article 490(3) in conjunction with Article 45 CCP actually fully comply with the Directive. In our assessment, Article 490(3) CCP only partially implements the Directive.

9.1.8 Other guarantees

Further safeguards introduced by the Directive concern the right to privacy (Article 14) and the right to be accompanied by the holder of parental responsibility during the proceedings (Article 15). The explanatory memorandum took the view that Article 14 did not require implementation. In fact, it appears that the safeguards concerning the protection of a suspect's privacy are indirectly transposed by virtue of a few existing provisions. In particular, the respect of a juvenile's privacy during a criminal proceeding, as mandated by Article 14(1), is satisfied by Article 495b CCP which among other things stipulates that in principle cases shall be tried behind closed doors. Equally relevant is the duty for Member States to ensure that audio-visual and written recordings of proceedings

involving minors are not disseminated. In the Netherlands, auditory and audio-visual recordings as well as written recordings are automatically subjected to the legislative regimes of both the Police Data Act (*Wet politiegegevens*) and the Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens*), pursuant to which such recordings are not publicly disseminated.

As for the right of children to have their holders of parental responsibility present at hearings the Dutch code already provided for a specific duty for these individuals to attend the trial hearing (see Article 496 CCP). Interestingly this prerogative is framed as a legal obligation rather than as a fundamental right of the juvenile: Dutch law compels parents or the guardian to be present during court hearings, whereas the Directive envisages a right of the child thereto. The second and third paragraphs of this Article have been reframed to allow for the participation in the hearings, when needed, of a trusted person in addition to the parents. These provisions fulfil the obligation stipulated by Article 15(2) which requires the appointment of 'another appropriate adult' nominated by the child and accepted as such by the competent authority.[36] The implementing act has also introduced new provisions (488ab and 491a CCP) in order to give effect to the clause of Article 15(4) of the Directive when the suspect is being questioned by the police or is heard before the public prosecutor with a view to impose a penal order. In line with the exceptions listed by Article 15(4), letters a and b, the request to be accompanied by a parent or a trusted person can be rejected when it is not in the child's interest to be accompanied by this person or when the presence of such person will prejudice the criminal proceedings. These exceptions are provided for under Article 488ab(2) and Article 491a(3) CCP [37]

9.1.9 Rights of juvenile suspects in surrender proceedings

In line with other Directives belonging to the 'Roadmap' on procedural rights, Directive 2016/800/EU extend the scope of application of some key procedural safeguards to cover the position of individuals concerned by EAW proceedings. Member States are called on to ensure that the rights referred to in Articles 4, 5, 6 and 8, Articles 10 to 15 and Articles 17 and 18 of the Directive apply mutatis mutandis, in respect of children who are requested persons, upon their arrest pursuant to EAW proceedings in the executing Member State. The transposition of this provision required a greater effort on the part of the Dutch legislator as the relevant piece of legislation regulating surrender proceeding, the

[36] This provision is of use when the presence of a parent or holder of parental responsibility would be be contrary to the child's best interests or may jeopardise the proceeding (or whenever the holder of parental responsibility cannot be reached or his or her identity is unknown).
[37] It is worth mentioning that these exceptions are framed by the Dutch implementing legislation as grounds for refusal.

Surrender of Persons Act did not include specific rules in this respect. Yet the explanatory memorandum presents Dutch legislation as already partly compliant with the Directive.

The application of Article 4 of the Directive (right to information) in EAW proceedings has been effectuated through amending Article 17(3) of the Surrender of Persons Act in which Articles 27e of the Dutch Code of Criminal Procedure (CCP) and 488ab CCP have been declared to apply mutatis mutandis. Read in conjunction with Articles 27e and 488ab of the Dutch Code of Criminal Procedure, this provision establishes the application of the right to information (Article 4 of the Directive) in EAW proceedings.

The application of Article 5 of the Directive (right to have the holder of parental responsibility informed) in EAW proceedings has been effectuated through amending Article 17(3) of the Surrender of Persons Act in which Article 488b CCP has been declared to apply mutatis mutandis. Read in conjunction with Article 488b of the Dutch Code of Criminal Procedure, this provision establishes the application of the right to have the holder of parental responsibility informed in EAW proceedings.

The application of Article 6 of the Directive (right to assistance by a lawyer) in EAW proceedings has already been effectuated in the course of transposing Directive 2013/48/EU. Pursuant to Article 43a of the Surrender of Persons Act, the right of access to a lawyer already applies in EAW proceedings, also for children. This provision foresees the notification to the Legal Aid Board for the appointment of a lawyer in accordance with articles 28b(1), second sentence, and 39 CCP. No additional transposition measures were considered necessary.

The application of Article 8 of the Directive (right to a medical examination) in EAW proceedings has not been effectuated. This is seemingly due to a mistake, perhaps accidentally. According to the explanatory memorandum, the application of Article 8 in EAW proceedings had to be effectuated through amending Article 21(1) of the Surrender of Persons Act, namely by means of declaring Article 489a CCP to apply mutatis mutandis. Article 21(1) of the Surrender of Persons Act does not, however, contain a reference to Article 489a CCP, while it does refer to Article 17(3), which mutatis mutandis entails the application of the right to be informed on a number of rights, but even here the right to a medical examination has not been included, neither for adults, nor for children. Therefore, the only possible conclusion is that this part of Article 17 of the Directive has not been transposed.

As for the application of Article 10 of the Directive (limitation of deprivation of liberty) in EAW proceedings, it was stated that Articles 61 and 22 of the Surender of Persons Act already comply with the requirements of the Directive. Article 61 of the Surrender Persons Act stipulates that persons who have been deprived of liberty under the Surrender of Persons Act are treated equally as suspects who has been deprived of liberty under the CCP. Moreover, the strict terms for deciding on an EAW

envisaged in Article 22 of the Surrender of Persons Act must further guarantee that deprivation of liberty is significantly limited in time. Consequently, the requirements of Article 10 of the Directive must be considered to be met in EAW proceedings too. Article 61 of the Surrender of Persons Act also complies Article 11 of the Directive (alternatives to detention) in EAW proceedings in that it stipulates that persons who have been deprived of liberty under the Surrender of Persons Act are treated equally as suspects who has been deprived of liberty under the CCP. Consequently, the alternatives to detention, envisaged in the CCP apply mutatis mutandis in EAW proceedings. See also the comments made with respect to the transposition of Article 11 of the Directive.

The application of Article 13 of the Directive (timely and diligent treatment of cases) in EAW proceedings was – like in ordinary criminal proceedings – not considered requiring transposing legislation. See the comments made with respect to the transposition of this provision.

The application of Article 14 of the Directive (right to protection of privacy) in EAW proceedings was considered already ensured, first because Article 25 of the Surrender of Persons Act does provide for the possibility to have court hearings held behind closed doors, and, secondly through the other existing regulations regarding the protection of privacy.

The application of Article 15 of the Directive (right to be accompanied during proceedings) in EAW proceedings has been effectuated through, first, the adoption of Article 62 of the Surrender of Persons act (in which Article 490(1) and (3) CCP has been declared to apply mutatis mutandis, and, secondly, through amendments of Articles 21, 24 and 25 of the Surrender of Persons Act). These amendments entail the adoption of new paragraphs in which the right of the child to be accompanied was laid down for the various stages of the surrender proceedings. Article 490(3) CCP declares that in criminal proceedings against children, Article 45 CCP applies with respect to the parents and the guardian of the child. Article 45 CCP deals with free access of lawyers to their clients who have been deprived of their liberty. Pursuant to Article 490(3) CCP, parents and guardians have free access too. Under Article 62 of the Surrender of Persons Act, this is now also the case in surrender proceedings. Article 62 of the Surrender of Persons Act must be considered a partial implementation, for 490(3) CCP does not apply to suspects kept in youth offender institutions, the question arises whether and to what extent Article 490(3) in conjunction with Article 45 CCP actually fully comply with the Directive. In our view, Article 490(3) CCP only partially implements the Directive.

9.2 Case-law

We now turn to the case law on the subject-matter of the current Directive, focusing on the main decisions in this regard. Unlike other case law sections in this report, in this section we have included a few decisions by lower courts.[38]

As for lower courts' decisions, the District Court of Zeeland in ECLI:NL:RBZWB:2020:5646[39] was confronted with the interpretation of Article 488ab CCP which implements a person's right to have their parents (or holders of parental responsibility) present during police questioning. This provision implements Article 15 of the Directive with regard to the suspect's rights during this stage of the proceeding. In the case at issue the prosecutor, instead of relying on the newly adopted provision, decided to for the application of Articles 45 in conjunction with 490 CCP. Interestingly, the reason given by the prosecutor is that these provisions (interpreted by analogy to limit the access of parents to police questioning) would allow a judicial review of the prosecutorial order. The prosecutor accordingly submitted the order to the district court (*rechtbank*) for review. The choice of applying this regulation (instead of Article 488ab) relies on the assumption that Articles 45 in conjunction with 490 CCP while applying to the relationship between the suspect and their counsel can be applied extensively to cover the access of parents to police questioning, so that a refusal can submitted to judicial scrutiny. In the present case, the Court however concluded that the newly introduced Article 488ab shall take precedence over other provisions in that it operates as *lex specialis*. As a result, the decision to admit or refuse the access of parents to police interviews should have been left to an assistant prosecutor, who adjudicates on these requests with the permission of the prosecutor (see Article 488ab(3)). As the legislative history summed up in the Explanatory Memorandum relays, a deliberate choice was made to designate the assistant public prosecutor as the authority to decide – with the prosecutor's consent – on the grounds for refusing the parents access to the interrogation. The court has no power of review in this matter. As a result, in the case at issue the request by public prosecutor was declared inadmissible. A district court can only declare itself unable to assess the content of the grounds for granting the order. This conclusion, although certainly in line with the implementing legislation, may raise questions about the real adequacy of the provisions adopted by the Dutch legislator to satisfy the requirement of an effective judicial remedy as mandated by Article 47 of the Charter.

[38] Regarding the selection of case law for the purposes of this report, see Section 5.4 above.
[39] Rechtbank Zeeland-West-Brabant 17 november 2020, ECLI:NL:RBZWB:2020:5646

One of the very few decisions issued by Supreme Court on the subject-matter of the current directive is HR 8 december 2020, ECLI:NL:HR:2020:1958[40] concerning the legal obligation for the holders of parental responsibility in accordance with the newly reframed Article 496 CCP. As explained, this provision implements Article 15(1) of the Directive. Prior to the most recent changes, this duty of attendance at trial had sparked much criticism, thereby leading to the adoption of a new article 496a CCP. This provision, while setting out that in the absence of the previously mentioned adults the hearing should be suspended, has also clarified that the hearing of a case will not be postponed if 'the presence of one or both parents is not considered to be in the best interest of the minor', see Article 496(3). In the case at hand, the question was whether the failure of one of the two parents to appear would give rise to an obligation to suspend the trial hearing. The Supreme Court following the Attorney General's opinion and referring to a 'reasonable application of the law in line with the legislator's intention and the requirements of practical feasibility', came to the conclusion that 'the parents' in article 496a(1) CCP means 'both parents'. Among the proposed changes to the law advanced within the debate concerning the modernisation of the Code of Criminal Procedure,[41] it is noteworthy that the proposed legal text does not exclude the possibility that the case will not be suspended when none of the parents has appeared at the hearing. This is striking because the current caveat of Article 496a paragraph 3 of the Code of Criminal Procedure did not find its way in the in proposed text of the new Code and the freedom of the judge not to suspend the case is therefore increased.[42]

[40] HR 8 december 2020, ECLI:NL:HR:2020:1958
[41] See in this regard Section 5.1 above.
[42] See J.V. ten Voorde, Case note on Hoge Raad 8 december 2020, no. 19/01939, *Nederlandse Jurisprudentie* 2021, p. 1634-1645. This may be explained in light of the importance of expeditious handling of cases, perhaps the most important objective of the new Code, and yet it may be hard to square with the obligation to appear in person (new Article 6.1.33 paragraph 1) and with the Directive that describes the presence of the parent as an essential right of the minor.

10 Directive (EU) 2016/1919: Legal aid

10.1 Legislation

10.1.1 Introduction

Directive (EU) 2016/1919 (hereafter: the Directive) was implemented entirely through existing legislation, as is apparent from the official notification of implementation of the Dutch Government published on 20 October 2017[1] and the accompanying transposition table. In the transposition table, the Government does not provide any further explanation as to how the existing legislation in question covers the relevant provision of the Directive (as it does, for example, for Directive (EU) 2016/343). Apparently, the Government deems this to be self-explanatory. Given that the Directive was implemented entirely through existing legislation, one could be forgiven for thinking that it is has had little impact on Dutch legal order. Nothing is further from the truth, however, with the Directive currently under discussion being closely tied up with another instrument which is widely regarded as having necessitated significant adjustments to Dutch criminal procedure: Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed.[2] Accordingly, while the current chapter focuses on Directive (EU) 2016/1919, it should be read together with Chapter 8 in order to fully appreciate its impact. There it was observed that prior to the ECtHR's judgment in the case of *Salduz v. Turkey*,[3] Dutch law did not provide for the right to consult a lawyer prior to police questioning or the right to have a lawyer present and participate during such questioning. Worth noting at the outset then, is that one of the pre-existing provisions (repeatedly) referred to in the transposition table is Article 28b of the Dutch Code of Criminal Procedure (hereafter: CCP), the article providing for access to a lawyer without undue delay in criminal proceedings as newly introduced into the CCP for the purposes of implementing Directive 2013/48/EU.

[1] Titled *Mededeling van de implementatie van richtlijn (EU) 2016/1919 van het Europees parlement en de Raad van 26 oktober 2016 betreffende rechtsbijstand voor verdachten en beklaagden in strafprocedures en voor gezochte personen in procedures ter uitvoering van een Europees aanhoudingsbevel (PbEU 2016, L 297* (*Staatscourant* 2017, 59575), publicly available on zoek.officielebekendmakingen.nl.

[2] Regarding the relationship between Directive 2013/48/EU and Directive (EU) 2016/1919, see V. Costa Ramos & B. Vidal Fernández, 'Access to a Lawyer and Legal Aid', in: C. Arangüena Fanego, M. de Hoyos Sancho & A. Hernández López (eds), *Procedural Safeguards for Suspects and Accused Persons in Criminal Proceedings: Good Practices Throughout the European Union*, Cham: Springer 2021.

[3] ECtHR 27 November 2008, *Salduz v Turkey*, n. 36391/02.

The rights and provisions of the Directive can be found in various laws. As a preliminary remark, it should be noted that subsidised legal aid in criminal proceedings is regulated not in the CCP, but in the Legal Aid Act (*Wet op de rechtsbijstand*), which pre-dates the Directive. Nevertheless, in the transposition table accompanying the official notification of implementation of the Directive, the Government cites certain provisions of the CCP, as well as other laws, i.e. the Surrender of Persons Act and the General Administrative Law Act (*Algemene wet bestuursrecht*). It also cites the regulations adopted each year by the Dutch Legal Aid Board (*Raad voor Rechtsbijstand*) regarding the conditions under which the legal profession may register with the Board so as to be able provide legal aid services (the '*Inschrijvingsvoorwaarden advocatuur*', which are reissued every year). The relevant national provisions are set out below, per right of the Directive.[4] Regarding the scope of the Directive (as set out in Article 2 thereof), we refer to our comments in Chapter 8 on Directive 2013/48/EU.[5]

As a matter of context, it is worth noting that since 2013, successive governments have called for far-reaching changes and cuts to be made to the legal aid system, which has led to ongoing, critical debate against the backdrop of legal aid system that was already widely perceived to be under financial pressure, and as exacerbated by the efforts made to accommodate the ECtHR's judgment in *Salduz v. Turkey*.[6] The most recent call for change was made in 2018,[7] proposing a new legal aid system 'without increasing the costs', with the Dutch Bar Association (*Nederlandse Orde van Advocaten*) taking the stance that the proposals are unnecessary, will lead to more bureaucracy and will make it more difficult for those with the lowest of incomes to access justice.[8]

10.1.2 The right to legal aid in criminal proceedings (Art. 4 of the Directive)

According to the official notification of implementation (see in this regard the comments made above in Section 10.1.1), Article 4 of the Directive finds implementation in the Legal Aid Act and the CCP. Specifically, paragraphs 1 to 4 find implementation in Article 12(1) and (2)(a, b and c), in conjunction with Articles 34 to 34d, 35 and 43 of the Legal Aid Act, in conjunction with Article 28b of the CCP. Finally, Article 4(5) of the Directive finds implementation in Articles 28b and 28 of the CCP, while Article 4(6) finds implementation in Articles 43(1) and 44(1) of the Legal Aid Act. Article 28 CCP,

[4] In addition, Articles 6, 7 and 8 of the Directive are addressed separately.
[5] See Section 8.1.2.
[6] See in this regard the following report (in English) issued by the Legal Aid Board: https://www.rvr.org/english/ (last visited 3 September 2021), p. 22 and 29 in particular.
[7] For a summary of what it entails, see https://www.rvr.org/english (last visited 3 September 2021), p. 30.
[8] For an overview of developments in this regard, see https://www.advocatenorde.nl/standpunten/gefinancierde-rechtsbijstand-2/duurzaam-stelsel-rechtsbijstand (last visited 5 May 2021).

it should be recalled, provides in paragraph 1 for a general right of access to a lawyer in criminal proceedings, 'in the manner stipulated in the CCP'. Pursuant to paragraph 2 thereof – which provides that '[l]egal assistance shall be provided to the suspect in accordance with the manner provided by law, by an assigned defence counsel or defence counsel of his choice' – if a suspect chooses a lawyer, they themselves must bear the costs of the legal assistance, while if the suspect is unable to bear such costs or does not know a lawyer, they will be assigned one.

The general picture to emerge from the national provisions is that of a legal aid system that complies with the right lying at the heart of Article 4 of the Directive. In the Netherlands, the right to legal aid is dependent on both a means and merits test, as apparent from Article 12 of the Legal Aid Act, which provides in paragraph 1 (in relevant part) that legal aid 'shall only be granted … to natural or legal persons whose *financial capacity* does not exceed [a certain amount]',[9] while paragraph 2 sets out other grounds for not granting legal aid, i.e. where 'the request for legal aid is evidently devoid of any foundation; the costs related to the legal aid to be granted are not reasonably proportionate to the significance of the case; or the request for legal aid relates to a criminal case and it is likely, given the norm to have been violated, that a small fine relative the income will be imposed'.[10] Articles 34 to 34d of the Legal Aid Act set out the norms by which the suspect's means are determined, while Article 35 stipulates that the litigant is required to contribute to the costs of legal aid, 'unless otherwise provided by Legislative Decree'.[11] While in principle a personal contribution is required, in certain cases it is not. Article 43(1) of the Legal Aid Act provides that '[i]n the cases in which, pursuant to a statutory provision of the Criminal Code or the [CCP], a suspect, a convicted person or a former suspect has been assigned counsel by the governing body [of the Legal Aid Board], or has been assigned counsel on the instructions of the judge', the legal assistance is free of charge, 'notwithstanding the third paragraph'.[12] An example of such a statutory provision is Article 28b(1) and (2) of the CCP.[13]

Regarding Article 28b CCP, it should be recalled that pursuant to paragraph 3 thereof, in respect of arrested persons suspected of crimes for which pre-trial detention is not permitted, the authorities are required to give them the opportunity to contact a lawyer themselves, i.e. a lawyer of their own

[9] Own translation; official translation not available (emphasis added).
[10] Own translation; official translation not available.
[11] Own translation; official translation not available.
[12] Own translation; official translation not available. In the same paragraph, it says: 'The first sentence is not applicable to the assistance provided by assigned counsel during questioning as per Article 28d of the Code of Criminal Procedure of a person suspected of a criminal offence in respect of which pre-trial detention is not permitted.'
[13] This provision is set out above, in Section 8.1.3.1 above.

choosing and not through the Legal Aid Board. According to the legislator, in principle, such persons are not eligible for subsidised legal aid.[14] This would appear to comply with the Directive, given that according to Article 4(4) of the Directive, in applying the merits test, Member States may take into account the seriousness of the offence and the merits test will be deemed to have been met in two situations: 'where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of … [the] Directive' and 'during detention'.[15] Regarding the first situation, being arrested for a crime for which pre-trial detention is not permitted means that police custody (*inverzekeringstelling*) is not possible, whereas it is in the context of police custody that the suspect would first be brought before a judge (the investigating judge; *rechter-commissaris*) in order to decide on detention. Regarding the second situation, the thinking appears to be that the deprivation of liberty that that results from arrest is distinguishable from detention. Telling in this regard is further the legislator's observation in the context of the implementation of Directive 2013/48/EU (and in relation to Article 28b CCP) that pursuant to Recital 28 of that Directive, the arrangements that Member States are required to take in order to ensure that the suspect or accused deprived of their liberty are able to effectively exercise the right of access to a lawyer may, but need not, entail legal aid.[16]

Other examples of statutory provisions within the meaning of Article 43(1) of the Legal Aid Act are Article 39 of the CCP, pursuant to which the Legal Aid Board is required to assign a lawyer upon notification that the suspect has been taken into police custody (and who has not already been assigned a lawyer) and Article 40 CCP, pursuant to which the Legal Aid Board is required to assign a lawyer upon notification by the Public Prosecution Service of an order for pre-trial detention or, where the suspect is not in police custody, of a 'demand' (*vordering*) for such detention,[17] or that an appeal has been lodged against the final judgment at first instance and that it concerns a case in which pre-trial detention has been ordered.[18] Finally, with a view to the right to legal aid in European arrest warrant proceedings set forth in Article 5 of the Directive, worth noting here is that pursuant to Article 43(2)

[14] In the context of the implementation of Directive 2013/48/EU; see *Kamerstukken II* 2014-2015, 34157, 3, p. 26 (explanatory memorandum).
[15] See Article 4(4) of the Directive. See however D.V.A. Brouwer, *Verhoorbijstand 2.0. Een onderzoek naar de toelaatbaarheid van verhoorbijstand door anderen dan advocaten*, Deventer: Wolters Kluwer 2017 (a non-commercial publication of which is available at: https://www.jahae.nl/media/pages/ons-team/dian-brouwer/1386625276-1584949924/oratie-brouwer-um-verhoorbijstand-2.0.pdf), where the author argues that the national legislation, distinguishing as it does between arrested persons suspected of crimes for which pre-trial detention is permitted and arrested persons suspected of crimes for which pre-trial detention is not permitted as regard the availability of legal aid, falls foul of the standards set by the ECtHR in this regard.
[16] See *Kamerstukken II* 2014-2015, 34157, 3, p. 18-19 (explanatory memorandum).
[17] Art. 40(1)(a) CCP.
[18] Art. 40(1)(b) CCP.

of the Legal Aid Act, the stipulation in Article 43(1) thereof that in certain cases, the legal assistance is free of charge, applies mutatis mutandis to Article 43a(2) and (3) of the Surrender of Persons Act.

Pursuant to the third paragraph of Article 43 of the Legal Aid Act, however (which is a relatively new provision[19]), in cases in which the suspect to have been assigned counsel in connection with their deprivation of liberty has been convicted, and the judgment has become final, the Legal Aid Board 'may claim the amount of remuneration … from the convicted person whose financial capacity exceeds [the threshold for eligibility for legal aid]'.[20] While paragraph 3 would appear to be in line with the Directive,[21] it has nevertheless been criticised in the literature for potentially leading suspects to declining legal assistance on the basis that they may have to pay for it at a later stage.[22] Article 44(1) provides that '[p]ersons who pursuant to the Criminal Code or the [CCP] may be assisted by counsel, may be assigned a lawyer by the governing body [of the Legal Aid Board].'[23]

While the national legislation set out above may be said to cover the right to legal aid in criminal proceedings provided for in Article 4 of the Directive, it is worth noting here that it is also complex; the picture sketched above is not immediately apparent from the legislation. Here it is worth recalling that the national legislation through which the right finds legislation (according to the official notification of implementation) pre-dates the Directive.

10.1.3 The right to legal aid in European arrest warrant proceedings (Art. 5 of the Directive)

According to the official notification of implementation, Article 5 of the Directive finds implementation in the Surrender of Persons Act and the Legal Aid Act. Specifically, paragraph 1 finds implementation in Article 43a(1) and (2) of the Surrender of Persons Act and Article 43(2)(j) of the Legal Aid Act. Paragraph 2 finds implementation in Articles 12 and 28 of the Legal Aid Act, while paragraph 3 finds implementation in Articles 12(1) and 34 of the Legal Aid Act.[24]

[19] Having entered into force in 2017.
[20] Own translation; official translation not available.
[21] See the second sentence of Recital 19 of the Directive: 'The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts referred to in this Directive are carried out. *If the competent authorities are not able to do so, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts are carried out.*'
[22] See e.g. J. Nan, 'Kroniek van het straf(proces)recht', *Nederlandse Juristenblad* 2017/835, p. 1020.
[23] Own translation; official translation not available.
[24] Regarding Article 5(3) of the Directive, we refer to Section 10.1.2 of this report.

Regarding Article 5(1) of the Directive, Article 43a(1) of the Surrender of Persons Act – which was newly introduced for the purpose of implementing of Directive 2013/48/EU – provides for a general right of access to a lawyer in surrender proceedings and declares that certain provisions of the CCP providing for access to a lawyer in criminal proceedings apply mutatis mutandis to surrender proceedings. Article 43a(2) provides in relevant part that upon arrest of a requested person pursuant to the Surrender of Persons Act, the assistant public prosecutor is required to notify the Legal Aid Board, in order that it appoints a lawyer. Pursuant to Article 43(2)(j), this legal assistance is free of charge.

Regarding Article 5(2) of the Directive, Article 12(1) of the Legal Aid Act provides in relevant part that legal aid 'shall only be granted in respect of legal interests laying in the Dutch legal sphere, to natural or legal persons whose financial capacity does not exceed [a certain amount]',[25] while Article 12(2) provides for other grounds for not granting legal aid. Article 28 of the Legal Aid Act provides for a number of grounds on which to deny the assignment of a lawyer. As stated above, in the transposition table accompanying the official notification of implementation, the Government does not provide any further explanation as to how the existing legislation in question covers the relevant provision of the Directive. Neither of the two national provisions expressly refer to European arrest warrant proceedings or the right of persons sought for criminal prosecution in the Netherlands to legal aid when exercising their right to appoint a lawyer in the Netherlands to assist the lawyer in the executing Member State. Presumably the thinking was that this situation corresponds to the rule that legal aid may only be granted 'in respect of legal interests laying in the *Dutch* legal sphere', while the various grounds for not granting legal aid or denying the assignment are covered by the provision of Article 5(2) that the issuing Member State need only provide such legal aid 'in so far as … [it] is necessary to ensure effective access to justice'.

10.1.4 Decisions regarding the granting of legal aid (Art. 6 of the Directive)

According to the official notification of implementation, Article 6 of the Directive finds implementation in the CCP, the Surrender of Persons Act and the General Administrative Law Act. Specifically, paragraph 1 finds implementation in Article 28b CCP and Article 43a(5) of the Surrender of Persons Act, while paragraph 2 finds implementation in Article 3:41 of the General Administrative Law Act.[26]

[25] Own translation; official translation not available (emphasis added).
[26] Art. 3:41 of the General Administrative Law Act is a general provision for the communication of orders (*besluiten*) to the parties concerned, including the applicant, in writing (either by sending or handing it over to them). It will receive no further attention in this report.

Regarding Article 6(1) of the Directive, while the official notification refers to Article 28b CCP and Article 43a(5) of the Surrender of Persons Act, Article 43a(2) of the latter would also appear to be relevant in this regard. Articles 28b CCP and 43a(2) of the Surrender of Persons Act are set out above, while Article 43a(5) provides that if a person deprived of liberty pursuant to the Surrender of Persons of Act – other than pursuant to a European arrest warrant or a Dutch warrant of arrest or provisional arrest, or an order to be taken into police custody or for such custody to be extended, i.e. where the requested person has been remanded in custody (taken into *bewaring*, a form of pre-trial detention; *voorlopige hechtenis*) – does not have a lawyer, the Legal Aid Board is required, upon notification of the deprivation of liberty by the Public Prosecution Service, to appoint a lawyer. While each of these provisions sets out the competent authority deciding on whether or not to grant legal aid and on the assignment of a lawyer – the Legal Aid Board – not all of them give expression to the requirement that such decisions be taken 'without undue delay'. While Article 28b CCP does (although, arguably, only indirectly, given that it is the notification of arrest that must be made immediately), the provisions of the Surrender of Persons Act (themselves) do not. None of the aforementioned provisions give expression to the requirement that decisions on whether or not to grant legal aid and on the assignment of a lawyer be taken 'diligently, respecting the rights of the defence'. However, in the situations set out in those provisions in which the individual in question is entitled to legal aid,[27] assignment of a lawyer is more or less automatic.[28]

10.1.5 Quality of legal aid services and training (Art. 7 of the Directive)

According to the official notification of implementation, Article 7 of the Directive finds implementation in the Legal Aid Act and the regulations adopted each year by the Dutch Legal Aid Board regarding the conditions under which the legal profession may register with the Board so as to be able to provide legal aid services. Specifically, paragraphs 1 to 3 find implementation in find implementation in Article 15(b) of the Legal Aid Act in conjunction with the regulations adopted each year by the Dutch Legal Aid Board regarding the conditions under which the legal profession may register with the Board so as to be able provide legal aid services (and, in particular, Articles 3 and 6a thereof). Paragraph 4 finds implementation in Article 1(l)[29] of the regulations.

Article 15(b) of the Legal Aid Act provides that the Legal Aid Board may stipulate rules regarding the expertise of the lawyer in certain areas of the law. As to the regulations, no official translation is

[27] See Art. 28b(1) and (2) CCP, Art. 43a(2) and (5) of the Surrender of Persons Act.
[28] In the situation set out in Article 28b(2) CCP, the suspect is required to request the legal assistance.
[29] At the time, the relevant provision could be found in Article 1(j) of the regulations (in which regard it bears observing that the regulations are reissued on a yearly basis), and it is that provision that was cited by the Government in the transposition table.

available and they are too extensive to translate in their entirety here. Accordingly, we will only summarise them. The conditions referred to above may relate to the organisation of the firm where the lawyer is employed, the reporting by the lawyer with respect to the services provided by them, the minimum and maximum amount of cases in which a lawyer may be assigned and the expertise of the lawyer in certain areas of the law. Article 3 is titled 'Compliance with quality systems agreed on' and should be read in conjunction with Article 15(b) of the Legal Aid Act, while Article 6a is titled 'Expertise requirements for the provision of legal assistance in criminal cases'. Article 1(l) of the regulations provides that: 'In the cases in which he has been assigned the lawyer shall handle it personally and standby duties assigned to the lawyer should be handled by him personally, except in case of force majeure, sickness, hearings in other cases planned on the same day or other compelling reasons. In that case the lawyer shall ensure replacement. In case of replacement, the lawyer assigned shall remain accountable for the quality of the legal assistance provided.'

As stated above, since 2013, successive governments have called for far-reaching changes and cuts to be made to the legal aid system, which has led to ongoing, critical debate. While to date, the Directive has not featured prominently in this discussion, it is clear that the criticisms made have the potential to raise issues under Article 7 of the Directive in particular.[30]

10.1.6 Remedies (Art. 8 of the Directive)

According to the official notification of implementation, Article 8 finds implementation in Article 1:3 and Chapters 6 and 7 of the General Administrative Law Act. These provisions provide for a general administrative law remedy in respect of 'orders' as defined in Article 1:3 of the General Administrative Law Act: 'a written decision of an administrative authority constituting a public law act'. Chapters 6 and 7 thereof (which are too extensive to set out here) are titled 'General Provisions Concerning Objections and Appeals' and 'Special Provisions Concerning Objections and Administrative Appeals', respectively.[31] The mechanism cited by the Government in the transposition table does not provide *immediate* access to a judicial authority, however; before putting the matter to the administrative court, in principle the decision must first be challenged before the administrative authority to have issued the decision, or before another (higher) administrative authority. Here it bears observing that while the Directive does not specify what exactly the 'adequate and effective' remedy

[30] As observed in J. Boksem, 'Quality is everyone's responsibility', *Nieuwsbrief Strafrecht* 2018/341.
[31] For an impression of these chapters, the user is referred to https://www.acm.nl/sites/default/files/old_publication/publicaties/15446_dutch-general-administrative-law-act.pdf, an unofficial translation of the General Administrative Law Act, with the proviso that this translation may be outdated.

should entail (either in Article 8 itself or the relevant recital), under Article 47 of the EU Charter, the effective remedy envisaged is a judicial one.

10.2 Case Law

The case law by both the Supreme Court and the lower courts have been surveyed for cases addressing the interpretation of Directive 2016/1919, delivered after the expiration of the implementation deadline (25 May 2019) in accordance with the criteria set out for this report. The research conducted provided no relevant result.

11 Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial

11.1 Legislation

11.1.1 Introduction

Directive (EU) 2016/343 was implemented entirely through existing legislation. The following analysis is based on the official notification of implementation of the Dutch government to the European Commission published on 28 March 2018 regarding the implementation of Directive on certain aspects of the presumption of innocence and right to be present at trial, titled *Mededeling van de implementatie van richtlijn (EU) 2016/343 van het Europees parlement en de Raad van 9 maart 2016 betreffende de versterking van bepaalde aspecten van het vermoeden van onschuld en van het recht om in strafprocedures bij de terechtzitting aanwezig te zijn* (PbEU 2016, L 65/1) (*Staatscourant*, 29 March 2018, nr. 18991). The annex to this notification includes a transposition table which indicates how the Directive is implicitly implemented in Dutch law by means of existing legislation. This official notification was issued pursuant to Article 339 of the Dutch Instructions on Legislation (*Aanwijzingen voor de regelgeving*), which requires to communicate the viewpoint that no implementing legislation is required whenever existing legislation already complies with EU secondary law.

The rights and provisions of the Directive can be found in various laws, but principally in the Dutch Code of Criminal Procedure (hereafter: CCP), which is the primary source of law in the Netherlands for the rules governing the investigation and prosecution of crime. The other national laws in which such rights and provisions can be found are the Surrender of Persons Act, the Custodial Institutions (Framework) Act, the Young Offenders Institutions (Framework) Act and the Dutch Civil Code (*Burgerlijk Wetboek*), as well as delegated legislation in the form of a Legislative Decree (*algemene maatregel van bestuur*). The relevant national provisions are set out below, per right of the Directive.

11.1.2 The scope of application (Art. 2 of the Directive)

It is worth noting that the Directive has a slightly broader scope of application, *ratione temporis*, than other directives on procedural rights adopted on the basis of the Roadmap. Previously adopted instruments in the field of procedural rights used a similar wording, stating that they would apply from the moment the persons concerned have been made aware − by official notification or otherwise

– that they are suspected or accused of having committed a criminal offence. Yet during the negotiations all the involved EU institutions agreed that in order for the principle of the presumption of innocence to be effective, safeguards need to be put in place before suspects are informed of the charges against them.[1] This translates into the current version of Article 1 of the Directive according to which its guarantees apply 'from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence'.

On the other hand, the safeguards concerning the presumption of innocence and the right to be present at trial do not apply when legal entities are concerned. The EU legislator has chosen to restrict the scope of application of the Directive to natural persons (despite the concerns voiced during the negotiations by the EU Parliament) and effectively ruled out the application of these provisions to legal persons.[2] A further limitation, at least on paper, concerns the proceedings in which EU secondary law can be invoked. Pursuant to Article 2, the Directive applies to natural persons who are suspects or accused persons in 'criminal proceedings'. This specification is meant to avoid confusion[3] and a larger application of the safeguards enshrined in the Directive. For this reason, it was argued that the notion of 'criminal proceedings' is meant as an autonomous concept of EU law subject to the interpretation of the CJEU. These attempts to convey a narrow understanding of the Directive need to reckon with the long-standing approach taken by the ECtHR in interpreting the notion of 'criminal charge' and the related guarantees of Article 6 ECHR in light of the well-known *Engel*-criteria. The CJEU has already shown its inclination to rely on these criteria when interpreting the concept of 'sanction'. One can therefore expect that the same approach will be followed defining the boundaries of the notion of 'criminal proceedings' for the purpose of this Directive.[4] As indicated above (see Section 6.1.1), there are signs that the Dutch Supreme Court may be leaning towards a broader (and less formalistic) interpretation of procedural rights.[5]

[1] S. Cras, A. Erbežnik 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial Genesis and Description of the New EU-Measure' in *EUCrim* 2016, pp. 25-35
[2] S. Lambergits, 'The Directive on the Presumption of Innocence. A Missed opportunity for Legal Persons', *EUCrim* 2018, pp. 36-42
[3] The Council and the Commission, however objected that such an addition would create substantial confusion, since it was not contained in the other three already adopted Directives.
[4] J. Nan, 'Richtlijn 2016/343, betreffende de versterking van bepaalde aspecten van het vermoeden van onschuld; iets nieuws onder de zon?', *Delikt en Delinkwent* 2016, pp. 706-723.
[5] HR 20 februari 2018, ECLI:NL:HR:2018:247 in *Milieu en Recht* 2018, pp. 398-402 annotation by A. Tubbing. See also .L.G.F.H. Albers, *De onschuldpresumptie in het bestuursstrafrecht: het schemergebied tussen waarborg en instrumentaliteit*, Deventer: Kluwer 2004, p. 267-291

11.1.3 The right to be presumed innocent (Art. 3 of the Directive)

Article 3 of the Directive provides that Member States shall ensure that 'suspects and accused persons are presumed innocent until proved guilty according to law'. As the official notification to the European Commission indicates, a flagship provision in the CCP – that gives substance to the general principle formulated in the Directive – is Article 271(2) CCP. This paragraph reiterates that neither the presiding judge, nor any of the judges at the court session shall openly show any bias concerning the guilt or innocence of the defendant. The choice to indicate this provision as mirroring the broad obligation laid down in Article 3 of the Directive reflects a widespread view in the Dutch legal doctrine.[6] This rule concerns the attitude of judges during the trial hearing (*onderzoek ter zitting*) and ties into the requirement of 'appearance of independence' as defined by the ECtHR.[7] It is highly significant that the key provision indicated by the government to implement Article 3 of the Directive emphasises the presumption of innocence during trial. One could argue, *a contrario*, that lesser emphasis is placed on the role of this principle during preliminary investigation where evidence is collected. In a way, this reflects a somewhat narrow understanding of the scope of the presumption, one that has more to do with the judicial determination of guilt or innocence than with fact-finding.[8] At the same time, as numerous authors[9] (and the Government itself official notification)[10] seem to suggest, the presumption of innocence in the Dutch criminal justice system can be regarded as a 'golden thread' that unfolds throughout the whole code of criminal procedure, as its aspects can be found in various provisions. This is particularly apparent when it comes to the implementation of one of the key corollaries of this principle, namely the rule pursuant to which the burden of proof for establishing the guilt of suspect and accused persons is on the prosecution (Article 6 of the Directive). As we shall see below this provision is mirrored by numerous articles of the CCP: in particular, Articles 8, 9, 284, 311, 348 and 350 CCP.

In truth, other provisions in the CCP seem less likely to fulfil the prescriptions of the Directive in securing the respect of the presumption of innocence. Questions may arise in particular with regard to the adoption of coercive measures against suspects (such as pre-trial detention). Article 67a(2) CCP

[6] L. Stevens 'Het nemo-teneturbeginsel en de onschuldpresumptie. Commentaar op artikel 271 Sv' in: A.L. Melai, M.S. Groenhuijsen (eds.), *Wetboek van Strafvordering*, Deventer: Kluwer 2008, p. 1-170
[7] ECtHR 6 december 1988, *Barberà, Messegué en Jabardo v. Spain*, n. 10590/83, § 77.
[8] L. Stevens (n 6): 'Gedurende het proces komt het als uitgangspunt echter het meest pregnant naar voren tijdens het onderzoek ter zitting. Daar immers is het grootste deel van het feitenonderzoek al achter de rug, en komt de balans tussen de waarheidsvinding en de rechten van de verdachte pas echt naar voren.'
[9] J.H.B. Bemelmans *Totdat het tegendeel is bewezen*, Deventer: Kluwer 2018, pp. 335-391. N. Keijzer, 'Enkele opmerkingen over de praesumptio innocentiae in strafzaken', in: *Naar eer een geweten* Arnhem: Gouda Quint 1987, p. 251-253; see also L. Stevens (n 6).
[10] Mededeling van de implementatie van richtlijn, *Staatscourant*, 29 maart 2018, n. 18991, p. 2

mentions among the grounds that can justify deprivation of liberty both the risk of re-offending and the fact that charges against a suspect can create 'a serious upset to the legal order'. As per authoritative legal scholarship,[11] both grounds are hard to square with the presumption of innocence in that they do not justify deprivation of liberty on the basis of a trial-related argument (such as the risk of tampering with evidence).[12] In addition, Article 80 CCP allows the adoption of bail (and other alternatives to pre-trial detention) only by suspending an (already issued) arrest warrant.

11.1.4 Public references to guilt (Art. 4 of the Directive)

The Directive incorporates the findings of the ECtHR in its case law on Article 6(2) ECHR as regards the need to avoid public references to guilt by public officials and judicial authorities for as long as a person has not been proved guilty according to the law.[13] As for references or statements made by judicial authorities, the official notification refers again to Article 271(2) CCP, which according to its most recurrent interpretation, obliges the judge to treat the accused as if he or she were innocent (the principle of *in dubio pro reo*). In fact, this provision should be read in conjunction with Article 268 CCP, which requires the judge to be impartial. The judge at the trial session is responsible for maintaining the order during hearings; this duty would encompass an obligation to prevent undue references to a person's guilt from being made in that context. Article 271(2) sets a procedural requirement 'in the interest of a fair trial'. This is meant to prevent any expression that might hint at the guilt (or innocence of the defendant) before the end of the trial. Only once the trial is completed can the judge answer the questions of Article 350 CCP (i.e. if the charge has been proved and, if so, what punishable offence the proven fact constitutes according to law). Article 271(2) requires the judge to avoid any impression ('*geen blijk*') of their disposition toward the suspect. While this allows defence lawyers to exercise a scrutiny on the way in which a court[14] (its president and the other judges) treats the accused, it may not be easy to draw a line between some 'tough questioning' and a clear expression of bias (see below 11.2).

As for references to a person's guilt that can be uttered by other public and private authorities, the official notification points to other relevant provisions in the domestic legal system. Interestingly, the government makes clear that, because of their nature, most of these are to be found within sources

[11] A. Ashworth 'Four threats to the preumption of innocence' 10(4) International Jour-nal of Evidence and Proof (2006), p. 241–79, at 243.
[12] L. Stevens (n 6) however argues that these grounds are related to the more general objectives of the concrete criminal proceedings.
[13] S. Cras, A. Erbežnik (n 1), p. 27
[14] S.V. Pelsser, 'Vrijheid van verklaring/presumptio innocentiae. Commentaar op art. 271 Sv' in *T&C Strafvordering 2019* (online, last updated 1 July 2020).

other than the law. The reference goes, in particular, to a set of guidelines issued by the judiciary. These include guidelines regulating the contacts and the diffusion of information with the press and the media. A distinct, but equally relevant, set of guidelines concerns the anonymisation[15] of all data that may identify a natural person, a natural person working within a legal entity or a partnership (*samenwerkingverbanden*) in a judicial proceeding: any of this information must be rendered anonymous.[16] Furthermore, the way information concerning criminal proceedings is distributed and sourced to the media is regulated by the PPS instructions issued by College of General Prosecutors addressing both the police and public prosecutors. One of these instructions concerns 'the press policy' of public prosecution and is especially meant for spokespersons of the police and the PPS.[17] Among the numerous prescriptions included in this document, the instruction prescribes which personal data of a suspect may or may not be given to the press and identifies the authorities in charge (depending on the different stages in a criminal proceedings) to communicate with the media. None of these instructions or guidelines, however, prevent the public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest. Indeed, the instructions on 'the press policy' of public prosecution mentioned above describe the action of the PPS in the public sphere as 'visible, noticeable and recognizable' ('*zichtbaar, merkbaar en herkenbaar*'). Some commentators have therefore observed that the current 'press policy' of the PPS should be revised in order to make it more compliant with the Directive.[18] After all, in its 2013 impact assessment the European Commission concluded that the Netherlands were among those Member States (along with France and Poland) where the prohibition of public references to guilt were more frequently violated.[19]

As for the remedies to enforce the rule of Article 4(1) these could already be found under the existing legislation: similar to remedies available to enforce procedural rights covered by other EU directives, in its notification the Government points to the ability of a suspect to bring an alleged violation of their right to be presumed innocent in the investigative phase to the attention of the trial court. This can attach legal consequences to pre-trial procedural violations under Article 359a CCP: these consequences are discussed more extensively below and have been referred to in previous chapters of this report. In addition, the Government refers to the ability of a defendant (and of the prosecution)

[15] See https://www.rechtspraak.nl/Uitspraken/Paginas /Anonimiseringsrichtlijnen.aspx
[16] This duty of anonymisation does not include persons that are professionally involved in a criminal proceeding.
[17] College van procureurs-generaal, Aanwijzing voorlichting opsporing en vervolging (2012A009).
[18] J. Winkels, 'Het verbod op publieke verwijzingen naar schuld vereist een fundamentele verandering in het persbeleid van het Openbaar Ministerie', *Nederlands Juristenblad* 2019, pp. 1479-1480.
[19] European Commission, Commission Staff Working Document Impact Assessment accompanying Proposal for measures on the Presumption of Innocence, Brussels, 27 November 2013, SW 478 final, p. 21 and p. 57-58.

to apply for the recusation of the judge on the basis of facts or circumstances which might prejudice their impartiality (in accordance with Article 512 CCP). Finally, the official notification includes, among the possible remedies, the possibility for the suspect to bring preliminary relief (*kort geding*) proceedings by reason of unlawful act (*onrechtmatige daad*) before the civil courts, on the basis of Article 6:162 of the Dutch Civil Code.

11.1.5 The presentation of a suspect (Art. 5 of the Directive)

An important related guarantee concerns the presentation of suspects and defendants during criminal proceedings. Article 5 requires Member States to take measures ensuring that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.[20] The scope of this provision leaves some room for discussion. Yet according to recitals 20 and 21, the competent authorities should abstain from presenting suspects or accused persons as being guilty, in court or in public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons.[21] The recitals also makes clear that 'where feasible, the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so as to avoid giving the impression that those persons are guilty.' As André Klip put it, Article 5 'symbolises an approach that underlines respect for the accused's dignity and aims at preventing stigmatisation'[22]

According to the Government, the provision of Article 5(1) of the Directive is implemented by the rules restricting the use of police custody and pre-trial detention. In addition, the use of custodial measures vis-à-vis suspects is further framed by the official instructions applicable to the police, the Royal Gendarmerie and other investigating officers. As for the constraints on the use of arrest and pre-trial detention, Article 62(1) CCP stipulates that the suspect taken into police custody shall not be subjected to any restrictions other than those that are absolutely necessary in the interest of the investigation and in the interest of order. The same rule shall apply to those held in pre-trial detention according to Article 76 CCP. These combined provisions seem to give implementation to Article 5

[20] This provision has been largely inspired by ECtHR's case law on Articles 3 and 6(2) ECHR. See for a joint application of these articles in a case involving the use of means of physical coercion: ECtHR 17 July 2014, *Svinarenko and Slyadnev v. Russia*, n. 32541/08 and 43441/08), § 131

[21] See however Recital 20 'Unless the use of such measures is required for case-specific reasons, either relating to security, including to prevent suspects or accused persons from harming themselves or others or from damaging any property, or relating to the prevention of suspects or accused persons from absconding or from having contact with third persons, such as witnesses or victims'.

[22] A. Klip, 'Fair Trial Rights in the European Union: Reconciling Accused and Victims' Rights' in: T. Rafaraci, R. Belfiore (eds.), *EU Criminal Justice, Fundamental Rights Transnational Proceedings and the European Public Prosecutor's Office*, Cham: Springer 2019, pp. 3-24

of the Directive. It remains to be seen whether a proportionate use of police custody and pre-trial detention could, per se, ensure a correct implementation of the rationale behind this Article. As recital 20 clarifies, this provision is meant to prevent the 'use in court or in public of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons'. However, none of these means of coercion is routinely used in criminal proceedings in the Netherlands. At any rate, Article 5(2) makes clear that the provisions above shall be without prejudice for the possibility to use measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.

The rules governing the use of detention are complemented by a set of more detailed instructions for law enforcement officials (the police, the Royal Gendarmerie and other investigating officers) that pose further constraints in the use of means of physical coercion.[23] It is understood that in referring to these provisions, the Government hinted at the possibility that such coercive measures may have a bearing on criminal proceedings. In particular, the Official instruction for the national police corps, the royal gendarmerie and other investigating officers provides (at Article 22) that suspects can only be handcuffed 'for the purpose of transport' and when reasonably required by the 'facts or circumstances in view of the danger of escape or danger to the safety or life of the person deprived of his liberty as a matter of law, of the official or of third parties'. This provision allows enough leeway for law enforcement officials to decide on a case-by-case basis whether coercive measures are needed. This requirement is necessary in light of Article 5(2) which refers to the possibility of adopting such measures for 'case-specific reasons'.[24]

11.1.6 The burden of proof (Art. 6 of the Directive)

The presumption of innocence is more than a 'rule of treatment' applying beyond the criminal proceedings. Most notably, within the context of a criminal trial the presumption effectively lays down a 'rule of judgment', pursuant to which the burden of proof is on the prosecution, and any doubt should benefit the accused.[25] This aspect of the presumption of innocence ties into what Stefan Trechsel called the 'outcome-related' function of this principle, the goal being to 'avoid unjustified convictions and to uphold the fairness of the trial'.[26] Article 6(1) of the Directive incorporates this

[23] These instructions are included in a legislative decree issued on the basis of Article 9 of Police Act 1993 (Politiewet 1993).
[24] This clarification was requested by the European Parliament during negotiations and aimed at securing an individual assessment in each case as regards the proportionality of the use of measures of physical restraint, see S. Cras, A. Erbežnik (n 1), p. 30
[25] A. Balsamo, 'The Content of Fundamental Rights' in R. Kostoris (ed.), *Handbook of European Criminal Procedure*, Cham: Springer, 2018, p. 115.
[26] S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press 2005, p. 164.

side of the presumption of innocence by stipulating that Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution.

The Dutch Government indicated that this rule of judgement is expressed by several provisions in the CCP. This set of provisions is summarised as follows in the official notification by the Government: 'That the burden of proof lies with the prosecuting authority is shown *inter alia*, from the following: the decision to prosecute (*vervolgingbeslissing*) lies with the prosecution' Also: 'this decision is regulated by guidelines and requirements of care and is based on the legitimate results of the preliminary investigation. And finally: 'the prosecutor is responsible to present conclusive statements (*requisitoir*) that reflect what has been brought forward during the trial'. In other words, the Government recalls that prosecutors in the Netherlands are public officials and member of judiciary: as such they are under a duty, if the evidence so requires, to call for an adjusted sentence or apply for an acquittal or a conviction without sentence (*veroordeling zonder strafoplegging*). This means, *a contrario*, that the responsibility to put forward evidence for the charges (and argue in favour of a fitting sentence) lie on prosecutors.

Article 6(2) lays down the rule that doubts regarding the question of guilt shall always benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted. Although this provision concerns the decision regarding the choice of the verdict, the Directive did not go as far as to incorporate the rule that guilt needs to be proven 'beyond any reasonable doubt' and the standard of proof may not be that high under national law. The principle *in dubio pro reo* is however explicitly recognised in the Dutch legal order. Article 352(1) CCP makes clear that if 'District Court finds that it has not been proven that the defendant committed the offence for which he has been indicted, then it shall acquit him'. In making this decision, the judge shall rely on the standard of proof indicated by Article 338(1) CCP[27]: the evidence that the suspect committed the offence as charged in the indictment can be reached only 'when the court through the hearing has become convinced thereof from legal means of evidence'.[28]

In other words, Article 338 lays down that the judge can only reach a verdict of guilt if he is convinced that the accused has committed the offence. It is also stipulated that the judge shall base its verdict on the legal means of evidence as enumerated in Article 339(1) CCP. Legitimate means of evidence are the judge's own observation at the hearing, the accused's statement, the statement of a witness, the statement of an expert, and written documents.

[27] C.P.M. Cleiren, 'De rechterlijke overtuiging. Een sprong met hindernissen', *Rechtsgeleerd Magazijn Themis* 2010, p. 259-267

[28] Unofficial translation borrowed from http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf

In other words, the standard of proof required by Article 338 is one of 'judicial persuasion' (*rechterlijke overtuiging*). This requirement is to be interpreted as an 'objective conviction of the judge', and therefore should not be read in purely subjective terms.[29] The notion of 'objective judicial persuasion' implies, at the very least, that alternative explanations for the factual events underpinning the charges (as shown by the available evidence) can be ruled out (unless they appear extremely unlikely possibilities) and yet the court has a duty to provide a reasoned explanation of its verdict (*motivering*).[30] In its official notification the Government relays that a consolidated case law exists on the relevant Code's provisions which states that a court can only come to a finding of guilt if 'beyond any reasonable doubt' that a defendant has committed the offence. In this perspective, if reasonable doubt persists the judge has to acquit. This seems to be in keeping with the underlying rationale of Article 6(2) of the Directive: the principle *in dubio pro reo*. In reality, the interpretation of the objective standard of persuasion seems much more nuanced (and other interpretations of the term *overtuiging* have been proposed).[31] What is more, the rule of evidence applicable is different and somewhat less stringent when it comes to secondary proceedings related to the main one (e.g. in the case of a precautionary procedure for seizure).[32] Be that as it may, the wording of Article 338 CCP (and the risks of a subjective appreciation of facts, leading to a dissociation between a judge's personal conviction and evidence) have come under increasing criticism in the last few years.[33] The recent proposal of a 'modernised code of criminal procedure' spells out a new 'rule of judgement' which explicitly incorporates the notion of 'beyond any reasonable doubt'[34].

11.1.7 The right to remain silent (Art. 7 of the Directive)

The right to remain silent (or the right to silence, in Dutch: *zwijgrecht*) is another important guarantee flowing from the presumption of innocence. In fact, the right to silence can rather be seen as a particular application of the overarching principle *nemo tenetur se detegere*, or right not to incriminate oneself. The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the ECHR, but the ECtHR has derived these rights from the right to a fair procedure

[29] C.P.M. Cleiren (n 27)
[30] M. Dubelaar, 'Bewijsbeslissing. Commentaar op art. 338 Sv' in *T&C Strafvordering 2019* (online, last updated 1 July 2020).
[31] For an overview, see Cleiren (n 27)
[32] This type of procedures relies on the standard of proof of what is highly plausible (*hoogst aannemelijk* ('cogent and convincing' or 'clear and convincing'), see J.F. Nijboer, *Strafrechtelijk bewijsrecht*, Nijmegen: Ars Aequi 2017, p. 22
[33] H. Merckelbach, 'Liever rechters zonder overtuiging', *NRC Handelsblad* 6 and 7 January 2018, p. W3
[34] C.P.M. Cleiren, M.J. Dubelaar, 'Modernisering van het strafrechtelijk bewijsrecht', *Rechtsgeleerd Magazijn Themis* 2018, pp. 191-203

under Article 6 ECHR.[35] Article 7(1) lays down a general obligation to recognise the right to silence of suspects in relation to the criminal offence that they are suspected or accused of having committed. The Government's official notification recalls the provision of Article 29 CCP (discussed above) as regards the questioning of suspects during interrogations. Statements cannot be extorted, and before questioning begins suspects should receive a caution that they are not obliged to answer any questions. Similar obligations of taking caution with respect to the suspect in order to ensure their right to silence are incumbent on the trial court (see for instance 273 CCP).[36] The provision of Article 7(1) is complemented by the duty of Member States to ensure that 'suspects and accused persons have the right not to incriminate themselves' (Article 7(2)): along with the caution referred to in Article 29, other provisions in the Code allow the suspect to exercise their right to silence in line with the Directive, especially during trial hearings. Article 219 CCP, for instance, stipulates that a 'witness may assert privilege and refuse to answer a question posed to him, if by answering such question he would expose himself or one of his relatives by consanguinity or affinity in the direct line or in the collateral line in the second or third degree, his spouse or former spouse or civil registered partner or former civil registered partner to the risk of criminal prosecution'.

Interestingly, the Government in its official notification makes clear that in the Netherlands 'the right to remain silent receives further protection because a suspect has the right to consult a defence lawyer before his interrogation and can be assisted by a counsel during his interrogation. The lawyer can also intervene during the interrogation if she is of the opinion that there is a violation of the prohibition to bring pressure to bear on the suspect'.[37] We therefore refer back to our discussion of the right to legal assistance before and during interrogation above.

Article 7(3) codifies the case law of Strasbourg (see in particular the case of *Saunders* and the related case law)[38] which recognises that the *nemo tenetur* should be understood as not preventing national authorities from acquiring evidence which may be lawfully obtained through the use of legal powers of compulsion, provided that such evidence exists independent of the will of the suspects or accused persons. This 'exception' is implicitly transposed by a number of provisions in the Code. In particular,

[35] See, e.g., ECtHR 25 February 1993, *Funke v. France,* n. 10828/84, § 44
[36] See Article 273(2): 'The presiding judge shall advise the defendant to listen carefully to what is being said and shall inform him that he is not obliged to answer any questions.'
[37] Mededeling van de implementatie van richtlijn, *Staatscourant*, 29 March 2018, nr. 18991, p. 2. This seems to be in keeping with In line with the ECtHR's Grand Chamber's findings in *Salduz v. Turkey*, which link the right of access to a lawyer in the pre-trial investigative stage with the right to silence.
[38] ECtHR, 17 December 1996, *Saunders v. United Kingdom*, n. 43/1994/490/572; ECtHR, 29 June 2007, *O'Halloran and Francis v. United Kingdom*, n. 15809/02, 25624/02.

the Government in its official notification mentions Article 151b(1) CCP concerning the forcible acquisition of DNA samples.[39]

Importantly, Article 7(6) of the Directive stipulates that the exercise of the right to remain silent or of the right not to incriminate oneself 'shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned'. In this respect the information provided by the Dutch government is not entirely reassuring and one can safely raise questions about the effective implementation of this guarantee (and of the ECtHR's case law on which it is based): the official notification only refers to Article 29(1) (cited above) which lays down a prohibition to put pressure on a suspect during questioning (*pressieverbod*). No mention is made to provisions which might be invoked to avoid courts from drawing on a suspect's silence to prove charges against them. In fact, in some instances (e.g. where there is abundance of other incriminating evidence) the silence can be used against the suspect, 'in the sense that the judge may take the silence of the accused into account while weighing other incriminating evidence'.[40] This may influence the appraisal of available evidence[41] and thereby have a bearing on the verdict. In addition, the attitude of a suspect may be taken into account by the judge, in a negative sense, when making a sentencing decision or in other instances during the trial. Although the ECtHR in *John Murray* seems to have allowed 'adverse inferences' from silence, the extent to which the exceptions allowed by this jurisprudence are admitted under the Directive is still up for debate.[42] In addition, the case law of the Supreme Court seems to allow adverse inferences in the absence of the compensatory safeguards (e.g. warning of the legal consequences of silence) requested by the Strasbourg court to guarantee the overall fairness of the proceedings. In our view, current Dutch practice on the right to silence in this regard raises issues under Article 7(6) of the Directive.

[39] 'The public prosecutor may order in the interest of the investigation for the purpose of DNA testing as referred to in section 151a(1) that cellular material be taken from the suspect of a serious offence as defined in section 67(1), against whom there are serious suspicions, if he refuses to give his written consent. Section 151a(2) and (4) to (10) inclusive shall apply mutatis mutandis'. A similar provision, Article 195d(1), extends the same prerogative to the investigating magistrate.

[40] J. Boksem 'Zwijgrecht. Commentaar op art. 29 Sv' in *T&C Strafvordering 2019* (online, last updated 1 July 2020).

[41] HR 29 januari 2019, ECLI:NL:HR:2019:97.

[42] See Article 7(5) of the Directive: the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not be considered to be evidence that they have committed the criminal offence concerned. Recital 28 however adds that such provision shall be interpreted 'without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.' For an interpretation of this recital in light of the preparatory works, see Cras, Erbežnik (n 1), p. 35

11.1.8 Right to be present at the trial and right to a new trial (Artt. 8 and 9)

Article 8 and 9 of the Directive should be read in conjunction, as they regulate the instances in which a suspect was tried *in absentia* without being aware of the proceedings and, as per the ECtHR's case law, should be allowed to apply for a re-trial and obtain a new judicial determination on the merits.[43] According to the official notification of implementation (provided by the Government), the procedural rights in question are transposed via a set of provisions in the CCP. In essence, pursuant to the relevant provisions in the CCP concerning the trial *in absentia*, authorities must make every effort to ensure the presence of the suspect at trial. In order to do so, authorities are under the obligation to inform the suspect about the summons and the date and time of the hearing. As the official notification (and the annexed table) report, however, in the Dutch practice the time of the hearing is often determined only after consultation with the suspect's defence lawyer.[44] The right to appear in person is considered to be waived if the suspect has authorised a counsel to stand at trial as a defence lawyer: this authorisation does not have to be given in writing, and the counsel has no obligation to submit documentation in that respect to the court. If a counsel argues to have been explicitly authorized and is at the hearing to handle the suspect's defence, the proceeding is regarded as a defended action under Dutch law (see Article 279 CCP). This seems to fulfil one of the two pre-conditions for allowing a trial *in absentia*, namely that the suspect 'has given a mandate to a lawyer who has been appointed by that person or by the State and has represented the same person at the trial' (Article 8(2)b of the Directive).

The second pre-condition enumerated by the Directive is that the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance. Under the Dutch Code of Criminal Procedure, trials *in absentia* can take place only when certain formalities have been observed. The statutory notification procedure (according to Article 36b CCP) is the most important of these. The suspect is served with a copy of the summons indicating the time and place of the trial as well as of the charges and has a full right of access to the case file before the commencement of trial. At the beginning of the trial the court must satisfy itself that the prosecution has followed the provisions of the Code for notifying the defendant of the charges and of the trial place and date, but only when the defendant is absent from the court room. Pursuant to Article 278 the trial court 'shall determine the validity of the delivery of the summons to the suspect who has failed to appear. If it appears that said summons was not validly issued, it shall declare the summons null and void.'[45] The

[43] To the extent that the person concerned has not waived his right to appear and to defend himself or that he intended to escape trial, Balsamo (n 25), p. 138
[44] Mededeling van de implementatie van richtlijn, *Staatscourant*, 29 maart 2018, n. 18991, p. 2
[45] This provision was amended to comply with the judgement of the ECtHR in the case 22 September 1994,

current set of provisions regulating trials in the absence of a suspect is generally compliant with Article 8 of the Directive.

Article 9(1) of the Directive stipulates that when suspects are absent at trial and the conditions listed above are not met, they shall have a right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case including examination of new evidence, and which may lead to the original decision being reversed. The official notification published by the Government indicates that this rule is complied with by domestic legislation in that the person concerned may file appeals against a decision or verdict issued in their absence. Most notably, the communication refers to grounds for challenging a District Court's judgement or a Court of Appeal's judgment (via an appeal or an appeal in cassation). Article 404(3) CCP lays down that, in derogation of the limits normally applicable to other appeals, 'a defendant may file an appeal against a judgment rendered in absentia as referred to in paragraph (2)(a) and (b), if the summons or notice to appear at the court session of the court of first instance or the notice to appear at the court session at a later date was not given to or served on the defendant in person and no other circumstance has occurred from which it follows that the date of the court session or of the court session at a later date was known to the defendant beforehand'. The document also refers to Article 431(1) CCP which enables a defendant to appeal a judgement in cassation before the supreme court (on points of law).

It should be observed that while these remedies allow to challenge a decision *in absentia* only an appeal against the decision of a District Court paves the way for a new judgement involving a fresh determination of the merits and gathering of extra evidence. The judgement ensuing an appeal in cassation only deals with questions of law.

Although not mentioned in the official notification, the obligation to inform the suspect orally of the existing legal remedies (including the appeal) against a decision is laid down in general terms by Article 364 CCP. This duty is fulfilled by the presiding judge when pronouncing the verdict. On the other hand, Article 366 CCP stipulates that if the suspect is tried in absentia and he or she does not know or could not have known – with sufficient certainty – the date of the hearing or the continuation of the hearing after suspension, they will be notified the judgment by the Public Prosecutor. The rationale behind this provision is to allow the suspect to file an appeal against the judgment *in*

Lala v The Netherlands, n. 14861/89. See E. Stamhuis, 'In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminial Justice System', *Victoria University of Wellington Law Review* 2001, p. 715

absentia.[46] However, the content of this communication does not include an explicit information about the possibility to challenge the decision.

11.1.9 Remedies (Art. 10 of the Directive)

According to the official notification, Article 10 of the Directive finds implementation in a vast set of provisions allowing the suspect to challenge District Court's or Court of Appeal's judgements (see, *inter alia* Article 404 CCP) to claim before the trial court that evidence has been illegally gathered in the pre-trial phase (359a CCP), or to apply for the recusation of a judge. In particular, these remedies transpose Article 10(2), which requires to attach legal consequences to breaches of the right to remain silent or the right not to incriminate oneself, in a way that ensures that the rights of the defence and the fairness of the proceedings are respected. It therefore comes as no surprise that remedies available in this respect largely overlap with those analysed above in relation to the right of access to a lawyer.

The possibilities of filing an appeal on the basis of Article 404 CCP have already been discussed in the previous section. As for the ability of the trial court to attach legal consequences to pre-trial procedural violations, details have already been provided with regard to the mechanism designed by Article 339a CCP. In addition, the official notification refers to Article 512 CCP, pursuant to which 'on application of the defendant or the PPS, any of the judges, who hear a case, may be recused on the grounds of facts or circumstances which might prejudice judicial impartiality'.

11.2 Case law

The case law by both the Supreme Court and the lower courts has been surveyed to look for cases addressing the interpretation of Directive 2016/343, delivered after the expiration of the implementation deadline (1 April 2018) in accordance with the criteria set out for this report. The research conducted provided no relevant result.

[46] G.K. Schoep, 'Mededeling van vonnis uitgesproken buiten aanwezigheid van verdachte. Commentaar op art. 366 Sv' in *T&C Strafvordering 2019* (online, last updated 1 July 2020).

12 Concluding remarks

12.1 Introduction

What transpires from the preceding chapters is a very complex and nuanced landscape as far as the implementation of the Directives is concerned. Formally speaking, all six of the Directives under consideration in this report have been implemented. For the majority of the Directives, specific implementing legislation was introduced by the Dutch legislator, while only two of the Directives have been dealt with through implicit or indirect implementation: Directive (EU) 2016/343 on the presumption of innocence and right to be present at trial and Directive (EU) 2016/1919 on legal aid. The remaining Directives required to a lesser or greater degree an intervention of the legislator and the adoption of an array of implementing provisions, enshrined through ordinary legislation, delegated legislation, administrative acts and policy guidelines. In these concluding remarks we discuss briefly the nature of the implementation of the Directives in the Netherlands and main points of concern in this regard, as set out in the preceding chapters (for more concrete illustrations of the main problematic aspects of implementation, the reader is referred back to the chapters themselves). We will do so against the backdrop of the overall constitutional and legal framework (and to a certain extent the legal culture underpinning them) as set out in the introduction to this report. In doing so, an attempt will also be made to identify current trends in Dutch case law and prospects of reform of Dutch criminal procedure that may soon transform the state of things as described in this report.

12.2 Main points of criticism in the implementation of the Directives

Admittedly, as some commentators have noted, EU Directives can be seen as vague,[47] merely repetitive of ECtHR's case law, and largely inadequate to ensure an effective protection of defence rights in both transnational[48] and domestic proceedings.[49] However, as our analysis demonstrates, their impact on domestic criminal procedure can be hardly overstated. While some instruments have created a sizeable upheaval with significant repercussions in the public debate well beyond the boundaries of academic and professional discussion (e.g. Directive (EU) 2013/48 on the right of

[47] J. Nan, 'Richtlijn 2016/343, betreffende de versterking van bepaalde aspecten van het vermoeden van onschuld; iets nieuws onder de zon?', *Delikt en Delinkwent* 2016, p. 722
[48] T. Rafaraci, 'The Right of Defence in EU Judicial Cooperation in Criminal Matters', in: S. Ruggeri (ed.) *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, pp. 331-343
[49] L. Bachmaier Winter, 'The EU Directive on the Right to Access to a Lawyer: A Critical Assessment' in: S. Ruggeri (ed.) *Human Rights in European Criminal Law*, Chaim: Springer 2018, pp. 111-131

access to a lawyer), others have produced more subtle and almost invisible tectonic shifts which may nevertheless alter the balance of Dutch criminal procedure (e.g. Directive (EU) 2010/64 on the rights to interpretation and translation), possibly even more than Strasbourg case law. After all, as correctly pointed out by some commentators, EU Directives may engage domestic courts in the activity of consistent interpretation of national law (*richtlijnconforme interpretatie*) and may receive direct application within national criminal proceedings.[50] What is more, the Court of Justice will be gradually called upon to develop autonomous concepts of EU law in the interpretation of the Directives, thus maximising their impact in terms of harmonisation of national law. In other words, the effects of the Directives can be reasonably expected to expand in the future, with a noticeable progression in terms of protecting the rights of the defence across the EU.

In light of the above, it is regrettable that Dutch implementing legislation has not engaged more vigorously with the contents of the Directives and the rights-approach to criminal procedure envisaged thereunder. This is somewhat surprising, as some key procedural rights enshrined by the EU legislator were not provided for under Dutch law (the right to have a lawyer present and participate during police interrogation; the right to translation of essential documents; the right to medical examination for juvenile suspects) or were not explicitly recognised by legislation (the right to an interpreter in the pre-trial phase of the proceedings; the right to be informed of procedural rights promptly[51]). A possible explanation for this is that in implementing the Directives, the Dutch legislator was also seeking to ensure continuity. Here it may be observed that Dutch implementing legislation follows a line of linguistic continuity with the terminology employed by the CCP (which refers to the 'powers' or *bevoegdheden*). In many instances the language tries to follow closely the terminology previously used by the Code. This goes hand in hand with an approach to transposition which appears rather formalistic. Save for some exceptions (e.g. Article 28 CCP), the implementing provisions are at odds with the spirit of the Directives, in that they do not use a language of 'empowerment', but rather convey a sense of unilateral concessions being made to suspects. Indeed, several of the implementing provisions analysed in this report do not fully capture the protective nature of the rights covered by the Directive, i.e. what stands to be gained in effectuating it in terms of fairness, effective defence and equality of arms. This is certainly the case with regard to the right of access to a lawyer where the right to receive the assistance of a lawyer without undue delay is not expressed as such. In the same vein, the newly introduced provision concerning the right to an

[50] M. Luchtman, 'Kroniek van het Europees strafrecht', *Nederlandse Juristenblad* 2014, pp. 1082-1092; J. Ouwerkerk, 'Europeanisering van het Nederlandse strafrecht. Blessing in Disguise' (Essay t.b.v. jaarvergadering Jonge Nederlandse Juristen Vereniging), *Nederlandse Juristenblad* 2013, pp. 2896-2993.

[51] This right was in fact only partially recognised in practice as the CCP did not provide for the right to be informed of certain fundamental rights promptly, and while in practice suspects were provided with information on certain rights (for example, this was already standard practice in respect of suspects to have been arrested), this did not occur in all situations envisaged by the Directive, or in respect of all of the rights stipulated by the Directive in this regard.

interpreter, Article 29b CCP, adopts the terminology traditionally employed by the Code and seems to address mostly prosecuting authorities, thus demanding that the 'assistance of an interpreter shall be sought'. Similarly, Article 30(1) CCP provides that the public prosecutor may grant access to the materials of the case during the preliminary investigation, adding that access shall in any case be granted as from the interrogation upon arrest. These provisions, far from clearly attributing 'individual rights', are framed and construed as prescriptions addressing the authorities. In them, the suspect is regarded as the passive recipient of decisions being made by the prosecutors, judges and police officers. Aside from being at odds with the spirit of the Directives, it is also problematic from an internal perspective. As observed above, in the Netherlands, the effectuation of procedural rights is increasingly being made dependent on the defence taking the initiative in this regard. Yet at first glance the legislation is hardly inviting or accommodating in this regard. At the same time, it is debatable in how far the effectuation of the fundamental rights of the suspect or accused may be made dependent on the initiative of the defence.

In our view, the failure of national implementing provisions to capture fully the protective nature of the Directive is equally reflected by the lack of effective and timely judicial remedies, another visible pattern in the provisions analysed. What is particularly noticeable in this regard is the choice not to implement specific remedies that may provide immediate and effective redress, i.e. redress 'without undue delay', to violations of rights taking place in the pre-trial or early stage of criminal proceedings. The apparatus of remedies identified by the Dutch legislator, while largely drawing on existing provisions in the CCP, seems to revolve around complaint mechanisms (e.g. the exclusionary remedies for illegally acquired evidence) which can only be activated during trial. To a large degree, decisions concerning the effective implementation of procedural rights in the early stage of proceedings remain firmly in the hands of prosecuting authorities. Apart from the lack in some areas of prompt and timely remedies, this raises questions with respect to the independence of those handling complaints or challenges filed by the suspect given the lack of external judicial review of decisions (e.g. by an investigating magistrate).[52] It is noticeable that challenges against decisions to refuse the assistance of an interpreter made by a prosecuting officer, can be dealt with by assistant public prosecutors (in practice, senior police officers), thus casting serious doubts with regard to compliance with the requirements of an 'effective judicial remedy' under Article 47(1) EU Charter.

Finally, aside from the issue of framing and approach to remedies, a hurdle to a fuller and more effective exercise of procedural rights is caused by the somewhat minimalistic approach to certain rights of the Directives. Worth mentioning in this respect is the manner in which the right of access

[52] See however Article 30(4) CCP in case of refusal or partial access to the case file the suspect may submit a notice of objection to the investigative judge within fourteen days after the date of the notification referred to in paragraph 3, and thereafter each time after periods of thirty days. The investigative judge shall hear the public prosecutor and shall give the suspect the opportunity to present his views before taking a decision.

to a lawyer and to have a lawyer present and participate during questioning in particular, is regulated. The delegated legislation which, within the framework of what has been provided for by the Code, further regulates and restricts this right (e.g. by preventing the counsel from replying to questioning on behalf of their clients) betrays a certain uneasiness with this right. This legislation may therefore be criticised on the basis that it potentially undermines the effectiveness of the right. Similarly, while Directive 2012/13/EU compels Member States in no uncertain terms to ensure that case materials 'are made available', Dutch provisions regarding access to case materials (including Article 30(1) CCP) express a system in which the defendant or their lawyer must first submit a request for that purpose. Besides being reflective of a traditional framing of a suspect's prerogatives in criminal proceedings, which hardly sees those as 'rights', this minimalistic approach speaks of the attempt to avoid disrupting the activity of prosecuting and law enforcement authorities (which might have derived from a more ambitious implementation of the Directives).

12.3 Current trends in Dutch case law and the way forward

The national legislation may at the very least be criticised on the grounds that while it was introduced for the specific purpose of implementing the Directives, it does not speak for itself in terms of the rights-protection envisaged by the Directives. Many of the implementing provisions analysed reflect a rather conservative approach, aimed at drawing, to the largest extent possible, on existing procedural provisions and mechanisms. It is therefore unfortunate that in ruling on matters falling within the scope of the Directive, the Dutch Supreme Court appears reluctant to refer explicitly to the Directives. When it does so, this is often only *ad adiuvandum*, and national provisions are rarely interpreted in light of the corresponding Articles in the Directive. Meanwhile, the Dutch Supreme Court remains rather loyal to its reliance on the ECHR, even when some safeguards expressed in the Strasbourg case law are codified in the Directives. Interestingly enough, more references to EU law (and some timid attempts of consistent interpretation of national law) can be found in the jurisprudence of lower courts. While it is difficult on the basis of the case law examined for the purposes of this report to ascertain why courts do not always refer to the Directives, it seems likely that a more open attitude on the part of Dutch courts towards EU law is to be expected as knowledge of and familiarity with EU secondary law and, importantly, the EU Charter increase.

A final disclaimer is in order. The current state of affairs may be subject to impending transformations in the months and years to come as the prospects of a new and 'modernised' Code of Criminal Procedure for the Netherlands becomes more concrete. As a result, the depiction of the transposition provided in this report may soon become obsolete. The most recent proposals of reform pledge to

achieve a 'a future-proof, accessible workable code that provides a balanced system of safeguards'.[53] One of the driving forces behind this proposed reform is the need to reduce the gap of the current text (entered into force in 1926) with the overarching and right-centred case law of the ECtHR.[54] It is therefore plausible that some of the key points of contention summarized in this report (which largely reflect the history of Dutch criminal procedure, and its deeply inquisitorial attitude and focus on truth-finding) may give way to a more rights-based and adversarial narrative in the texture of the forthcoming code. This transformation will certainly be welcome, although to clarify our position some nuances may be needed. We acknowledge that traditionally, the CCP has been conceived of as a system of powers rather than a system of rights, and that there are drawbacks to construing procedural guarantees (solely or predominantly) in terms of individual rights.[55] Nevertheless, in our view (also) construing key procedural safeguards as fundamental rights of the suspect, i.e. as something from which they stand to benefit in terms of fairness, effective defence and equality of arms – whether through legislation or case law – is important. This is particularly so in the Netherlands, where the defence has traditionally had a marginalised role, while the effectuation of procedural rights is increasingly dependent on the defence itself raising issues (and higher substantiation requirements) in this regard.

[53] S. Brinkhoff, J. Bemelmans, M. Kuipers, 'Criminal Procedure Law' in: P. van Kempen, M. Krabbe, S. Brinkhoff (eds.), *The Criminal Justice System in the Netherlands*, Antwerp: Intersentia 2020, p. 106

[54] See in this regard p. 29 of the official, consolidated of the proposal published in July 2020 in the context of the large-scale reform referred to in the introduction to this report (see Section 5.1): https://www.rijksoverheid.nl/documenten/publicaties/2020/07/30/ambtelijke-versie-juli-2020-wetsvoorstel-wetboek-van-strafvordering (last accessed 18 May 2021).

[55] Other fundamental values risk being overlooked. Thus, hearing witnesses at trial may be framed as a right of the defence, but it may also be construed in terms of the principle of immediacy (*het onmiddellijkheidsbeginsel*), which in in the Dutch doctrine at least is tied up with the notion of judicial responsibility for the completeness of the inquiry at trial. See in this regard L. van Lent, A. Smolders & M. Malsch, '"We kennen allemaal de stukken …". Pleidooi voor een debat over een onmiddellijker strafproces in Nederland', *Delikt en Delinkwent* 2020/38.