CROSS JUSTICE
Knowledge, Advisory and Capacity Building Information tool
for Criminal Procedural Rights in Judicial Cooperation

D 2.7
National Report for Sweden

Grant Agreement nº:	<847346>
Project Acronym:	CROSS-JUSTICE
Project Title:	Knowledge, Advisory and Capacity Building. Information tool for Criminal Procedural Rights in Judicial Cooperation
Website:	https://site.unibo.it/cross-justice/en
Contractual delivery date:	M 24
Contributing WP	WP NO. 2
Dissemination level:	PUBLIC
Deliverable leader:	EUI
Contributors:	EUI, UNIBO

This project is funded by the European Union's Justice Programme (2014-2020)

1 Document History

Version	Date	Author	Partner	Description
1.0	2020-October 2021	Maria Bergström	Via EUI	Draft
2.0	November 2021	Mariavittoria Catanzariti	Senior Researcher-EUI	Review
3.0	December 2021	Giulia Lasagni	Project Coordinator UNIBO	Editing/Formatting

2 Contributors

Partner	Name	Role	Contribution
EUI	Maria Bergström	Main author	Swedish report
EUI	Mariavittoria Catanzariti	Reviewer	Feedbacks
UNIBO	Giulia Lasagni	Editing	Editing/Formatting

Disclaimer: On behalf of the European University Institute, the present deliverable has been drafted by Associate Professor Maria Bergström of the Uppsala Universitet. **For the purposes of this report, national case law has been included, in first instance, only if issued after the expiration of the implementation deadline of the procedural Directive it refers to**.

3 Table of Contents

Knowledge, Advisory and Capacity Building Information tool

CROSS JUSTICE

for Criminal Procedural Rights in Judicial Cooperation

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

4 Main findings/Executive summary

4.1 Legislation

This report describes and analyses the transposition of the six procedural directives into Swedish law with focus on what changes were identified as necessary in order to fully implement the directives, and thereby which legislative solutions were chosen to that end.

According to the traditional view in Swedish law, preparatory work, *travaux préparatoires*, is of great importance as a source of law,[1] and legal reasoning is often based on statements in preparatory work.[2] Before submitting a proposal for new legislation to the Swedish Parliament, the *Riksdag*, the Government need to examine various alternatives. The Government often appoints a committee or commission of inquiry (abbreviated inquiry below) to conduct an in-depth study of the matter. The commission of inquiry consist of one or several people, including experts, officials, and politicians. The commissions of inquiry's proposals are presented to the Government in a report, published in the Swedish Government Official Reports (*Statens offentliga utredningar, SOU*).[3] The Government then asks various groups in society of their opinion of the commission of inquirey's proposals. The Government's proposals for new legislation are then presented in Government bills *(regerings)propositioner*, which are submitted to the *Riksdag*. Thereby, the main legal sourses in the Swedish *travaux préparatoires* are the Swedish Government Official Reports, *Statens offentliga utredningar (SOU)*, and Government Bills, *(regerings)propositioner*, which are available online. As a result, in transposing these procedural directives, as any other directives, there is extensive legal reasoning by prominent legal specialists available in the *travaux préparatoires*, including critical assessment from a number of independent sources.

[1] See e.g. Case C-478/99, European Commission v. Sweden, EU:C:2002:281, para 14: "…According to a legal tradition well established in Sweden and common to the Nordic countries, the preparatory work is an important aid to interpreting legislation."

[2] For a discussion about preparatory work as a source of law in Swedish law and EU law, see e.g. Bergström, C.F. and J. Hettne, *Introduktion till EU-rätten*, Studentlitteratur, 2014.

[3] If a government ministry has conducted the inquiry, it will be published in the Ministry Publication Series (Ds). The Swedish Parliament's website, Documents and laws - Riksdagen.

As most of the requirements of the directives, according to the *travaux préparatoires*, were already being fulfilled in the Swedish legal system, focus is mainly set on the requirements that were not already met, and thereby on the explicit transpositions. Besides these legislative changes, the analysis also touches upon remaining problems as identified with the help of recent case law from the national courts, mainly lower level courts given the short period of time the amandments and new provisions have been in place. Besides such indications of remaining problems addressed in recent case law or doctrinal sources, a number of issues will be commented upon in the sections analysing the different directives. The report thereby deals with the directives one by one starting with the oldest.

Firstly, and in general, the Swedish legal system lived up to the requirements of Directive 2010/64/EU on the rigth to interpretation and translation in criminal proceedings. In accordance with the *travaux préparatoires*, a few legislative changes and a number of regulatory amendments were required to implement the directive. As a result, there are greater opportunities for a suspected or accused person who does not have a command of Swedish to have documents translated into his or her mother tongue. These changes also mean that the quality requirements are raised as regards both interpretation and translation. It can therefore be assumed that the changes will result in fewer erroneous judgments and thus increased legal security and confidence in the judicial system. In this respect, the changes can also be expected to contribute to meeting the integration policy objectives of equal rights and opportunities for everyone regardless of ethnic or cultural background.

Secondly, the changes introduced by the Directive 2012/13/EU on the right to information in criminal proceedings included that anyone reasonably suspected of a crime should be informed of certain procedural rights when he or she is informed of the suspicion. In addition to the right to be informed of the right to a lawyer, notification shall be given of, among other things, the right to transparency of the investigation and the right not to have to comment on the suspicion. Where a suspect has been arrested or detained, such information shall be provided in writing. The written information in the event of detention shall also contain information on, inter alia, the right to have a relative informed of the detention and the right to healthcare.

Thirdly, the assessment is made that current Swedish law largely meets the requirements of the Directive 2013/48/EU on the right to a lawyer and to have a third party informed. A number of minor

adjustments and clarifications have been made in order to fully implement the directive. These in particular concerned a number of aspects of the right of access to a lawyer, the right to confidentiality between a detained suspect or defendant and his or her defense councel, the right to have a third party informed of the deprivation of liberty, and the right to communicate with third persons, the right to communicate with consular authorities, the right of access to a lawyer in European arrest warrant proceedings, and finally, education, etc.

Fourthly, in accordance with the *travaux préparatoires*, the starting point is that the Swedish legal system is largely designed in such a way that it already corresponds to Directive (EU) 2016/800 on procedural safeguards for juvenile defendants. Thus Swedish law already offered strong protection to safeguard the rights dealt with in the Directive. However, some changes were introduced so as to fully comply with the Directive's requirements.

Fifthly, the right to legal aid according to Directive (EU) 2016/1919 corresponds in Swedish law to the right to have a public defender. Accordingly, in the *travaux préparatoires*, the assessment is made that Swedish law already essentially satisfies the requirements of the Directive. In order to fully meet the requirements, the prosecutor should have the right, while the court is not available for decision, pending a court decision, to appoint a public defender for a suspect who has been arrested or detained and who has an urgent need for a defender. Such a decision shall be submitted to the court for review as soon as possible.[4]

Lastly, in our assessment, the Swedish legal system is largely structured in such a way that it already meets the requirements of Directive (EU) 2016/343. Both the right to be presumed innocent and the right to be present at one's own trial are guaranteed in several ways. We also consider that the existing legal remedies offer adequate protection in cases in which one of these rights is disregarded.[5]

[4] Government Bill 2018/19: 42, p.18.
[5] Swedish Government Official Report 2017:17, p. 23. Government Bill 2017/18:58, p. 14 and 38.

4.2 Case-law

From a legal analysis of the most prominent *travaux préparatoires* it can be concluded that very few of the directives' specific requirements needed additional legislation in order for the directives to be properly transposed. In other words, most of the requirements stipulated in the directives were already in place. When it comes to case-law, there are few cases addressing the transposition and interpretation of the directives analysed in this study. This is nothing unusual given the care with which the transposition process is dealt with in the Swedish legal system, and the number of years the directives have so far been in force.

Besides case-law from the ordinary courts, Decisions from the Chancellor of Justice and the Parliamentary Ombundsman, of which neither is a court, have been included in this study in order to provide some additional information regarding the transposition and interpretation of the directives analyses.

Firstly, there is no case-law identified that address Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings but there is one decision by the Office of the Chancellor of Justice. In this decision, the Chancellor of Justice raised criticism of a district court for the fact that the court's procedures for using an interpreter were not in accordance with the Code of Judicial Procedure, implementing Directive 2010/64/EU. Upon this critique, the internal procedures were aligned with the new requirements.

Secondly, there are so far very few cases mentioning Directive 2012/13/EU on the right to information , of which one District Court decision, and one Court of Appeals judgement, did not find that the suspect's right to a fair trial had been violated. In one Supreme Court case, the Supreme Court did not even mention the Directive althought the Court of Appeal in its decision did. In total, nothing much can be drawn from these few cases.

Thirdly, there is only one case identified so far mentioning Directive 2013/48/EU on the right to access to a lawyer and to have a third party informed. The result of this case by the Svea Court of Appeal is that access to a lawyer, in practice, very much relies on the rules on economic compensation to the lawyer, which is thereby duly acknowledged by the Court. Likewise, a Decision by the Parliamentary Ombudsman, which is not a court, focuses on a very practical part of the Directive, i.e. that meetings in private between suspects and their defenders must not be monitored

with a surveillance camera, upon which this previous practice has been amended by the Police Authority.

Fourthly and fifthly, so far and to my knowledge, there are no cases mentioning Directive 2016/800/EU on procedural safeguards for juvenile defendants nor Directive 2016/1919/EU on legal aid.

Finally, there are very few cases mentioning Directive 2016/343/EU on the presumption of innocence and of the right to be present at the trial, of which one Court of Appeals judgement did conclude that Article 4 on public references to guilt had been violated. When considering a possible breach of the provision, the crucial question is how a statement can be perceived by an outsider, not whether the judge making the statement had actually taken a position before the judgement had been given. In a Supreme Court case, the Supreme Court concluded that the indictment against a driver for deviation from the accident site without giving his name and domicile did not constitute a violation of his right not to incriminate himself and his right to a fair trial. This finally settled the particular cases against drivers for deviation from the accident site without giving their name and domicile and whether this constitutes a violation of ones right not to incriminate oneself and the right to a fair trial. Still, the right not to incriminate oneself has long before the introduction in the EU directive been upheld in the Swedish legal system.

5 Introduction

Constitutional and Criminal Justice System: the National Constitutional Framework for the Protection of Fundamental Rights in Criminal Investigations and Procedure

In general, fundamental rights in Sweden are largely protected in the Constitution and ratified international law.[6] Besides the three Constitutional acts concerning human rights; Chapter 2 of the Instrument of Government, *Regeringsformen* (1974:152), the Freedom of the Press Act, *Tryckfrihetsförordningen* (1949:105), and the Fundamental Law on Freedom of Expression (1991:1469), *Yttrandefrihetsgrundlagen* (1991:1469), the European Convention on Human Rights was incorporated into Swedish domestic law in 1995.[7]

The right to an effective remedy is a fundamental human right as set out in a number of international conventions on human rights. The requirement for an effective remedy against infringements of EU law is stated in Article 19(1) of the Treaty on European Union (TEU) and Article 47(1) of the Charter of Fundamental Rights of the European Union (EU Charter). The directives analysed require suspects or accused persons to have access to an effective remedy in the breach of the rights of those directives. As the requirement for an effective remedy is found in Article 47 EU Charter, it applies in relation to all the criminal law directives. European law therefore calls for an effective remedy against violations of rights, including procedural rights in criminal matters.

Amongst the rights and freedoms dealt with in Chapter 2 of the Instrument of Government (IG) that are absolute, in the sense that they cannot be limited other than by changing fundamental law, the following rights of relevance for the procedural directives can be found:[8]

[6] The Constitution of Sweden, The Fundamental Laws and the Riksdag Act, The Swedish Parliament, *the Swedish Riksdag,* available at, the-constitution-of-sweden-160628.pdf (riksdagen.se), 2016.

[7] Law (1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms. See further eg Nergelius, J., Constitutional Law in Sweden, 2nd ed., Kluwer Law International, 2015.

[8] The Constitution of Sweden, The Fundamental Laws and the Riksdag Act, The Swedish Parliament, *the Swedish Riksdag,* available at, the-constitution-of-sweden-160628.pdf (riksdagen.se), 2016, at p. 30. The following are absolute rights and freedoms:

- the right to a hearing before a court of law if deprived of liberty; in certain cases, such a hearing may be replaced by examination before a tribunal presided over by a permanent salaried judge (IG 2:9);

- protection against the establishment of a court of law to examine an offence already committed or a particular dispute or otherwise in regard to a particular case (IG 2:11, paragraph one);

- legal proceedings are to be conducted fairly and within a reasonable period of time (IG 2:11, paragraph two, first sentence).

Then, amongst the rights and freedoms dealt with in Chapter 2 of the Instrument of Government (IG) that can be limited by means of law and are covered by qualified procedure rules, the following rights of relevance for the procedural directives can be found:[9]

- prohibition of capital punishment, corporal punishment, torture and medical intervention with the purpose of extorting or suppressing statements (IG 2:4–5);
- prohibition of deportation or refusal of entry into Sweden of a Swedish citizen, and protection of a Swedish citizen from deprivation of citizenship (IG 2:7);
- the right to a hearing before a court of law if deprived of liberty; in certain cases, such a hearing may be replaced by examination before a tribunal presided over by a permanent salaried judge (IG 2:9);
- prohibition of retroactive penal sanctions (IG 2:10, paragraph one);
- prohibition of retroactive taxation or State charges (IG 2:10, paragraph two). The Riksdag may approve exceptions in times of war, danger of war or grave economic crisis;
- protection against the establishment of a court of law to examine an offence already committed or a particular dispute or otherwise in regard to a particular case (IG 2:11, paragraph one);
- legal proceedings are to be conducted fairly and within a reasonable period of time (IG 2:11, paragraph two, first sentence).

[9] The Constitution of Sweden, The Fundamental Laws and the Riksdag Act, The Swedish Parliament, *the Swedish Riksdag,* available at, the-constitution-of-sweden-160628.pdf (riksdagen.se), 2016, at p. 31. The rights and freedoms which can be limited by means of law and are covered by qualified procedure rules are as follows:

- protection against forcible physical violation (in addition to that mentioned under absolute rights and freedoms point 6 (IG 2:6 paragraph one);

- protection against violation of confidential correspondence or communications (IG 2:6, paragraph one);
- protection against significant invasions of personal privacy which entail surveillance or systematic monitoring of an individual's personal circumstances (IG 2:6, paragraph two);
- the right to a public trial (IG 2:11, paragraph two, second sentence).

Besides these rights and freedoms, there are additional protective provisions, e.g. in the Swedish Code of Judicial Procedure (*Rättegångsbalken, RB*) and the Swedish Penal Code (*Brottsbalken, BrB*). These concern protection against violations of less intrusive nature not deemed necessary to include in the constitutional provisions, but that are to be dealt with in the detailed rules covering court proceedures in general.

Institutional framework: The national authorities involved in criminal proceedings and their independent judicial oversight

The courts form the backbone of the Swedish judicial system. Agencies for crime prevention and investigation, i.e., the Swedish Police Authority, the Swedish Security Service, the Swedish Crime Victim Compensation and Support Authority, the Swedish Prosecution Authority, the Swedish Economic Crime Authority and the Swedish Prison and Probation Service, are also regarded as part of the judicial system. Other agencies, such as the National Board of Forensic Medicine and the

- protection against body searches, house searches and other invasions of privacy (IG 2:6, paragraph one);
- protection against violation of confidential correspondence or communications (IG 2:6, paragraph one);
- protection against significant invasions of personal privacy which entail surveillance or systematic monitoring of an individual's personal circumstances (IG 2:6, paragraph two);
- protection against deprivations of personal liberty and freedom of movement within Sweden and freedom to leave Sweden (IG 2:8); and
- the right to a public trial (IG 2:11, paragraph two, second sentence).

Swedish Enforcement Authority, may also have tasks within or linked to the judicial system. The aim of the judicial system is to ensure the rule of law and legal security for individuals.[10]

In general, a decision to initiate a preliminary investigation is to be made by the police authority, the security service or by the prosecutor. If the investigation has been initiated by the police authority or the security service and the matter is not of a simple nature, the prosecutor shall assume responsibility for conducting the investigation as soon as someone is reasonably suspected of the offence. If legal assistance is needed, or if special reasons so require, the prosecutor shall also take over the conduct of the investigation.[11]

Swedish prosecutors are independent when making decisions concerning prosecution or coercive measures, such as search and arrest. This means that each prosecutor is solely responsible for his or her decisions, and that these decisions cannot be changed by a prosecutor's superior, for example. However, people affected by a prosecutor's decision may request that it be reviewed by another prosecutor at a higher judicial level.[12] Hence, current regulations regarding preliminary investigations allow requesting a review of a prosecutor's decision. Such a review is usually carried out by a Director of Public Prosecution or a Deputy Director of Public Prosecution. Besides the right to a review, there is also a possibility to request the court to consider any shortcomings in the preliminary investigation in accordance with Chapter 23, Section 19 of the Swedish Code of Judicial Procedure.[13]

[10] The Swedish Judicial System, The Ministry of Justice, 2015, at The Swedish judicial system (government.se).

[11] Govt Bill 2016/17:218 Nya regler om bevisinhämtning inom EU SFS: 2017:1000–1021, p. 59. For further information about the national authorities involved in criminal proceedings see e.g. the overview in the recent report by the Civil Rights Defenders, "Processuella rättigheter i bevisförfaranden: En undersökning av tillgången till upprättelse vid regelöverträdelser i brottmål," available at Ny rapport om rätten till en rättvis rättegång i brottmål - Civil Rights Defenders (crd.org).

[12] Prosecutor – part of the legal system, Åklagarmyndigheten, Swedish Prosecution Authority, p.11, at prosecutor---a-part-of-the-legal-system.pdf (aklagare.se).

[13] **19 §** If the investigation leader has concluded all inquiries he considers necessary without granting a request made pursuant to Section 18 b, paragraph 1, or when the suspect believes that there is any other defect in the inquiry, the suspect may notify this to the court.

In case C-625/19 PPU and in joined cases C-566/19 and C-626/19 PPU,[14] the CJEU confirmed that Swedish and French prosecutors were sufficiently independent from the executive to be able to issue EAWs. In its analysis, the CJEU clarified, 'first, the scope of the concept itself of an "issuing judicial authority" for the purposes of issuing an EAW under the Framework Decision on EAWs and second, the notion of effective judicial protection for individuals who are the subjects of EAWs.'[15] Further, in the Swedish case, according to Laure Baudrihaye-Gérard, Fair Trials,

> 'national law requires that the decision to issue an EAW be preceded by a court decision to order pre-trial detention. The CJEU confirmed that effective judicial protection is ensured when the court verifies the conditions and the proportionality of the EAW before it is issued by the prosecutor, i.e. during the hearing in relation to pre-trial detention. The Court also noted that the pre-trial detention order can be challenged after it is issued, and where the challenge is successful, the EAW is automatically invalidated. For the CJEU, this system satisfies the requirement for effective judicial protection, even in the absence of a stand-alone appeal procedure against the decision to issue an EAW by the prosecutor.'[16]

In addition, in these cases concerning Swedish and French prosecutors 'the CJEU argued that effective judicial protection is further guaranteed by other instruments of EU law, most notably the Access to a Lawyer Directive (2013/48/EU), which requires the Member State who is asked to

---

The court shall consider the notification as promptly as possible. The court may, if there is reason, question the suspect or any other person or take any other measure considered necessary. Compensation for the attendance of the suspect shall be paid in accordance with regulations issued by the government. (SFS 2017:176) See further Swedish Government Official Reports 2012:49, p. 27-28.

[14] Joined cases C-566/19 and C-626/19 PPU, EU:C:2019:1077.

[15] EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent pubic prosecutors, 2 January 2020, at EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors.

[16] EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent pubic prosecutors, 2 January 2020, at EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors.

execute the EAW to inform the person that they have a right to appoint a lawyer in the country that has issued the EAW.'[17]

Apart from the Scandinavian countries, where there is police-to-police cooperation to some extent, all international cooperation with a purpose of obtaining information in an investigation is done by the prosecutor.[18]

When it comes to cooperation between law enforcement agencies in different countries, such cooperation is today well established, not least within the EU. Work takes place in the EU largely through direct contacts between prosecutors. Eurojust and the European Judicial Network (EJN) are important actors with the task of facilitating cooperation, especially within the EU. EJN is a network of contact persons within the EU, primarily prosecutors and judges in charge of preliminary investigations (*förundersökningsdomare*), whose task is to facilitate criminal cooperation within the Union.

Difficulties/Challenges Faced During the Research

It has been somewhat difficult to find relevant court cases in particular since first instance cases are not reported or included in any searchable database, but need to b e requested from each specific court in question. There might therefore be additional cases that are not included in this report. Of those so far identified, very few have focused upon the rights provided in the six Directives and their implementation. Besides one District Court Decision, there were only three Court of Appeal Orders/Judgements and two Orders/Judgements from the Supreme Court identified during the relevant period. Beside these Court Rulings, there were one Decision from the Chancellor of Justice

[17] EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent pubic prosecutors, 2 January 2020, at EU Law Analysis: Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors.

[18] Answers to e-survey received from a Swedish prosecutor, the National Public Prosecution Department, National Unit against Organised Crime, 2018-09-24.

and one from the Parliamentary Ombudsmen of some interest. A number of District Court Decisions dated before the expiration of the implementation deadline were not included in this report.[19]

Directive 2010/64/EU on the rigth to interpretation and translation, should have been implemented by 27 October 2013; Directive 2012/13/EU on the right to information, by 2 June 2014; Directive 2013/48/EU on the right of access to a lawyer, by 27 November 2016; Directive (EU) 2016/800 on procedural safeguards for juvenile defendants, by 11 June 2019; Directive (EU) 2016/1919 on legal aid, by 25 May 2019; and Directive (EU) 2016/343 on presumption of innocence, by 1 April 2018. These direcives will now be focused upon one by one in the subsequent sections.

[19] Cases delivered after the expiration of the implementation deadline have been included in this report.

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

6.1 Legislation

The following acts implement Directive 2010/64/EU by changes of:[20]

- Act (SFS 2013:663) amending the Code of Judicial Procedure (1942:740), adopted on 19 June 2013, changed the following provisions:
  - Chapter 5, section 6
  - Chapter 23, section 16
  - Chapter 31, sections 1 and 2
  - Chapter 33, section 9
- Act (SFS 2013:664) amending the Act (1975: 689) on professional secrecy for certain interpreters and translators, adopted on 19 June 2013, changed the following provision:
  - Section 1

The following Articles of the Directive have been explicitly transposed:

Article 2(1) on the right to interpretation[21]

According to the Directive, suspected or accused persons who do not speak or understand the language of the proceedings are to be provided with interpretation without delay during the criminal proceedings.

[20] Expiration of the implementation deadline, 27 October 2013.
[21] The following discussion is reproduced from *the Swedish Government Official Reports 2012:49, p. 21. See further Government Bill 2012/13:132, p. 23.*

Chapter 5, Sections 6–8 of the Swedish Code of Judicial Procedure, (Rättegångsbalken, hereafter abbreviated RB) contain provisions on interpretation at court hearings. These provisions are applicable for both civil and criminal cases. Chapter 5, Section 6 RB prescribed that an interpreter may be engaged to assist the court if a party, witness, or any other person who shall be heard by the court 'is incapable of understanding and speaking Swedish'. There was no explicit provision on interpretation regarding preliminary investigations. However, the rules on interpretation in Chapter 5 RB have been considered to apply by analogy during preliminary investigations.

The provisions of RB regarding interpretation were thus optional, i.e. the court was not required to, but may engage an interpreter. However, the Commission of Inquiry (hereafter the Inquiry) has learned that in practice, this rule is applied as a mandatory rule, i.e. if a suspected or accused person does not have a command of Swedish, an interpreter must be engaged.[22] Although the provision, in reality, is often applied as a mandatory rule, the Inquiry considered that the provision needed to be tightened up for the Directive's requirements to be fulfilled. The Inquiry proposed that the current regulation be clarified by explicitly stating that interpretation must be provided to suspected or accused persons who do not have a command of Swedish. A new second paragraph in Chapter 5, Section 6 RB regulating this situation was therefore introduced. Under the first paragraph – which henceforth only regulate interpret action in civil cases and interpretation for other people who are heard in criminal cases – an interpreter may be engaged when necessary.

The Inquiry further proposed that the right to interpretation during preliminary investigations be regulated in law and introduced in Chapter 23 RB. The new provision 23:16 refers to the provisions on interpretation in the fifth chapter RB. Under the new provision, the right to an interpreter is to apply from the time a suspected person is notified of suspicion of a crime under Chapter 23, Section 18 RB and thereafter throughout the entire proceedings of the preliminary investigation.

Article 2(3) on the right to interpretation for persons with hearing or speech impediments[23]

[22] *The Swedish Government Official Reports 2012:49, p. 21.*

[23] The following discussion is reproduced from *the* *Swedish Government Official Reports 2012:49, p. 21-22, and Government Bill 2012/13:132, p. 22.*

Under the Directive, the right to interpretation also includes appropriate assistance for persons with hearing or speech impediments.

Chapter 5, Section 6, third paragraph RB contained provisions on interpretation for persons with serious hearing or speech impediments. In practice, this provision means that the stipulations in the Directive concerning these people were fulfilled, since the provision not only applies to those who completely lack the ability to hear or speak, but also those who, due to a minor hearing or speech impediment, cannot be examined without an interpreter. However, the Inquiry considered that the current wording 'serious hearing or speaking impediment' does not completely correspond to the Directive's requirements and the way the provision, according to the reasoning, is intended to be applied in practice. For this reason, it was proposed that the terminology be changed so that the provisions on the right to an interpreter apply to 'a person who has a hearing or speech impediment'.

Article 3(1) on the right to translation of essential documents[24]

The Directive contains provisions on the right to translation of documents. Suspected or accused persons who do not understand or speak the language of the proceedings are, within a reasonable period of time, to receive a written translation of such documents that are essential to ensure that they can exercise their right to defence and to safeguard the fairness of the criminal proceedings.

Chapter 33, Section 9 RB regulates translation at courts. There was no explicit provision concerning the obligation of the police or prosecution authorities to translate documents during a preliminary investigation. Chapter 33, Section 9 RB stated that if required, the court may provide for the translation of documents filed with or dispatched from the court. This rule was thus not mandatory and applied to both civil and criminal cases. Therefore, to fulfil the requirements of the Directive, special provisions regarding translation had to be introduced. The Inquiry proposed that a new second paragraph of Chapter 33, Section 9 RB be introduced that is to apply to a suspected or accused person's right to translation of documents in criminal cases. It was also proposed that the right to translation during a preliminary investigation be regulated in law by introducing a provision in Chapter 23 RB that refers to Chapter 33, Section 9 of the same Code.

[24] The following discussion is reproduced from *the* *Swedish Government Official Reports 2012:49, p. 22-23.*

Article 4 on the costs of interpretation and translation[25]

The Directive prescribes that Member States are to meet the costs of interpretation and translation irrespective of the outcome of the proceedings. Accordingly, the suspected or accused person cannot be ordered to repay the costs of interpretation and translation even if he or she is later convicted of the offence.

Under current regulations, the costs of interpretation and translation incurred through instructions of the police, prosecutor or court are paid by the state. No repayment obligation for these costs is imposed on a suspected or accused person. Accordingly, the current regulations fulfil the requirements of the Directive in this respect.

Regarding expenses for interpretation or translation incurred by a public defence counsel, current regulations stated that an accused person who is convicted of an offence can be ordered to compensate these expenses. Therefore, to fulfil the requirements of the Directive, Chapter 31, Section 1, second paragraph RB had to be amended so that it explicitly states that the obligation of the convicted person to pay does not cover costs of interpretation or translation.

Article 5(1) on the quality of the interpretation and translation[26]

Under the Swedish system, interpreters and translators can become authorised by the Legal, Financial and Administrative Services Agency by taking certain examinations. Authorised interpreters and translators are also under the supervision of the Legal, Financial and Administrative Services Agency. This system provides a guarantee that those interpreters and translators who are authorised maintain a high standard. Despite measures taken in recent years, there are currently still too few authorised interpreters and translators in certain languages. Furthermore, to truly achieve a satisfactory quality of interpretation in the judicial system, more court interpreters are needed.

Regarding interpreters, Swedish regulations only stipulated that those who were engaged were to be suitable for the task. There were no regulations concerning translators. To assure quality and encourage more interpreters and translators to improve their skills, the Inquiry therefore proposed

[25] The following discussion is reproduced from the Swedish Government Official Reports 2012:49, p. 28.
[26] The following discussion is reproduced from the Swedish Government Official Reports 2012:49, p. 25-26.

introducing special regulations specifying the skills that primarily were to apply for interpretation and translation. Regarding interpreters, a new provision was introduced in Chapter 5, Section 6 RB stating that if possible, a court interpreter or other authorised interpreter is to be engaged. Only if an interpreter with these qualifications is not available may another suitable person be appointed. Regarding translation, a provision was introduced in Chapter 33, Section 9 RB stating that when possible, an authorised translator is to be engaged. If an authorised translator is not available, another suitable translator may be engaged.

Article 5(3) on confidentiality regarding interpretation and translation[27]

Under the Directive, Member States are to ensure that interpreters and translators observe confidentiality regarding the interpretation and translation provided.

Interpreters and translators engaged by the police, prosecutors or courts are covered by the Public Access to Information and Secrecy Act (2009:400) and therefore have the same duty of confidentiality as a public authority or an official. Even authorised interpreters and translators engaged by actors other than public authorities are covered by confidentiality under the Act on confidentiality for certain interpreters and translators (1975:689). The requirement in the Directive concerning confidentiality is thus met in these respects and there is therefore no need for legislative amendments in this area.

However, there were no provisions concerning confidentiality for non-authorised interpreters and translators engaged by actors other than a public authority, such as defence counsels. The Inquiry therefore proposed that a provision be introduced in the Act on confidentiality for certain interpreters and translators so that this Act also applies to other interpreters and translators who are professionally engaged in connection with criminal proceedings.

Relevant provisions de facto or indirectly implementing the Directive

Apart from the above-mentioned Articles, that have been explicitly transposed, there are relevant provisions de facto or indirectly containing the same right, which have been officially recognized in

[27] The following discussion is reproduced from the Swedish Government Official Reports 2012:49, p. 29.

the *travaux préparatoires*. Please see the transposition table for Directive 2010/64/EU for a more detailed analysis.

One aspect may however be commented specifically upon. The Directive also sets requirements on training regarding the special situation that exists when interpreting for judicial staff. Police and prosecution authorities provide training that incorporates these elements by including them in interrogation technique training. As regards the courts, the Swedish National Courts Administration did not provide training in interpretation issues. According to the National Courts Administration, one aspect included in the training for assistant judges in autumn 2012 was matters that a judge must consider when an interpreter appears in court. The Courts of Sweden Judicial Training Academy was also considering a more systematic training course in interpretation issues for assistant judges, as from spring 2013.[28]

Accordingly, the Inquiry considered that it may be necessary to review these measures to ensure that the requirements of the Directive are fully met. The Inquiry therefore proposed that the issue of training courses in this area be highlighted in the Government's management of the authorities by such means as appropriation directions or in some other appropriate manner.[29]

The Government considered it important that judges, prosecutors and other personnel in the judicial system be trained as prescribed by the directive. Since this was already part of the Government's management of the authorities, the Government assessed that the Swedish system met the requirements of the directive.[30]

As a result, the implementation of the directive can be considered satisfactory as acknowledged already in the *travaux préparatoires*, which guided the legislative changes that followed, and as to my legal analysis.

[28] Swedish Government Official Reports 2012:49, p. 26-27.
[29] See further the Swedish Government Official Reports 2012:49, p. 26-27.
[30] Government Bill 2012/13:132, p. 46.

A brief critical analysis of the legislative framework in regard to directive 2010/64/EU

As stated by the *travaux préparatoires*; 'Greater cross-border mobility and increased immigration has produced a Swedish society characterised by cultural, ethnic and religious diversity. From having been primarily a monolingual country, more than 150 different languages are spoken in Sweden today. Even though many people are multilingual and have a very good command of the Swedish language, there is still a large number of people who, in various contexts, may have need for interpretation or translation to understand or to make themselves understood.'[31]

Under the Directive, the interpretation or translation provided is to be of sufficiently high quality to safeguard the fairness of the proceedings, particularly by ensuring that suspected or accused persons understand what they are accused of and can exercise their right to defence.

In accordance with the legislative tradition in Sweden, a Governmental Inquiry was tasked with determining how the EU Directive was to be transposed into Swedish law. The remit has included analysing how Swedish law relates to the Directive and assessing the need for legislative amendments and other measures. The Inquiry was also instructed to propose the legislative amendments and other measures necessary to transpose the Directive.[32]

The result of this analysis was to introduce mandatory rules on the right to interpretation, that an enhanced right to translation was needed, that the quality requirements for interpretation and translation needed to be raised. Yet, the existing possibilities to appeal decisions regarding interpretation or translation was already adequate, and there is no repayment obligation or interpreter or translation costs for accused persons who are convicted of a criminal offence. Hence, current regulation fulfil the requirements of the Directive in this respect. However, expanded rules concerning confidentiality and secrecy for certain interpreters and translatiors were deemed necessary.[33]

As a result, as was concluded in the *travaux préparatoires*, the 'Inquiry's proposals entail greater opportunities for a suspected or accused person who does not have a command of Swedish to have

[31] The Swedish Government Official Reports 2012:49, p. 19.
[32] The Swedish Government Official Reports 2012:49, p. 20.
[33] The Swedish Government Official Reports 2012:49, pp. 20-28.

documents translated into his or her mother tongue. These proposals also mean that the quality requirements are raised as regards both interpretation and translation. It can therefore be assumed that the proposals will result in fewer erroneous judgments and thus increased legal security and confidence in the judicial system. In this respect, the proposals can also be expected to contribute to meeting the integration policy objectives of equal rights and opportunities for everyone regardless of ethnic or cultural background.'[34]

Since I find the analysis in the *travaux préparatoires* convincing, I have not included any critical comment, and I have found only little critique of how the system is enforced. As will be exemplified next, any problems in upholding the requirements are rather practical than legal when it comes to the inernal routines, information provided, and availability of authorised translators and interpreters thoughout the country.

6.2 Case-law

The main decisions that address the interpretation of directive 2010/64/EU

There is no case law identified but there is one decision by the Office of the Chancellor of Justice that adress the implementation of the Directive. The Office of the Chancellor of Justice is an independent authority and the Chancellor performs his or her duties from a strictly legal point of view. The duties of the Chancellor of Justice are set forth in two legal instruments: The Act (1975:1339) concerning the supervision exercised by the Chancellor of Justice and the Ordinance (1975:1345) concerning the duties of the Chancellor of Justice.

One of the main tasks of the Chancellor of Justice is to act as the Government's ombudsman in the supervision of authorities and civil servants. In its decision*, JK beslut 2015-05-11 dnr 3421-14-40*, the Chancellor of Justice raised criticism of a district court for the fact that the court's procedures for using an interpreter were not in accordance with Chapter 5, Section 6(2) RB, implementing Directive 2010/64/EU. Upon this critique, the internal routines and information provided to assist the day-to-day work at the court were aligned with the new requirements. Interpretation provided

[34] The Swedish Government Official Reports 2012:49, p. 28.

under the Directive shall be of a quality sufficient to safeguard the fairness of the proceedings. Had the internal routines and information provided been aligned with the requirements of the Directive, the person complaining would most probably have been given the assignment to work as an interpreter at some specific cases, since he was both authorised and had been able to take on the task during the periods in questions.

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

7.1 Legislation

The following acts implement Directive 2012/13/EU by changes of:[35]

- Act (2014:257) amending the Code of Judicial Procedure (1942:740), adopted on 29 April 2014. In force 1 June 2014.
  - Chapter 23, section 18 was changed
  - A new section 9 a was inserted in Chapter 24
- Act (2014:258) amending the Act (1989:152) on obligation of notification etc. when foreigners are deprived of their liberty), adopted on 29 April 2014. In force 1 June 2014.
  - Section 1 was changed
- Act (2014:259) amending the Public Access to Information and Secrecy Act (2009:400), adopted on 29 April 2014. In force 1 June 2014.
  - Chapter 10, Section 3 was changed
- Ordinance (2014:260) amending the decree on preliminary inquiries (1947:948), adopted on 30 April 2014. In force 1 June 2014.
  - Previous Section 12 a was renamed 12 b
  - A new Section 12 a was inserted
- Ordinance (2014:261) amending the decree on brech-of regulations fines (1968:199), adopted on 30 April 2014. In force 1 June 2014.
  - A new Section 17 was inserted

[35] Expiration of the implementation deadline, 2 June 2014.

- Ordinance (2014:262) amending the decree on summary impositions of a fine (1970:60), adopted on 12 April 2014. In force 1 June 2014.
    - A new Section 13 was inserted
- Ordinance (2014:263) amending Ordinance (2003: 1179) regulating surrender from Sweden according to the European arrest warrant), a dopted on 29 April 2014. In force 1 June 2014.
    - Section 4 was changed

The following Articles have been explicitly transposed:

Article 4(2b) on the right to have consular authorities and one person informed

A second and third sentence is added to paragraph 2 of Article 1 of Act (1989:152) on intelligence requirements etc., when foreigners are deprived of liberty in order to fully implement the directive: '*If a foreigner has been deprived of his liberty on suspicion of a crime, such information [the right to have consular authorities informed] shall be provided in writing in a language he or she understands. He or she has the right to retain the written information for as long as the deprivation of liberty lasts*.'

Article 7(1) on the right of access to the materials of the case

A new provision, Article 24:9a, was inserted in the Code (1942:740) of Judicial Procedure (*Rättegångsbalken, RB*) and Article 23:18(4) RB was slightly amended:

- Article 24:9a RB: 'The person who is arrested or detained has the right to know the circumstances on which the arrest or detention is based.'
- Article 23:18 RB: A reference is now made to the new article 24:9a, which grants a wider right.
- Article 10:3 (second paragraph) of the Public Access to Information and Secrecy Act (2009: 400) was amended: This provision contains rules on what applies regarding confidential information that is covered by the suspect's right of access under any procedural rule or that otherwise follows from praxis or general legal principles. The change means that not only final decisions are covered by the provision but that decisions during the preliminary investigation and trial are also covered.

Relevant provisions de facto or indirectly implementing Directive 2012/13/EU

According to the *travaux préparatoires*, a few legislative changes and a number of regulatory amendments were required to explicitly transpose the Directive into Swedish law, as has been shown above. Apart from these, there are relevant legal provisions in force de facto or indirectly containing the same right, which according to the *travaux préparatoires*, comply with the obligations laid down in the Directive.[36] Please see the transposition table for Directive 2012/13/EU for further details.

As a result, the implementation of the directive can be considered satisfactory as acknowledged already in the *travaux préparatoires*, which guided the legislative changes that followed, and as to my legal analysis.

A brief critical analysis of the legislative framework in regard to directive 2012/13/EU

In accordance with the *travaux préparatoires*, including Government Bill 2013/14:157, a few legislative changes and a number of regulatory amendments were required to transpose the Directive in Sweden. These changes included that anyone reasonably suspected of a crime should be informed of certain procedural rights when he or she is informed of the suspicion. In addition to the right to be informed of the right to a lawyer, notification shall be given of, among other things, the right to transparency of the investigation and the right not to have to comment on the suspicion. Where a suspect has been arrested or detained, such information shall be provided in writing. The written information in the event of detention shall also contain information on, inter alia, the right to have a relative informed of the detention and the right to healthcare. According to the *travaux préparatoires*, the fact that pre-trial authorities should inform suspects about these rights should be mainly regulated in the decree on preliminary inquiries (1947:948). The Code of Judicial

[36] Government Bill 2013/14:157, p. 16-17.

Procedure*, Rättegångsbalken (RB)*, now stipulates that the person arrested or detained should have an unconditional right to know the circumstances on which the detention order is based.

In total, this is a rather straightforward directive including rather specific requirements easy to verify as has been discussed in the *travaux préparatoires* including extensive consultation with different stakeholders in accordance with the Swedish legislative process. I find the analysis convincing but have found some critique of how the system is enforced. Although any remaining problems in upholding the requirements are rather practical than legal when it comes to maintaining internal routines, what consequences follows upon errors of the present type during the preliminary investigation needs to be further addressed, as will be illustrated in the next section.

7.2 Case-law

The main decisions that address the interpretation of the directive

So far and to my knowledge, there are very few cases referring to Directive 2012/13/EU. These will be briefly mentioned below:

District Court of Värmland, 31 May 2017, in case no B 3852-16, not available online.

The District Court found that at least the error had been made during the preliminary investigation that the accused had not been reminded of his right to remain silent. The interrogations with him therefore, during the preliminary investigation, can be considered to constitute unduly taken evidence, but in any event, there may be considered to have been an impropriety at the time of the hearings.

In a Swedish context, it is not entirely clear what consequences follows upon errors of the present type during the preliminary investigation. If, in addition to the improper evidence, other independent evidence against the accused, has also been found, the right to a fair trial has not been violated. It is mainly when incorrect evidence is the main evidence against the accused that the trial cannot be regarded to be fair. Hence, the overall right to a fair trial in Article 6 of the European Convention on Human Rights (ECHR) according to the case-law of the European Court of Human

Rights (ECtHR), must be assessed on the basis of the legal process as a whole, which means that a deficiency in some part under certain conditions can be cured in another part. Due to what has thus emerged about the overall state of the evidence, the district court considered, in the light of current Swedish practice, that the right to a fair trial had not been violated in a way that affected the assessment in the case.

Court of Appeal for Western Sweden, 21 November 2018, in case no B 3414-18, not available online

The Court of Appeal stated that the investigation on which the district court's judgment in the case was based had not been based on information provided by the suspect during the preliminary investigation. Neither had the breach of the suspect's right to remain silent enabled the production of any evidence that had been used as a basis for the conviction. The suspect had been well placed to question the evidence presented by the prosecutor under adversarial conditions. Against the specific background of the case, the Court of Appeal agreed with the district court's assessment that the procedure, taken as a whole, could not lead to the conclusion that the suspects' right to a fair trial had been violated because he was not informed of the right to remain silent at the first police interrogation. The Court of Appeal also did not consider that what had otherwise been stated by the suspect had meant that his right to a fair trial had been violated.

A brief critical analysis of the case law

There are so far very few cases mentioning Directive 2012/13/EU, of which one District Court decision, and one Court of Appeals judgement, did not find that the suspect's right to a fair trial had been violated although the accused had not been reminded of his right to remain silent during the preliminary investigation.[37]

[37] In the Supreme Court case, the Supreme Court did not even mention the Directive althought the Court of Appeal in its decision Ö 8290-14, 18 November 2014, did.

Despite the standpoint of the ECtHR, it can be questioned whether the current situation meets the requirement for an effective remedy under EU law, in the sense that the individual's situation is restored to a situation before the violation. This is partly because the most powerful evidence - related remedies (such as refusal) has been applied to a small extent,[38] and, on the other hand, to the remedies may be unforeseeable as the judiciary has a wide scope for their own assessments on this issue. According to a recent report by the Civil Rights Defenders, it is also noted that the investigating authorities have little incentive to avoid breaches of rules because even undue evidence may be used as a basis for a conviction.[39] Other tools, such as notification to the Parliamentary Ombudsman (JO), the Attorney General (JK) or the police report on misconduct, are intended to prevent systematic violations but they are not effective in restoring situation to the situation prior to the violation. In addition, it is uncertain whether those remedies actually lead to a change in the application of the law.[40]

[38] See in particular the report, "Processuella rättigheter i bevisförfaranden, en undersökning av tillgången till upprättelse vid regelöverträdelser i brottmål, available at - DREP_webb.pdf (crd.org)
[39] Ibid, p. 5.
[40] Ibid, p. 5.

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

8.1 Legislation

The following acts implemented Directive 2013/48/EU:[41]

- Act (2016:929) amending the Code of Judicial Procedure (1942:740). In force on 27 November 2016.
    - Chapter 21, section 9 was changed
    - Chapter 23 , section 10 was changed
    - Chapter 24 , section 21 was changed
- Ordinance (2016:932) amending the decree on preliminary inquiries (1947:948). In force on 27 November 2016.
    - Section 12 a was changed
    - Section 20 was changed
- The International Legal Assistance in Criminal Matters Act (2000:562).
    - No amendments were adopted
- The International Legal Assistance in Criminal Matters Ordinance (2000:704).
    - No amendments were adopted.
- Act (2003:1156) on surrender from Sweden according to the European arrest warrant.
    - No amendments were adopted.
- Ordinance (2016:934) amending Ordinance (2003:1179) Regulating Surrender from Sweden According to the European Arrest Warrant Act. In force on 27 November 2016.

[41] Expiration of the implementation deadline, 27 November 2016.

- Section 4 was changed

- Act (2011:1165) on surrender from Sweden according to a Nordic arrest warrant.
  - No amendments were adopted.
- Ordinance (2016:935) amending Ordinance (2012:565) regulating Surrender from Sweden According to a Nordic arrest warrant. In force on 27 November 2016.
  - Section 3 was changed
- Ordinace (2016:933) amending Ordinance (2003:1178) Regulating Surrender to Sweden According to the European Arrest Warrant Act. In force on 27 November 2016.
  - A new section 11 a was inserted
  - A new heading before section 11 a was inserted
- Ordinace (2016:936) amending Ordinance (2012:566) Regulating Surrendered to Sweden According to the Nordic Arrest Warrant. In force on 27 November 2016.
  - Section 3 was changed
  - A new section 10 a was inserted
  - A new heading before section 10 a was inserted
- Act (2016:931) amending Detention Act (2010:611). In force on 27 November 2016.
  - Chapter 3, sections 4, 5, 6, 7, 8 were changed
  - Chapter 6, section 2 was changed
- Act (2016:930) amending Act (1964:167) containing specific provisions on young offenders. In force on 27 November 2016.
  - Sections 5, 6, and 32 a were changed
- Act (1989:152) on Intelligence Requirements, etc., when foreigners are deprived of liberty.
  - No amendments were adopted.
- Ordinace (2016:969) amending the General Court Cases and Matters Ordinance (1996:271). In force on 27 December 2016.
  - A new section 8 a was inserted

- The Act (1975:1339) concerning the supervision exercised by the Chancellor of Justice.
    - No amendments were adopted
- Ordinance (1975:1345) concerning the duties of the Chancellor of Justice.
    - No amendments were adopted
- Instructions for the Parliamentary Ombudsman Act (1986:765).
    - No amendments were adopted

Relevant provision de facto or indirectly implementing the Directive

Concerning the implementation of this directive, the *travaux préparatoires* include an inquiry conducted by a government ministry published in the Ministry Publication Series (Ds) and Government Bill 2015/16: 187.[42] In DS 2015:7, the Ministry of Justice made the assessment that current Swedish law largely met the requirements of the directive. Explicit transposition was therefore not required. [43] In this respect, although there were already relevant provisions de facto or indirectly containing the same right as the Directive, a few provisions that have been specifically discussed in the *travaux préparatoires*, need to be specifically commented:

Article 3 – on the right of access to a lawyer in criminal proceedings

Under Swedish law, the suspect may be assisted by a defense counsel in the preparation and execution of his or her action.[44] The right applies from the time that the person who is reasonably suspected of a crime is notified of the suspicion. [45] According to Chapter 21, Section 9, first paragraph, first sentence *RB*, anyone held (*gripen*), arrested or detained has the right to see their

[42] If a government ministry has conducted the inquiry, it will be published in the Ministry Publication Series (Ds). The Swedish Parliament's website, Documents and laws - Riksdagen.
[43] Summary of Ds 2015: 7 in Government Bill 2015/16: 187, p. 76.
[44] Chapter 21, Section 3, paragraph 1 of the Swedish Code of Judicial Procedure. Government Bill 2015/16: 187, pp. 16.
[45] Chapter 23, Section 18 of the Swedish Code of Judicial Procedure.

defence counsel. In implementing the directive, it was clarified that it is a right for the detainee and not for the defender and that the right also applies to an arrested person.[46] There are thus provisions in Swedish law which mean that a person who is a suspect or accused has the right to a defense counsel in accordance with the requirements set out in the directive.[47]

According to Chapter 21, Section 3a *RB*, a public defence councel shall be appointed for a suspect who is arrested or detained if he or she so requests. A public defence counsel shall also be appointed upon request for a person who is suspected of a offence in respect of which a less severe sentence than six months imprisonment is not prescribed. A public defender must also be appointed in certain other specified cases.[48] A lawyer suitable for the assignment shall be appointed as public defender. If there are special reasons, another suitable person may be appointed who has passed the knowledge tests prescribed for eligibility for judicial employment, which means that the person must have completed a law degree.[49] There are thus higher

[46] Government Bill 2015/16: 187, p. 54.
[47] Government Bill 2015/16: 187, p. 50.
[48] A public defence counsel shall also be appointed 1. if a defence counsel is needed by the suspect in connection with the inquiry into the offence, 2. if a defence counsel is needed in view of doubt concerning which sanction shall be chosen and there is reason to impose a sentence for a sanction other than a fine or conditional sentence or such sanctions linked together, or 3. if there are otherwise special reasons relating to the personal circumstances of the suspect or the subject of the case. If the suspect is represented by defence counsel that he designated, no public supporting defence counsel shall be appointed. However, a public defence councel shall be appointed if there are exceptional reasons. Chapter 21, Section 3a of the Swedish Code of Judicial Procedure. See further Chapter 21, Section 3b of the Swedish Code of Judicial Procedure according to which: A public defence councel shall be appointed for a previously accused if 1. he or she is in need of a lawyer, taking into account that, under Chapter 58, Section 6a, the prosecutor has decided or has the possibility to decide to reopen a preliminary investigation or to allow an ongoing preliminary investigation also to address the question of the former accused's involvement in the crime; 2. otherwise there are exceptional reasons. In assessing whether the former accused is in need of a lawyer, the court shall take into account the nature of the offence, the personal circumstances of the former accused and the investigative measures to be taken.
[49] Chapter 21, Section 5 of the Swedish Code of Judicial Procedure.

requirements for those who may be appointed as public defenders than for those who may be appointed as private defenders.[50]

According to the Government's assessmen,[51] the directive covers both private and public defenders. The right of access to lawyers under the Directive, ie the right to meet the defense counsel and to speak in private, the right to contact the defense counsel and the right to have the defense counsel present at the hearing,[52] should apply without exception to the person represented by a public defender. In these contexts, private defenders who meet the requirements for a public defender should be equated with public defenders.

However, as it cannot be excluded that there are private defenders who are unsuitable, based on certain criteria set out in the directive, it should still be possible to restrict the right of access to a lawyer for a suspect represented by a private lawyer who does not meet the requirements for a public defender.[53] Hence, a defender who does not meet the requirements imposed on a public defender in Chapter 21, Section 5, first paragraph *RB*, may be prevented from attending if it is necessary so that the investigation of the matter is not substantially hindered or to avert danger to someone's life, physical health or freedom. Such a decision can according to Chapter 21, Section 9, first paragraph *RB* be taken by the head of the investigation or the prosecutor. The decision shall be in writing and shall contain the reasons on which it is based. The suspect or the defence councel may request that the court review the decision.[54]

Yet, according to a new second paragraph of Chapter 21, Section 9 *RB*, if the detained person has the right to see his defense counsel, it must be done in private. The provision covers all defence counsels. The possibility of restricting conversations in a private room if it is to the detriment of the

[50] Government Bill 2015/16: 187, p.17.
[51] Government Bill 2015/16: 187, p. 16.
[52] These rights are stated in Swedish law e.g. by Chapter 21, Section 9 of the Swedish Code of Judicial Procedure (the right to talk in private) and Chapter 3, Section 6 of the Detention Act (2010: 611) (the right to send and receive consignments). Government Bill 2015/16: 187, p. 16.
[53] Government Bill 2015/16: 187, p. 16.
[54] Government Bill 2015/16: 187, p. 21.

investigation or the security of the storage place for those who have a private defence counsel was thereby removed.[55]

In Swedish law, there is only an unconditional right for a defense counsel to be present at an interrogation called for by the suspect himself. The suspect and his or her defense counsel have the right to attend hearings during the preliminary investigation held at the request of the suspect.[56] The memorandum's proposal that the suspect should, as a starting point, have the right to have his or her defense counsel present at the interrogation is in line with the directive which speaks of the rights of the suspect and the accused.[57] During interrogation of a suspect, his or her defense counsel should therefore, as a starting point, have the right to be present, regardless of whether the interrogation is called for by the suspect or not.[58]

Furthermore, there is a right for the defense counsel to attend other interrogations, if this can be done without prejudice to the investigation. This regulation applies to both interrogations with the suspect himself and interrogations with other persons. The same applies when a prosecution has been brought, and the suspect has thus been prosecuted, when the preliminary investigation needs to be supplemented with interrogation.[59]

In Swedish law, investigative measures in which the suspect participates, such as witness confrontations and reconstructions are regarded as interrogations. There is no equivalent in Swedish law of confrontations mentioned in the directive.[60]

In Sweden, an unrestricted right applies to a suspect or defendant who is not deprived of liberty to meet and speak in private with his or her defense counsel. There are thus no regulations that limit

[55] Government Bill 2015/16: 187, pp. 55.
[56] Chapter 23, Section 10, fourth parapgraph of the Swedish Code of Judicial Procedure.
[57] Government Bill 2015/16:187, p. 31.
[58] Government Bill 2015/16: 187, p.31.
[59] Chapter 23, Section 23 of the Swedish Code of Judicial Procedure.
[60] Government Bill 2015/16: 187, p. 30.

this possibility. This applies regardless of whether the defender is public or private. The same must be considered to apply to a suspect who is subject to a travel ban.[61]

A person who is arrested or detained must not be refused to see his or her defense counsel, regardless of whether he or she is a public or a private defense counsel. An arrested or detained person must also not be refused to see his or her public defender in private. For those who have a private defence counsel, such a right exists only if the head of the preliminary investigation or the prosecutor allows it or the court finds that it can be done without prejudice to the investigation or to the order or security of the detention center.[62]

Article 4 on confidentiality

An absolute right was introduced for a suspect who is deprived of liberty to meet and talk in private with his or hers defence counsel. The same shall apply to any other contact in the form of e.g. e-mail or letters between the detained person and his or her defence counsel.

It is clarified in the Detention Act (2010: 611) that electronic communication between a suspect or detained person and his or her public defence council, similar to what already applies in the case of letters, etc., may not be refused. When the defence counsel is private, it must be possible to refuse electronic communication provided that it is necessary to avert danger to someone's life, physical health or freedom. If an interception would mean that communication does not have to be refused, it must be possible to intercept communication instead. The same shall apply to letters etc. between the detainee and the private defender.[63]

The Swedish Code of Judicial Procedure clarifies that the provision on private conversations between a detained suspect or defendant and his or her defense counsel shall apply not only to an

[61] Government Bill 2015/16: 187, p. 22.
[62] Chapter 21, Section 9 of the Swedish Code of Judicial Procedure. Government Bill 2015/16: 187, p. 22.
[63] Summary of Ds 2015: 7 in Government Bill 2015/16: 187, p. 76.

arrested or detained person but also to a held arrested (gripen) person. The right, which as before must be unrestricted for those who have a public defender, shall apply as a starting point for a detainee with a private defender. When the defense counsel is private, the head of the preliminary investigation or the prosecutor must be able to decide that conversations may not take place, if this is necessary either to prevent the investigation of the case or to avert danger to someone's life, physical health or freedom at the detention center.[64]

Besides the above-mentioned provisions, there are relevant provisions de facto or indirectly containing the same right. Please see the transposition table for Directive 2013/48/EU for a more detailed analysis.

As a result, the implementation of the directive can be considered satisfactory as acknowledged already in the *travaux préparatoires*, which is regarded an important legal source in Sweden, and as to my legal analysis. It was the *travaux préparatoires* that guided the legislative changes that followed,

A brief critical analysis of the legislative framework in regard to directive 2013/48/EU

As stated initially, in DS 2015:7 in the Ministry Publications Series, the assessment is made that current Swedish law largely meets the requirements of the directive.[65] A number of minor adjustments and clarifications have been made in order to fully implement the directive. These in particularly concerned a number of aspects of the right of access to a lawyer, the right to confidentiality between a detained suspect or defendant and his or her defense counsel, the right to have a third party informed of the deprivation of liberty, and the right to communicate with third persons, the right to communicate with consular authorities, the right of access to a lawyer in European arrest warrant proceedings, and finally, education, etc.

[64] Summary of Ds 2015: 7 in Government Bill 2015/16: 187, p. 76.
[65] Summary of Ds 2015: 7 in Government Bill 2015/16: 187, p. 76.

Please improve coherence among paragraphs of the report.

8.2 Case-law

The main decisions that address the interpretation of the directive

So far and to my knowledge, there is only one case mentioning Directive 2013/48/EU. Besides this, there is a decision by the Parliamentary Ombudsman. These will be briefly mentioned below.

Svea Court of Appeal, 17 February 2017, in case RH 2017:6

During its implementation in Swedish law, the directive has, among other things, led to changes in the rules of the Code of Judicial Procedure on the right to have a defense counsel present at interrogations and other investigative measures (see Government Bill 2015/16: 187 p. 30 et seq.). The amendments to the law entered into force on 27 November 2016. Of interest here is that it now follows from Chapter 23, Section 10, fourth paragraph of the Code of Judicial Procedure that the suspect, as a general rule, has the right to have his defense counsel present at the interrogation, regardless of whether the interrogation is called for by the suspect or not. According to the previous wording, at interrogations that were not held at the request of the suspect pursuant to Section 18, second paragraph, the defense counsel was allowed to attend if this could be done without prejudice to the investigation. The change in the law has thus strengthened the suspect's right to have his defense counsel present during questioning.

According to the Court of Appeal, the development should be given importance in determining compensation for work performed by the defense counsel in connection with interrogations during a weekend. In the present case, T.M. in his capacity as public defender summoned to and participated in police questioning on a Saturday. As the work was not carried out as a result of an arrest hearing, as the district court stated, the compensation cannot be determined with application of the special regulations on compensation at weekend hearings. T.M. has, however, not been able to influence when the interrogation was to be held and his principal has had the right to have his defense counsel present at the interrogation. In the opinion of the Court of Appeal, the circumstances are thus such that there is reason to deviate from the hourly cost norm when determining the compensation. Since the work was performed during a public holiday, the hourly

rate, in accordance with what T.M. requested, correspond to what at the time would have been paid according to the regulations on compensation at weekend negotiations.

Parliamentary Ombudsmen (JO) Decision (not a court), 19 December 2019, dnr 7300-2018.

The decision in brief: A person who was suspected of a crime and had been arrested was placed in police custody. The suspect had the right to see his defender. When the suspect and the defender had a meeting in custody, the police recorded the meeting with a surveillance camera that recorded image but not sound.

When a suspect has the right to see his defense counsel, it must be allowed to do so in private, according to a provision in the Code of Judicial Procedure. In the decision, the Ombudsman states that this provision means that such a meeting may not be monitored with a surveillance camera. According to the Ombudsman, this should also apply if the surveillance camera does not record sound and regardless of whether the recording is saved or deleted.

The police are criticized for the fact that the meeting between the suspect and the defender that was to take place in a private room was monitored with a surveillance camera.

The Parliamentary Ombudsman welcomes that the Police Authority has introduced new routines for arrest in Solna in such a way that meetings in private between suspects and their defenders are no longer monitored.

A brief critical analysis of the case law

Hence, there is only one case mentioning Directive 2013/48/EU identified so far. The result of this case by the Svea Court of Appeal is that access to a lawyer, in practice, very much relies on the rules on economic compensation to the lawyer, which is thereby duly acknowledged by the Court. Likewise, the Decision by the Parliamentary Ombudsman, which is not a court, focuses on a very practical part of the Directive, i.e. that meetings in private between suspects and their defenders must not be monitored with a surveillance camera, upon which this previous practice has been amended by the Police Authority.

Please double check if other rulings regarding access to a lawyer can be found.

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

9.1 Legislation

The following acts implemented Directive (EU) 2016/800:[66]

- Act (2019:263) amending the Code of Judicial Procedure (1942:740), in force on 11 June 2019.
  - ändr. 21 kap. 3 a §;
  - nya 21 kap. 9 a §, 33 kap. 6 a §
- Ordinance (2019:266) amending the Decree on preliminary inquiries (1947:948), in force on 11 June 2019.
  - ändr. 12, 12 a §§
- Act (2003:1156) on surrender from Sweden according to the European arrest warrant,
  - no amendments adopted.
- Act (2011:1165) on surrender from Sweden according to a Nordic arrest warrant,
  - no amendments adopted.
- Act (2019:265) amending the Detention Act (2010:611), in force on 11 June 2019.
  - ändr. 2 kap. 3 §
- Ordinance (2019:267) amending the Detention Ordinance (2010:2011), in force on 11 June 2019.
  - ändr. 2 §
- Act (1964:167) containing specific provisions on young offenders,

[66] Expiration of the implementation deadline, 11 June 2019:

- no amendments adopted.

- Ordinance (2007:1172) with instructions for the Swedish Prison and Probation Service,
  - *no amendments adopted.*
- The Act (1975:1339) concerning the supervision exercised by the Chancellor of Justice,
  - no amendments adopted.
- Ordinance (1975:1345) concerning the duties of the Chancellor of Justice,
  - *no amendments adopted.*
- Instructions for the Parliamentary Ombudsman Act (1986:765),
  - no amendments adopted.
- The Tort Liability Act (1972:207),
  - no amendments adopted.
- The Children and Parents Code (1949:381),
  - no amendments adopted.
- Public Access to Information and Secrecy Act (2009:400),
  - no amendments adopted.
- Act (2009:600) on languages,
  - no amendments adopted.

Relevant provisions de facto or indirectly implementing the Directive

According to the *travaux préparatoires*, which is regarded an important legal source in Sweden, the starting point is that the Swedish legal system is largely designed in such a way that it already corresponds to the Directive's requirements today. Thus Swedish law already offers strong

protection to safeguard the rights dealt with in the Directive. However, some changes are proposed below so as to fully comply with the Directive's requirements.[67]

In this respect, although there were already relevant provisions de facto or indirectly containing the same right as the Directive, a few Articles that have been specifically discussed in the *travaux préparatoires,* will be specifically commented:

Article 6(1)[68]

Another fundamental aspect is that children have to be assisted by a lawyer. The basis of the Swedish system is that a public defence counsel has to be appointed for a child – if it is not evident that the child does not need one. This means both that a child who is a suspect almost always has to be assisted by a defence counsel and that the state offers legal aid for the costs incurred. So it is not up to the child or the child's custodian to determine whether or not a defence counsel is needed. The main rule is that a member of the Swedish Bar Association is appointed as defence counsel. In exceptional cases another suitable person who has a law degree can be appointed.[69]

Article 6 of the Directive contains a provision that children who are suspects or accused persons shall be assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. The Article expresses a compulsory provision – children have to be assisted by a lawyer when they are suspected or accused of an offence unless this would not be proportionate. The absolute main rule is that children shall be assisted by a lawyer when questioned and have the right to meet in private and communicate with the lawyer representing them.

Art. 6(8)?

There are only limited possibilities of temporarily limiting communication and meetings in private and of questioning the child when their lawyer is not present. This may only be done in isolated cases where the circumstances are exceptional, for example where immediate action by the authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence. Derogations from the requirement of assistance by a lawyer are also

[67] Swedish Government Official Reports 2017: 68, p. 43.
[68] The following discussion is reproduced from the *travaux préparatoires*.
[69] Swedish Government Official Reports2017: 68, p. 38.

permitted where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person. These derogations may only be used at the pre-trial stage.[70]

The Swedish legal system already offers strong protection at present. The provisions of the Young Offenders (Special Provisions) Act mean that, in principle, persons under 18 always have to have a public defence counsel appointed for them. A different outcome is only possible in instances where it is evident that there is no need for a public defence counsel. So the public authorities are responsible for ensuring an effective defence – and this is in good agreement with the Directive's compulsory requirement of access to a lawyer. The exceptions permitted by Swedish law in evident cases must also be considered to be consistent with the Directive. In addition, when the Directive on the right to access to a lawyer in criminal proceedings previously adopted by the EU was implemented in Swedish law, the right of a suspect or accused person who had been deprived of their liberty to meet their defence counsel in private or to communicate with them in some other way was expanded. The possibilities of having their defence counsel present during questioning were also modified. In this way the Swedish legal system also guarantees possibilities for children to prepare and conduct their defence.[71]

The conclusions were therefore that Swedish law already contains the core provisions foreseen by the Directive. However, the ultimate purpose of the provisions of this part of the Procedural Safeguards for Children Directive is to make an effective defence possible. In our view, this also makes other demands on the legal system than those that are immediately apparent from the Directive. A system that is characterised by a suspect or accused person being able to communicate relatively freely with their defence counsel and that foresees the presence of the defence counsel during all questioning of the suspect is an important legal safeguard. At the same time, such a system requires that the role of defence counsel is only entrusted to those who meet the applicable requirements concerning qualifications and suitability. Otherwise there is risk of the suspect or accused person appointing an unsuitable defence counsel during the investigation – and up until the question of criminal responsibility has been decided with final effect – who can influence the

[70] Swedish Government Official Reports 2017: 68, p. 44.
[71] Swedish Government Official Reports 2017: 68, p. 44-45.

process or endanger legal safeguards. The situations that should be avoided are, in particular, those in which a person appointed by the suspect or accused person to defend them may, in the worst case, be an accomplice or a link between an accomplice and the suspect or accused person. This is not a big problem in the context of the Swedish legal system. To the extent that it occurs, it must be assumed to concern strictly exceptional cases. It is, however, something that should be countered to the greatest possible extent – especially since it can risk undermining the suspect's fundamental right to an effective defence.[72]

The problem can be attacked in various ways. One method is to change the rules about who can be a defence counsel. But the inquiery have chosen not to propose any change to the rules concerning the requirements that have to be met to act as a defence counsel. Our starting point is that the Swedish system follows the fundamental right that a suspect has to appoint their own defence counsel. A proposal of such fundamental changes would also require a perspective broader than the one we have to work within. According to our terms of reference, however, we have been tasked with investigating whether there should be greater possibilities of rejecting unsuitable defence counsel. But we have come to the conclusion that the current law is also adequate in this case. On the other hand, we consider that there is reason to try to make the application of the current regulations more effective. One step in that direction is to put the court in a position to make an earlier examination of whether or not a defence counsel, whose qualifications and suitability can be questioned, should be rejected or dismissed. We therefore propose that the law should state explicitly that if a prosecutor judges that a defence counsel does not meet the statutory requirements to be allowed to be a defence counsel, they shall report the matter for examination by the court. If the suspect has been apprehended, arrested by order of a prosecutor or detained by order of a court, the court should examine the matter as soon as possible.[73]

If there are exceptional reasons it should be possible to also appoint a public defence counsel alongside the defence counsel appointed by the accused. In the inquery's view the prime instance of exceptional reasons is when the defence counsel appointed by the suspect influences the process

[72] Swedish Government Official Reports 2017: 68, p. 45.
[73] Swedish Government Official Reports 2017: 68, p. 46.

or endangers security. And does so to such an extent that it is judged to be necessary to refuse communication or meetings in private if the suspect is deprived of their liberty. It can also involve situations in which it is judged necessary to refuse the presence of the defence counsel at questioning. This means that this regulation is chiefly aimed at cases where the defence counsel appointed by the suspect or accused person does not meet the requirements set for public defence counsel. In principle, defence counsel who meet the requirements set to be public defence counsel cannot be refused communication, private meetings and presence at questioning, etc.[74]

For there to be considered to be exceptional reasons for appointing a public defence counsel – when the suspect or accused person has appointed a defence counsel – the enquiery also consider that there should be a risk that the processing of the matter as such will be adversely affected. This regulation is thus chiefly aimed at cases where there is a prompt processing requirement – such as when the suspect or accused person has been deprived of their liberty or is young. But they are not limiting this regulation to solely refer situations in which the supect or accused person is a child.[75]

As a result, there is a need for additional guarantees for an effective defence. If, in the circumstances, there is a need to examine whether the person appointed to assist the suspect meets the requirements of being a lawyer under the Code of Procedure, the prosecutor shall report this to the court. A public defence counsel may be appointed alongside the lawyer designated by the suspect himself, if there are exceptional reasons.[76]

God analysis but not clear to what extent it relates specifically to situations of child offenders rather than to the broader issue of effective defence when a private defence counsel is appointed.

Article 10(1)[77]

Special rules also apply to children concerning deprivation of liberty. Even in cases where the suspicion relates to a more serious offence a person under 18 years may only be detained by a court

[74] Swedish Government Official Reports 2017: 68, p. 46.
[75] Swedish Government Official Reports 2017: 68, p. 47.
[76] Government Bill 2018/19:71, p. 19.
[77] The following discussion is reproduced from the *travaux préparatoires*.

as a last resort. There is a requirement that it is evident that adequate supervision cannot be arranged and there also have to be exceptional reasons for ordering detention (in practice the same rules apply to arrest orders). If it is necessary to arrest and detain the young person, they are guaranteed certain rights. For example, the starting point is that the young detainee has to be placed in such a way that they do not spend time with adults unless doing so can be considered to be in their best interests. For example, a starting point is that the young person should already be able to come into contact with their close relatives when in police custody. The person who has been deprived of their liberty should also be able to continue their schooling etc. A person who has been deprived of their liberty is also guaranteed the right to be examined by a doctor and to health care, etc.[78]

Several provisions in the Directive deal with deprivation of liberty of a child. To begin with the Directive contains provisions limiting deprivation of liberty. The starting point is that deprivation of liberty, in particular detention, of a child shall be viewed as a measure of last resort. Member States shall therefore, when possible, use alternative measures to detention. If a deprivation of liberty is necessary, it shall be limited to the shortest possible period of time. Account shall be taken of the age and individual situation of the child, and of the particular circumstances of the case. Children who are deprived of their liberty shall also be guaranteed certain rights, for example one starting point is they have to be placed so that they do not spend time with adult detainees unless doing so is consistent with their best interests. Even if a child reaches 18 years while in detention, there has to be a possibility to continue to hold them separately from other adults – if justified in the light of their individual circumstances.[79]

As far as Sweden is concerned, the widely supported tradition of special treatment of young offenders also makes itself felt regarding deprivation of liberty, as is seen from the account given above. The Swedish legal system is in basic agreement with the requirements of the Directive. However, even though the present system is characterised by special treatment of young people, Sweden has received recurring criticism, at both national and international level, for its use of

[78] Swedish Government Official Reports2017: 68, p. 39.
[79] Swedish Government Official Reports 2017: 68, p. 47. See also Government Bill 2018/19:71, p. 24.

detention and restrictions. Part of this criticism has been that the use of restrictions is too extensive, resulting in isolation. In particular, the criticism made has drawn the attention of the legislator to the need for reforms. At present reform work is under way that includes a review of the detention regulations. That reform work also covers special rules for children. It is of great importance and will reinforce the impact of the Directive.[80]

The enquiry has, however, found reason to also propose a minor change in this context. In order to meet the requirements of the Directive they proposed a minor amendment to the Detention Act – that applies to persons who reach the age of 18 when they are in detention. The proposal is they should continue to be placed so that they do not spend time together with adult detainees – if this is justified in the light of their individual circumstances and is considered appropriate in other respects. When this assessment is made, particular account should be taken of the personal maturity and vulnerability of the suspect. Account should also be taken of what is best for the detainees under the age of 18 who will, in that case, be placed so that they continue to spend time with the person who is now of age. But the idea is not to narrow down the present system. So the object of the regulation proposed is not to limit possible placements for young offenders.[81]

Relevant provision de facto or indirectly implementing the Directive

Besides the above-mentioned Articles, there are relevant provisions de facto or indirectly containing the same right, which have been officially recognized in the travaux préparatoires, which is regarded an important legal source in Sweden. Please see the transposition table for Directive (EU) 2016/800 for a more detailed analysis.

According to the *travaux préparatoires*, a few legislative changes were required and a number of regulatory amendments to implement the Directive into Swedish law. Apart from those mentioned above, the legal provisions in force comply with the obligations laid down in the Directive.[82]

A brief critical analysis of the legislative framework in regard to directive (EU) 2016/800

[80] Swedish Government Official Reports 2017: 68, p. 47-48.
[81] Swedish Government Official Reports 2017: 68, p. 48.
[82] Government Bill 2018/19:71, p. 17-26.

In accordance with the travaux préparatoires, including the Swedish Government Official Reports 2017: 68, and the Government Bill 2018/19:71, the starting point is that the Swedish legal system is largely designed in such a way that it already corresponds to the Directive's requirements. Thus Swedish law already offered strong protection to safeguard the rights dealt with in the Directive. However, some changes were introduced so as to fully comply with the Directive's requirements.[83]

The Convention on the Rights of the Child is explicitly aimed at safeguarding the rights of the child; it includes standards aimed at children who are suspects or accused persons in criminal proceedings. In its interpretation of the European Convention on Human Rights, the European Court on Human Rights has stressed on several occasions that member states should take action to meet the special needs of children in their capacity as suspects or accused persons in criminal proceedings. In the case law of the European Court the child perspective often shines through concerning the right to a fair trial.[84]

EU Member States, including Sweden, are also bound by the EU's Charter of Fundamental Rights, which also covers guarantees for children who are suspects or accused persons.[85]

There is also an ambition that procedural rules should aim at bringing about positive change and foster favourable development. With respect to the treatment of children and young people who are suspected of offences, there are today a large number of explicit procedural rights that have to be guaranteed. The Young Offenders (Special Provisions) Act contains special rules for the processing by the police, prosecutors and courts of cases and matters concerning offences where children are suspects or accused persons. Most of these provisions apply to the 15–17 years age group, but some of the rights guaranteed by the Act have to be applied up until the suspect or accused person has turned 21 years. When there is no special regulation in the Act, it is the Code of Judicial Procedure and other general provisions that are applicable. It should, for example, be

[83] Swedish Government Official Reports 2017: 68, p. 43.
[84] Swedish Government Official Reports 2017: 68, p. 35.
[85] Swedish Government Official Reports 2017: 68, p. 35-36.

mentioned that the Preliminary Investigations Ordinance (1947:948) also contains special provisions aimed at the processing of matters where the suspect is under 18 years.[86]

The Directive is limited to criminal proceedings and shall, in addition, be applied to children who are requested persons under a European arrest warrant. But the Directive does not cover any other types of proceedings. It should, for example, not apply to procedures that are specially designed for children and that could lead to protective, corrective or educative measures.[87]

Within the framework of Swedish criminal procedure legislation, there is considerable scope to take into account the circumstances of the individual case, an approach in which the requirements of the directive can also be said to be based.[88]

In general the Swedish legal system is based on creating conditions to enable young people to participate effectively in their own trial. To give these rights the effect intended, the current law contains, for example, certain requirements concerning expertise or requirements concerning specialisation regarding persons who process matters in which children are suspects or accused persons. For example, the leader of the preliminary investigation has to be particularly suitable for the task and interviews have to be held by a person with special expertise. The judges handling cases involving young persons also have, according to the main rule, to be specially appointed.[89]

The main rule is that the person who is suspected or accused also has to be present in person at their own trial. This system is of particular importance regarding children and young people who are accused persons. Exceptions can only be made in certain instances and then the system is, for example, based on requirements that the investigation has to be adequate and that the defendant has been served with information about the trial and about the consequences of not attending. So the starting point applicable is that the child or young person has to be present in person, and here the prime justification is educative. In cases against persons who have not turned 21 years it is possible, in order to safeguard privacy, to make departures from the principle that court hearings

[86] Swedish Government Official Reports 2017: 68, p. 37.
[87] Swedish Government Official Reports 2017: 68, p. 41.
[88] Swedish Government Official Reports 2017: 68, p. 86.
[89] Swedish Government Official Reports2017: 68, p. 40.

are held in public. In certain instances – for example in cases attracting a great deal of attention – it is possible for the court to hear the case in private. But close relatives of the suspect may still be allowed to be present.[90]

The use of paragraphs can be improved: please separate paragraphs when they refer to different situations/ norms and enhance internal coherence.

9.2 Case-law

So far and to my knowledge, there are no cases mentioning Directive (EU) 2016/800.

[90] Swedish Government Official Reports2017: 68, p. 41.

10 Directive (EU) 2016/1919: Legal aid

10.1 Legislation

The following acts implemented Directive (EU) 2016/1919:[91]

- Code of Judicial Procedure (1942:740),
  - no amendments adopted.
- Decree on preliminary inquiries (1947:948),
  - no amendments adopted.
- The International Legal Assistance in Criminal Matters Ordinance (2000:704),
  - no amendments adopted.
- Ordinance (2003:234) on the Time of Provision of Judgments and Decisions etc.,
  - no amendments adopted.
- Ordinance (1997:406) on public defence counsel, etc.,
  - no amendments adopted.
- The International Legal Assistance in Criminal Matters Act (2000:562),
  - no amendments adopted.
- Act (2019:177) Amending the Act (2003:1156) on surrender from Sweden according to the European arrest warrant, in force from 1 May 2019.
  - ändr. 4 kap. 8 §
- Ordinance (2003:1179) Regulating Surrender from Sweden According to the European Arrest Warrant Act,
  - no amendments adopted.

[91] Expiration of the implementation deadline, 25 May 2019.

- Act (2019:178 amending the Act (2011:1165) on surrender from Sweden according to a Nordic arrest warrant, in force from 1 May 2019.
    - ändr. 3 kap. 4 §
- Ordinance (2012:565) regulating Surrender from Sweden According to a Nordic arrest warrant,
    - no amendments adopted.
- Ordinance (2003:1178) Regulating Surrender to Sweden According to the European Arrest Warrant Act,
    - no amendments adopted.
- Ordinance (2012:566) Regulating Surrendered to Sweden According to the Nordic Arrest Warrant,
    - no amendments adopted.
- Act (2017:1000) on the European Investigation Order,
    - no amendments adopted.
- Ordinance (2017:1019) on the European Investigation Order,
    - no amendments adopted.
- Ordinance (2019:673) amending Ordinance (1988:31) on the readiness of district courts to examine detention issues, etc., in force from 10 December 2019.
    - ändr. 2, 4, 5, 6 §§;
    - ny 1 a §
- Act (1964:167) containing specific provisions on young offenders,
    - no amendments adopted.
- Instructions for the Parliamentary Ombudsman Act (1986:765),
    - no amendments adopted.
- The Act (1975:1339) concerning the supervision exercised by the Chancellor of Justice,
    - no amendments adopted.
- Ordinance (1975:1345) concerning the duties of the Chancellor of Justice,

- no amendments adopted.

The right to legal aid according to the directive corresponds in Swedish law to the right to have a public defender. In the *travaux préparatoires*, the assessment is made that Swedish law already before essentially satisfies the directive's requirements for the right to legal aid.[92]

In this respect, although there were already relevant provisions de facto or indirectly containing the same right as the Directive, a few Articles that have been specifically discussed in the *travaux préparatoires*, which is regarded an important legal source in Sweden, need to be specifically commented:

Article 5(1)[93] - Legal aid in European arrest warrant proceedings

The right to legal aid in connection with a European arrest warrant applies until a surrender takes place or until the decision not to surrender has become final (Article 5 (1)). There is no provision in Swedish law that regulates how long a defence assignment lasts. Practice shows that the assignment as public defender for a defendant in the ordinary criminal proceedings ceases when the decision on the issue of liability has become final (NJA 2006 p. 464). In extradition cases, the public defender's task is not to assist the wanted person during a preliminary investigation and subsequent trial, but he or she has instead the task of assisting the wanted person in the transfer case. The memorandum states that it must therefore be in the nature of the assignment that it, in any case, continues until the issue of surrender has been finally decided by a decision that has become legally binding.[94]

The Government therefore proposes that an amendment be made to the Act (2003: 1156) on surrender from Sweden in accordance with a European arrest warrant, meaning that the wanted person has the right to a public defender until a decision on surrender has been enforced. A corresponding change should be made in the Act (2011: 1165) on surrendered from Sweden according to a Nordic arrest warrant.[95]

[92] Government Bill 2018/19: 42, p. 23.
[93] The following discussion is reproduced from the *travaux préparatoires*.
[94] Government Bill 2018/19: 42, p.19.
[95] Government Bill 2018/19: 42, p.19.

Article 6(1)[96] - Decisions regarding the granting of legal aid

A decision that a public defender shall be appointed is made by the court (Chapter 21, Section 4 of the Code of Judicial Procedure). The district courts are available during regular working hours. In addition, the district courts on Sunday, other public holidays, Saturday, Midsummer's Eve, Christmas Eve and New Year's Eve are prepared for consideration of, among other things, issues of detention and appointment of public defenders (Section 1 of the Ordinance [1988: 31] on the district courts' readiness for examination of detention issues etc.)[97]

Decisions on the granting of legal aid, as well as on the appointment of defenders, shall be taken by a competent authority without undue delay (Article 6). The competent authority shall, as a rule, be an independent authority or a court. In urgent cases, temporary involvement of prosecutors or police is allowed to the extent necessary for the granting of legal aid in a timely manner (recital 24).[98]

The Government therefore proposes that the prosecutor should have the right, while the court is not available for decision, pending a court decision to appoint a public defender for a suspect who has been arrested or detained and who has an urgent need for a defender. Such a decision shall be submitted to the court for review as soon as possible.[99]

Chapter 21, Section 4, New Third Paragraph of the Code of Judicial Procedure

When the court is not available for a decision, the prosecutor may, pending the court's decision, appoint a public defender for a suspect who has been arrested or detained and who has an urgent need for a defender. The decision shall be submitted to the court for review as soon as possible.

The third paragraph, which is new, introduces a right for the prosecutor to make interim decisions on the appointment of public defenders. The provision constitutes an exception to the main rule in

[96] The following discussion is reproduced from the *travaux préparatoires*.
[97] Government Bill 2018/19: 42, p.14.
[98] Government Bill 2018/19: 42, p.11.
[99] Government Bill 2018/19: 42, p.18.

the first paragraph that a public defender is appointed by the court. The provision is only applicable when the court is not available for decision, i.e. outside the court's office and standby hours. The application presupposes that there is an urgent need for a defender for a person who has been arrested or detained. For example, it may be that interrogation of the suspect cannot be postponed. If the suspect has proposed someone who is competent for the assignment, he or she shall be appointed, unless there are special reasons against it (Chapter 21, Section 5 of the Code of Judicial Procedure). Should the proposed defence counsel not be able to carry out the assignment, this should constitute such a special reason that speaks against appointing the person chosen by the suspect. The second sentence of the third paragraph states that the prosecutor shall submit the decision to the court for review as soon as possible. This means that a transfer must take place no later than when the court opens.[100]

Besides the above-mentioned Articles, there are relevant provisions de facto or indirectly containing the same right, which have been officially recognized in the *travaux préparatoires*, which is regarded an important legal source in Sweden. Please see the transposition table for Directive (EU) 2016/1919 for a more detailed analysis.

According to the *travaux préparatoires*, a few legislative changes were required and a number of regulatory amendments to implement the Directive into Swedish law. Besides those mentioned above, the legal provisions in force comply with the obligations laid down in the Directive.

A brief critical analysis of the legislative framework in regard to directive (EC) 2016/1919

The right to legal aid according to the directive corresponds in Swedish law to the right to have a - public defender. In the memorandum, the assessment is made that Swedish law already today essentially satisfies the directive's requirements for the right to legal aid. In order to fully meet the requirements, it is proposed e.g. the following:

It is clarified in the Code of Judicial Procedure and the Act (1964: 167) with special provisions on young offenders that a preliminary investigation leader's obligation to report the need for a public

[100] Government Bill 2018/19: 42, p.22.

defender to the court must be fulfilled without undue delay and before an interview with the suspect.

The head of the preliminary investigation must also make a corresponding report to the court if the suspect has made a request for a public defender. The Code of Judicial Procedure also clarifies that the court's examination of a question of the appointment of a public defender shall take place without undue delay. If a request is made before an interrogation with the suspect, the question of appointing a public defender must be examined before the interrogation is held. The memorandum makes the assessment that, in connection with the directive, a system should be introduced for the appointment of a public defender outside the court's office and standby hours, ie. mainly during evenings and nights. It is proposed that, instead of establishing a standby duty or readiness for the courts during such time, a regulation be introduced in the Code of Judicial Procedure which gives the prosecutor the right to, under certain conditions, temporarily appoint a public defender for an arrested or detained suspect. The prosecutor's decision must then be submitted as soon as possible to the court for the usual examination of the issue of the defence. In the case of persons wanted in Sweden according to a European or Nordic arrest warrant, it is clarified that the right to the assistance of a public defender applies until the transfer takes place, ie. even in the period after a decision to grant a transfer has become final. The constitutional amendments entered into force on 1 January 2019.[101]

In summary, the Government proposes that the prosecutor should have the right, while the court is not available for decision, pending a court decision to appoint a public defender for a suspect who has been arrested or detained and who has an urgent need for a defender. Such a decision shall be submitted to the court for review as soon as possible.[102]

10.2 Case-law

So far and to my knowledge, there are no cases mentioning Directive (EU) 2016/1919.

[101] Government Bill 2018/19: 42, pp. 23.
[102] Government Bill 2018/19: 42, p.18.

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

11.1 Legislation

The following acts implemented Directive (EU) 2016/343:[103]

- Act (2018:120) amending the Code of Judicial Procedure (1942:740), in force from 1 April 2018.
  - ändr. 46 kap. 15 a §
- Ordinance (2018:121) amending the decree on preliminary inquiries (1947:948), in force from 1 April 2018.
  - ändr. 12 §
- Ordinance (1975:1345) concerning the duties of the Chancellor of Justice,
  - no amendments adopted.
- Detention Act (2010:611),
  - no amendments adopted.
- Police Act (1984: 387),
  - no amendments adopted.
- Instructions for the Parliamentary Ombudsman Act (1986:765),
  - no amendments adopted.
- Decree (1974: 152) on the adopted new Instrument of Government,
  - no amendments adopted.

[103] Expiration of the implementation deadline, 1 April 2018

In the *travaux préparatoires*, the assessment is made that the Swedish legal system is largely structured in such a way that it already meets the Directive's requirements. The right to be presumed innocent is guaranteed in several ways.[104]

Relevant provision de facto or indirectly implementing the Directive

In this respect, although there were already relevant provisions de facto or indirectly containing the same right as the Directive, a few Articles that have been specifically discussed in the *travaux préparatoires*, which is regarded an important legal source in Sweden, need to be specifically commented.

Article 8(2)[105]

The Directive is based on the notion that anyone who is suspected or accused of a crime must have the right to be present at their own trial. However, a decision can be issued and enforced even if the suspect or the accused person has not been present. For this to be possible, certain conditions must have been met. Put simply, one of two conditions must have been met.[106]

Either the suspect or the accused person must have been informed in due time about the trial and received information about the implications of failing to be present, or he or she must be entitled to a re-examination.[107]

The exceptions that are permitted where Sweden is concerned, i.e. the cases in which Swedish law allows the case to be examined in the absence of the accused person, are based on the investigation having been satisfactory. Moreover, as a general rule, the accused person must have voluntarily renounced their right to be present at the trial. The more detailed conditions for when a decision can be issued in a criminal case despite the fact that the accused person has not been present at the main hearing are contained in Chapter 46, Section 15a of the Swedish Code of Judicial Procedure. Under Chapter 45, Section 9, second paragraph of the Swedish Code of Judicial Procedure, the accused person must have been served with the court summons as well as the

[104] Swedish Government Official Report 2017:17, p. 23 and Government Bill 2017/18:58, p. 38.
[105] The following discussion is reproduced from the *travaux préparatoires*.
[106] Swedish Government Official Report 2017:17, p. 26-27.
[107] Swedish Government Official Report 2017:17, p. 26-27.

prosecutor's summons application. The accused person must also have been summoned to the hearing and given information about the trial and the consequences of failing to be present.[108]

However, there is one provision that allows deviations from the main principles. Chapter 46, Section 15a, third paragraph of the Swedish Code of Judicial Procedure states that a criminal case may, in certain situations, be settled in the absence of the accused person despite the fact that he or she has not been served with a summons to the hearing. This is the case in situations where the accused person has been proven to have absconded or is intentionally hiding in such a way that he or she cannot be brought to the hearing. In such cases, a decision can be issued in the case despite the fact that the accused person has not been informed about the trial. Swedish law does not guarantee the accused person an automatic right to a reexamination either. It is therefore considered that this system does not meet the Directive's requirements. We therefore propose that this provision be removed. This means that in these cases too, the accused person must have been served with a summons containing information about the possibility of a decision being issued in the case despite the fact that he or she is not present.[109]

The existing provision in Chapter 46, Section 15a, third paragraph of the Swedish Code of Judicial Procedure should only be applied in exceptional cases. There are also more methods of service available now than when the provision was introduced. The removal of the provision should therefore not affect efficiency in criminal proceedings to any major extent.[110]

Article 7(2)[111]

Regarding the right to remain silent and the right not to incriminate oneself, the enquiery proposes a minor amendment to the Preliminary Investigations Ordinance (1947:948). It is already the case that a suspect, when charged on reasonable suspicion of committing an offence, must be informed of their right to not make any statement about the suspected offence. Our proposal involves an addition to this obligation to inform. It is made clear that the suspect must also be informed of their

[108] Swedish Government Official Report 2017:17, p. 27.
[109] Swedish Government Official Report 2017:17, p. 27-28.
[110] Swedish Government Official Report 2017:17, p. 28.
[111] The following discussion is reproduced from the *travaux préparatoires*.

right to not contribute to the investigation into their own guilt. In general, it can be noted that the legislative measures have already been taken to adapt Swedish law to the European Convention in terms of the authorities' right to request information from individuals.[112]

Besides the above-mentioned Articles, there are relevant provisions de facto or indirectly containing the same right, which have been officially recognized in the *travaux préparatoires*, which is regarded an important legal source in Sweden. Please see the transposition table for Directive 2016/343/EU for a more detailed analysis.

As a result, the implementation of the directive can be considered satisfactory as acknowledged already in the *travaux préparatoires*, which guided the legislative changes that followed, and as to my legal analysis.

Critical analysis is good but only two paragraphs analysed.

A brief critical analysis of the legislative framework in regard to directive (EU) 2016/343

The right to a fair trial is enshrined in the Constitution in Chapter 2, section 11, second paragraph of the Instrument of Government. It is also a requirement for the courts and other administrative authorities' obligation to take into account everyone's equality before the law in their activities and to observe objectivity and impartiality (Chapter 1, Section 9 of the Instrument of Government). Of the provisions in Chapter 23 Section 4 of the Code of Judicial Procedure follows that both preliminary investigations and law enforcement activities must be conducted objectively. The requirements of objectivity in these provisions apply throughout the criminal proceedings, ie. both before and after someone has been notified of reasonable suspicion. The prosecutor and the person assisting him or her must also conduct their work objectively after the prosecution has been brought, see Chapter 45, Section 3 a of the Code of Judicial Procedure. Also the provisions on disqualification of a judge in Chapter 4 Section 13 of the Code of Judicial Procedure shall guarantee

[112] Swedish Government Official Report 2017:17, p. 26. Government Bill 2017/18:58, p. 14.

impartiality and prevent judges from speaking out publicly about a suspect's or defendant's guilt before the matter has been finally decided. Similar conflict of interest provisions exist for police officers, prosecutors and other officials.[113]

The Directive can be said to consist of three different parts. The first part regulates the presumption of innocence and its various aspects.[114]

In the assessment, the Swedish legal system is largely structured in such a way that it already meets the Directive's requirements. The right to be presumed innocent is guaranteed in several ways.[115]

The presumption of innocence is guaranteed not least through the status of the European Convention as law. The presumption of innocence is a given starting point in criminal proceedings and there are several provisions in the Swedish Code of Judicial Procedure that reinforce its effect.[116]

The first and overarching issue regarding the presumption of innocence was to analyse the extent to which the Directive assumes that this general legal principle is regulated by law. The presumption of innocence, i.e. that suspects and accused persons are to be presumed innocent until proven guilty according to law, is not explicitly established in law in any other way than through the status of the European Convention as law. In the assessment, the Directive does not require that this general legal principle as such be regulated by law. The enquiery has also concluded that no added value would be created that, in itself, would justify regulation by law.[117]

Instead, it is considered that the Directive is aimed at reinforcing certain aspects of the presumption of innocence. In this way, the presumption is made effective and usable in criminal proceedings. The Directive regulates three different aspects of the presumption of innocence:

i. A suspect or an accused person has the right not to be referred to as guilty until that person has been proven guilty according to law. ii. The burden of proof for establishing the guilt of the suspect

[113] Government Bill 2017/18:58, p. 13.
[114] Swedish Government Official Report 2017:17, p. 23. Government Bill 2017/18:58, p. 38.
[115] Swedish Government Official Report 2017:17, p. 23. Government Bill 2017/18:58, p. 38.
[116] Swedish Government Official Report 2017:17, p. 23-24.
[117] Swedish Government Official Report 2017:17, p. 24.

or the accused person is on the prosecution, and any doubt should benefit the suspect or accused person. iii. Suspects and accused persons have the right to remain silent and the right not to incriminate themselves.

Most of our work therefore focused on analysing Swedish law on the basis of these different aspects and ensuring that the legal system meets these requirements.[118]

Other issues analysed include the provisions allowing written processing in criminal proceedings, the regulation on abstention from prosecution and the possibilities of issuing a summary imposition of a fine and an imposition of a breach-of-regulation fine. In our assessment, these procedures meet the requirements of the Directive and no legislative amendments are necessary.[119]

In our assessment, the Swedish legal system is largely structured in such a way that it already meets the Directive's requirements. Both the right to be presumed innocent and the right to be present at one's own trial are guaranteed in several ways. We also consider that the existing legal remedies offer adequate protection in cases in which one of these rights is disregarded.[120]

11.2 Case-law

So far and to my knowledge, there are very few cases mentioning Directive 2016/343/EU. These will be briefly outlined below:

Supreme Court Judgement NJA 2018 s. 394, 12 June 2018.

The question in the Supreme Court was whether the indictment against the driver for infection constitutes a violation of the privilege against self-incrimination under Article 6 of the European Convention. The Supreme Court's examination is limited to the situation that a driver of a motor vehicle, who has been involved in a traffic accident without personal injury and who can be suspected of a traffic crime, deviates from the accident site without giving his name and domicile.

[118] Swedish Government Official Report 2017:17, p. 24.
[119] Swedish Government Official Report 2017:17, p. 28.
[120] Swedish Government Official Report 2017:17, p. 23. Government Bill 2017/18:58, p. 14 and 38.

A driver of a motor vehicle was involved in a traffic accident that caused only property damage. The circumstances gave reason to assume that the driver, who left the scene of the traffic accident without giving his name and domicile, had committed a traffic offence. Responsibility for leaving the scene of the traffic accident pursuant to section 5, first paragraph, first part, of the Traffic Offenses Act has not been considered to constitute a violation of the privilege against self-incrimination in accordance with Article 6 of the European Convention.

At the time the duty to provide information was to be fulfilled, the driver could only be suspected of traffic offenses. The duty to provide information was limited to stating his name and domicile, and the coercion - a fine - is of a relatively minor nature. Criminal liability requires intent. The indictment against the driver for deviation from the accident site without giving his name and domicile does not constitute a violation of his right to a fair trial.

Supreme Court Judgement NJA 2019 s. 327, 25 April 2019.

After the main hearing in a criminal case, the court decided that the verdict would be announced later and that the accused would remain in custody. According to notes sent to the parties, the court had also decided the verdict in connection with the hearing. Before the verdict was announced, the court supplemented the investigation and, at the request of the accused, took up new evidence at a further main hearing. The members who participated in the main hearing have not been deemed to be unfit to handle the case at the decision on supplementation or at a continued main hearing.

The Supreme Court rejects the appeal of the Court of Appeal’s decision on 23 November 2018.

The Supreme Court does not grant leave to appeal in connection with the appeal of the Court of Appeal's judgment of 10 December 2018. The Court of Appeal's judgment is thus upheld.

Göta Court of Appeal Order in case nr B 518-19, 18 June 2019.

The Court of Appeal: The district court's judgment in the so-called University examination case is set aside by the Court of Appeal and the trial must be resumed.

Three men were convicted in Norrköping District Court for, among other things, aiding and abetting a false declaration, a serious crime, a serious bookkeeping crime and a serious tax crime and one person for aiding and abetting a false declaration, a serious crime in connection with the University Examination. Another five people were convicted of various forms of crime related to the business and 23 people were convicted of cheating during the test.

In the Court of Appeal, several defendants had requested that the Court of Appeal set aside the district court's judgment and refer the case back to the district court. Some defendants had stated that the chairman of the district court was disqualified, as he had spoken about issues in the case at a law club meeting in Norrköping while the main hearing was taking place at the district court. The information about the statements had been obtained through an outside lawyer who was present at the law club meeting.

The President of the Court stated that he had not expressed himself in a way that would mean that he had taken a position in the case before the case was decided. The prosecutor had opposed deportation.

In its decision, the Court of Appeal concludes that there is no reason to question that the district court chairman at the law club meeting made statements that had the meaning that the lawyer reported. It can therefore be perceived that the judge had taken a position on issues that he would later assess in the case. The chairman of the court had thus been disqualified.

When considering a conflict of interest, the crucial question is how a statement can be perceived by an outsider. This was the question that the Court of Appeal has focused on and not whether the judge had actually taken a position.

If the Court of Appeal judges that a district court judge has been disqualified, the district court judgment must always be set aside. In the event of a dispute, it is not examined whether this has had a bearing on the outcome of the case.

The Court of Appeal therefore annulled the district court's judgment and remands the case there.

Are you sure the issue of conflict of interest/ natural Court is covered by the Directive in question?

A brief critical analysis of the case law

There are so far very few cases mentioning Directive (EU) 2016/343, of which one Court of Appeals judgement did conclude that Article 4 on public references to guilt had been violated. When considering a conflict of interest, the crucial question is how a statement can be perceived by an outsider. This is the question that the Court of Appeal has focused on and not whether the judge

had actually taken a position. In the Supreme Court case NJA 2018 s. 394, the Supreme Court concluded that the indictment against the driver for deviation from the accident site without giving his name and domicile did not constitute a violation of his right not to incriminate himself and his right to a fair trial.

12 Concluding remarks

After the changes introduced by Directive 2010/64/EU, there are greater opportunities for a suspected or accused person who does not have a command of Swedish to have documents translated into his or her mother tongue. These proposals also mean that the quality requirements are raised as regards both interpretation and translation. It can therefore be assumed that the changes will result in fewer erroneous judgments and thus increased legal security and confidence in the judicial system. In this respect, the changes can also be expected to contribute to meeting the integration policy objectives of equal rights and opportunities for everyone regardless of ethnic or cultural background.

In accordance with the *travaux préparatoires*, a few legislative changes and a number of regulatory amendments were required to implement Directive 2012/13/EU. These changes included that anyone reasonably suspected of a crime should be informed of certain procedural rights when he or she is informed of the suspicion. In addition to the right to be informed of the right to a lawyer, notification shall be given of, among other things, the right to transparency of the investigation and the right not to have to comment on the suspicion. Where a suspect has been arrested or detained, such information shall be provided in writing. The written information in the event of detention shall also contain information on, inter alia, the right to have a relative informed of the detention and the right to healthcare.

For the remaining directives, the assessment is made that current Swedish law largely meets the requirements of the directives. For Directive 2012/13/EU a number of minor adjustments and clarifications have been made in order to fully implement the directive. These in particularly concerned a number of aspects of the right of access to a lawyer, the right to confidentiality between a detained suspect or defendant and his or her defense councel, the right to have a third party informed of the deprivation of liberty, and the right to communicate with third persons, the right to communicate with consular authorities, the right of access to a lawyer in European arrest warrant proceedings, and finally, education, etc. Likewise, Swedish law already offered strong protection to safeguard the rights dealt with in Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, but still some changes were introduced so as to fully comply with the Directive's requirements. Similarly, Swedish law essentially

satisfied the requirements of Directive (EU) 2016/1919 for the right to legal aid. In order to fully meet the requirements, it was proposed that the prosecutor should have the right, while the court is not available for decision, pending a court decision to appoint a public defender for a suspect who has been arrested or detained and who has an urgent need for a defender. Such a decision shall be submitted to the court for review as soon as possible. Finally, the Swedish legal system was largely structured in such a way that it already met the requirements of directive (EU) 2016/343. Both the right to be presumed innocent and the right to be present at one's own trial are guaranteed in several ways. It was also considered that the existing legal remedies offer adequate protection in cases in which one of these rights is disregarded.

When it comes to case law, there are so far very few cases mentioning the directives, of which one District Court decision, and one Court of Appeals judgement, did not find that the suspect's right to a fair trial in Directive 2012/13/EU had been violated. A Court of Appeals judgement confirmed that access to a lawyer in accordance with Directive 2012/13/EU, in practice, very much relies on the rules on economic compensation to the lawyer, which is thereby duly acknowledged by the Court. So far and to my knowledge, there are no cases mentioning Directive 2010/64/EU, Directive 2016/800/EU or Directive 2016/1919/EU. Finally, there are very few cases mentioning Directive 2016/343/EU, of which one Court of Appeals judgement, did conclude that Article 4 on public references to guilt had been violated. When considering a conflict of interest, the crucial question was how a statement can be perceived by an outsider, not whether the judge had actually taken a position. In the Supreme Court case, the Supreme Court concluded that the indictment against the driver for deviation from the accident site without giving his name and domicile did not constitute a violation of his right not to incriminate himself and his right to a fair trial.

There is one decision by the Office of the Chancellor of Justice that adress the implementation of Directive 2010/64/EU. In its decision, the Chancellor of Justice raised criticism of a district court for the fact that the court's procedures for using an interpreter were not in accordance with the Code of Judicial Procedure, implementing Directive 2010/64/EU. Upon this critique, the internal procedures were updated. Likewise, the Decision by the Parliamentary Ombudsman, which neither a court, focuses on a very practical part of Directive 2013/48/EU, i.e. that meetings in private between suspects and their defenders must not be monitored with a surveillance camera, upon which this previous practice has been amended by the Police Authority.