D 2.11

Croatian Report

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/it
Contractual delivery date:	M24
Contributing WP	WP2
Dissemination level:	PUBLIC
Deliverable leader:	UNIZAGREB
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	September 2021	Zlata Đurđević, Elizabeta Ivicevic Karas, Marin Bonacic, Zoran Buric	UNIZAGREB	First draft
2.0	September 2021	Mariavittoria Catanzariti	EUI	Feedbacks on the all report
3.0	September 2021	Alessandra Santangelo	UNIBO	Feedbacks on the all report
4.0	October 2021	Giulia Lasagni	UNIBO	Feedback on all the report
5.0	December 2021	Zlata Đurđević, Elizabeta Ivicevic Karas, Marin Bonacic, Zoran Buric	UNIZAGREB	Final draft

2 Contributors

Partner	Name	Role	Contribution
Sveučilište u Zagrebu – Pravni fakultet	Prof. dr. sc. Zlata Durdevic	Tenured Professor	Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial Directive 2016/800/EU on procedural safeguards for juvenile defendants Articles 1-7

Sveučilište u Zagrebu – Pravni fakultet	Prof. dr. sc. Elizabeta Ivicevic Karas	Full Professor	Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed Directive (EU) 2016/1919 on the right to legal aid in criminal proceedings Articles 1 and 2
Sveučilište u Zagrebu – Pravni fakultet	dr. sc. Marin Bonacic	Assistant Professor	Directive 2010/64/EU on right to interpretation and translation in criminal proceedings Directive 2016/800/EU on procedural safeguards for juvenile defendants Articles 8-20
Sveučilište u Zagrebu – Pravni fakultet	dr. sc. Zoran Buric	Assistant Professor	Directive 2012/13/EU on the right to information in criminal proceedings Directive (EU) 2016/1919 on the right to legal aid in criminal proceedings Articles 3-9

On behalf of the Sveučilište u Zagrebu – Pravni fakultet, the present deliverable has been drafted by Prof. dr. sc. Zlata Durdevic, Tenured Professor, Prof. dr. sc. Elizabeta Ivicevic Karas, Full Professor, dr. sc. Marin Bonacic, Assistant Professor, dr. sc. Zoran Buric, Assistant Professor. **For the purposes of this report, national case law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to**.

Disclaimer: The content of this report represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

3 Table of Contents

4 Main findings/Executive summary

Directive 2010/64/EU on right to interpretation and translation in criminal proceedings was primarily transposed into Croatian law through two 2013 amendments of the Criminal Procedure Act and the 2017 amendments of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union. The Directive was also *de facto* implemented through the Judiciary Act, Misdemeanor Act and some other legislation. Most of the provisions were explicitly transposed and fully implemented. In that regard, the right is guaranteed from the time a person is made aware by the competent authorities that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings and it also applies in the misdemeanour proceedings. Many new provisions like the ones on the translation of essential documents, the use of communication technology, or the right to challenge a decision on no need for translation and its quality have been introduced. The analysis has, however, shown that some of the provisions are only partially implemented and, in the case of training for communicating with the assistance of an interpreter, that they are not implemented at all. The initial shortcoming of the transposition in relation to the right to challenge a decision finding that some documents or excerpts do not need to be translated was rectified by the Supreme Court. In relation to other issues, the case-law can be summarized as follows: 1. In the case of foreign nationals, the fact that they live and work in Croatia and are familiar with the Croatian language is not in itself sufficient to establish that they speak or understand the Croatian language to an extent that would not prejudice their rights of defence. Standards for the assessment have only just begun to develop in case-law; 2. The use of *ad hoc* interpreters instead of permanent court interpreters must be justified by the circumstances of the case and the reasons correspond to those for the use of *ad hoc* experts. In case the *ad hoc* interpreter does not take the oath under Art. 280(3) CPA it will not make the testimony of a witness illegal; 3. The defendant has the right to interpretation and translation in cases conducted *in absentia*, i.e. the fact that the proceedings are conducted *in absentia* cannot be a reason for restricting the right to interpretation and translation.

Directive 2012/13/EU on the right to information in criminal proceedings has been transposed into Croatian law primarily through the amendments of the Criminal Procedure Act which were adopted in December 2013. The Directive was transposed in time. Most of the provisions of the

Directive have been fully transposed into Croatian law. However, some shortcomings in the transposition have been identified and they relate to the following provisions of the Directive:

1) not implemented: Article 4(3) (there is no information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the arrest; or making a request for provisional release in the letter of rights to the arrested person or the person in pre-investigatory detention), Article 4(4) (the CPA determines the content of the letter of rights only in general terms and the language used in letter of rights is not simple and accessible enough), Article 5(2) (the AJCCMEU does not explicitly determine the content of the letter of rights but refers to the CPA. As already mentioned with regard to the content of the letter of rights to the arrested person Article 6(4) (Croatian law does not contain a provision which would explicitly or indirectly transpose the obligation to inform promptly the suspect or the accused person of any changes in the information given in accordance with Article 6 of the Directive, and Article 9 (no training has been identified);

2) only partially implemented: Article 3(1) (with regard to any entitlement to free legal advice and the conditions for obtaining such advice), Article 3(2) (the letter of rights not written in simple and accessible language). There is no general obligation to take into account specific needs of vulnerable suspects and vulnerable accused persons when informing them about their rights), Article 7(1) (a provision of the CPA, which enables the person in pre-investigatory detention to have access to all the materials which are necessary to challenge effectively the lawfulness of the detention, does not apply to arrested persons or the person in detention) and Article 7(4) (Croatian law goes beyond what the Directive allows. It enables the public prosecutor and the court to deny the defendant not only the rights of access to certain materials, but to the case file in its entirety).

With regard to the case-law analysis, as expected, not much case-law has been identified. The most important question which has been brought to the fore has been the moment from which a person acquires the status of the suspect (and the rights guaranteed by the Directive).

As concerns the **Directive 2013/48/EU on the right of access to a lawyer and to have a third party informed**, the vast majority of the provisions of the Directive have been transposed and fully implemented in Croatian criminal procedural law. As the most important change brought by the transposing legislation, the regulation of the interrogation of suspects and arrestees by the police should be pointed out. Until the transposition of the Directive, the police were able to conduct informal informative conversations with suspects and arrestees, without prior instruction on rights and without the right to have defence counsel. Although the official notes on these informative conversations could not be used as evidence in criminal proceedings, the police could actually use them to obtain further evidence, which were in fact derived from the informative conversations. Since

the Directive 2013/48/EU explicitly guarantees the right to counsel from the moment of deprivation of liberty, but also before and during any interrogation of a suspect, including the police interrogation, the Croatian legislator had to take significant interventions in the previous legal framework. Thus, a new substantive definition of a suspect was prescribed, and with the regulation of the right to a defence counsel, other fundamental defence rights during the police interrogation were regulated, such as the right to information and the right to remain silent. This means that the basic defence rights are now guaranteed in the earliest phases of proceedings - during police inquiries while the police interrogate a suspect or arrestee. The analysis of case law has shown that for the proper application of new legal solutions and effective exercise of the right to defence counsel, as well as other defence rights in the earliest stages of the procedure - during police interrogation, it is crucial that the court carefully considers all circumstances of each concrete case. This is especially important in determining: first, the moment at which a person acquires the status of the suspect and therefore has the right to be assisted by defence counsel before and during police interrogation, and second, to consistently apply the rules on the strict distinction between the procedural role of the suspect, with whom the police may not conduct informative conversations, and the role of the presumptive witness. It can be concluded that certain provisions of the Directive have been well implemented in case law, with the exception of difficulties in interpreting the new term "suspect". The courts in the analyzed decisions mainly dealt with the issue of illegal evidence, the regulation of which is left to national laws by the Directive. Therefore, the given interpretations concerned mainly domestic law on rather strict exclusionary rules, which were applied in several cases of most serious violations of the right to a defence counsel.

Directive 2016/800/EU on procedural safeguards for juvenile defendants was transposed into Croatian law through the 2019 amendments of the Juvenile Courts Act and, in regard to the European arrest warrant, through the amendments of the 2019 AJCCMEU. These Acts explicitly implemented the provisions of the Directive. However, many provisions of the Directive were *de facto* implemented through already existing provisions of the Juvenile Courts Act, Criminal Procedure Act, Family Act and other legislation. In comparison to other directives, the peculiarity of the transposition of this directive is that many provisions were transposed through regulations that are not laws but administrative acts. Due to complexity of the matter of the Directive, the research has also shown that some of its provisions were not implemented in Croatian legal system: the presumption that the person is a child is not provided for a child perpetrator; individual assessment was not introduced as a right but as the obligation of the competent authorities; a child is not informed about the right to periodic review of detention; there is limitation of the communication of the arrestee with the defence counsel up to thirty minutes; there is no obligation for the competent authorities when deciding about delay

to inform to take the child's best interests into account and it cannot be submitted to judicial review; no obligation to update the individual assessment; omitted request that medical examination should be as non-invasive as possible. No relevant national case-law has been identified.

Directive (EU) 2016/1919 on the right to legal aid in criminal proceedings has been primarily transposed in Act no. 126/2019 amending the Criminal Procedure Act and Act no. 70/2019 which amends the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union which entered into force after the Directive's transposition deadline of 5 May 2019. Overall, the transposition of Directive (EU) 2016/1919 by Croatia is partially complete. Main issues in Croatia relate to a restrictive merits test, the quality of legal aid services and the lack of training. The strict requirements for the merits test mean that some suspects will be easily excluded from the right to legal aid, thereby limiting the scope of the national law in relation to the scope of the Directive. There is a lack of specialisation and training of legal aid lawyers, their low remuneration, and the lack of training of staff involved in the legal aid decision-making. No relevant national case-law has been identified.

Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial has been transposed into Croatian law primarily *de facto* by already existing provisions of the Criminal Procedural Act and other legislation such as Act on Police Affairs and Powers, Juvenile Courts Act, Execution of Prison Sentence Act, Media Law, Law on Obligations, Rules on Household Order in Prisons for Execution of Detention, Regulation on the Method of Operation of Police Officers. Nominally, the Directive was transposed by the 2019 Amendment of the Criminal Procedural Act that introduced one declarative provision (Article 3(2) CPA) related to the burden of proof. Most of the provisions of the Directive have been fully transposed into Croatian law, however there are some violations of the Directive in legislation and the case law: in cases of wide range of criminal offences of penal protection of children temporary seizure of written notices of the defendant to the defence counsel is permitted; detention ordered in case of reasonable suspicion that a defendant will destroy evidence or influence witnesses will be abolished if s/he pleads guilty and describes the offence circumstantially and in detail; the accused may be temporarily removed from the courtroom if the co-accused or witness refuses to give a statement in his/her presence or if the circumstances indicate that they would not tell the truth in the presence of the accused; for a criminal offence punishable by imprisonment for a term of up to five years, the trial *in absentia* is possible without representation by a defence lawyer, without the accused being informed, in due time, of a trial and of the consequences of non-appearance; if the accused disturbs order or fails to comply with direction of the president of the panel concerning the maintenance of order, the president of the panel may punish him/her by a fine; the admissibility of guilty plea final judgment stating the name of the

accused as co-perpetrator contrary to the ECJ interpretation of Article 4(1) of the Directive and request to the accused to disprove the fact from that judgment.

5 Introduction

Croatia is a parliamentary republic, which has been internationally recognized as an independent state since January 1992. In 1992, Croatia became a member of the United Nations, in 1996 member of the Council of Europe, in 2009 it was accepted in NATO and in 2013. Croatia became the 28th member state of the European Union on 1 July 2013. The act of accession was preceded by a lengthy and difficult process of accession negotiations that lasted 13 years due to problems with regard to the rule of law, corruption and cooperation with the International Criminal Court for ex Yugoslavia. Croatia presided over the Council of the European Union in the first half of 2020. The Republic of Croatia is a rather young state, as its establishment as a sovereign and independent state dates back to 25 June 1991 when the Croatian Parliament passed a Constitutional Decision on the Sovereignty and Independence of Croatia[1] – thus initiating the proceedings of dissociation from the other Republics and from the Socialist Federal Republic of Yugoslavia – and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia.[2,3] Through a protracted process (1991 – 1995), which had included an armed conflict (Homeland War) against Serbia and Montenegro, followed by the peace-making intervention of the international community, Croatia was established and recognized as "a national state of the Croatian people, which guarantees equality to all members of national minorities".[4] In order to constitutionally transform the communist State into a democracy, it was established on the basis of respect for human and national rights and fundamental freedoms and for the rule of law. The Constitution was adopted as an expression of the popular will to establish a sovereign, independent, and democratic state. In the socialist system of the former Yugoslavia the Constitution could have been characterised as falling more into the second category of 'political' constitutions, as it was considered to be a set of ideopolitical principles which were not linked to legal practice and which were not supposed to be directly applied in practice.[5] The

[1] Official Gazette of the Republic of Croatia 31/91.
[2] Official Gazette of the Republic of Croatia 31/91.
[3] Maja Munivrana Vajda; Elizabeta Ivičević Karas; International Encyclopaedia of Laws, Criminal Law - Croatia; Wolters Kluwer, 2016, p. 18.
[4] Branko Smerdel, Republic of Croatia, https://www.pravo.unizg.hr/_download/repository/Constitutional_law_of_the_28_EU_Member_States_-_Croatia.pdf
[5] Goldner Land in: Goldner Lang I., Đurđević Z., Mataija M. (2019) The Constitution of Croatia in the Perspective of European and Global Governance. In: Albi A., Bardutzky S. (eds) National Constitutions

constitutional system represents a break from the former socialist system, as now in Croatia everyone is entitled to claim constitutionally guaranteed rights and freedoms and is entitled to use the guaranteed ways and means of protecting these rights.

The Constitutional Court enjoys a special constitutional status; it is excluded from the judicial hierarchy and separate from the legislative and the executive branches. The Constitution grants the Constitutional Court competence in the protection of human rights and fundamental freedoms guaranteed by the Constitution and protected by the Constitutional Court on a constitutional complaint or a proposal for the review of the constitutionality of laws against individual decisions taken by governmental agencies including courts. The defendants, detainees, accused and convicted persons whose constitutional rights and freedoms have been restricted in the criminal proceedings may file a constitutional complaint.

Article 154 of the Constitution provides that the exercise of rights derived from the acquis communautaire of the European Union is equivalent to the exercise of rights guaranteed by the Croatian legal order. The citizens of the Republic of Croatia are citizens of the European Union, enjoying rights guaranteed by the acquis communautaire of the European Union and Croatian courts must protect them as the European Union courts.

Croatia has a four-tiered judicial system, consisting of the Supreme Court, the High Criminal Court, county courts, and municipal courts. Croatia's Supreme Court (VSRH) is the highest court in the Republic and its main function is to ensure the uniform application of laws and decides on extraordinary legal remedies. The High Criminal Court was introduced in 2020 and it acts as an appellate court of last instance when so prescribed by law, and on conflicts of jurisdiction. The division between the county and municipal courts corresponds to the administrative division of the territory and the existing administrative demarcation lines: municipal courts are established for the territory of one or more municipalities and towns, while county courts are established for the territory of one or more counties.[6] Municipal courts conduct trials in the first instance as a rule for criminal offences for which a fine or imprisonment up to twelve years is prescribed by law. County courts conduct trials in the first instance for criminal offences for which imprisonment of more than twelve years or long-term imprisonment is prescribed by law, and when jurisdiction of the county court is prescribed by a special law. Courts having jurisdiction to conduct trials in criminal matters are

in European and Global Governance: Democracy, Rights, the Rule of Law. T.M.C. Asser Press, The Hague, p. 1140

[6] Maja Munivrana Vajda; Elizabeta Ivičević Karas; International Encyclopaedia of Laws, Criminal Law - Croatia; Wolters Kluwer, 2016, p. 20.

generally composed of both professional and lay judges who decide together and equally on legal and factual issues. Participation of lay judges in criminal proceedings at the stage of trial is a constitutional category and a part of Croatian legal tradition. However, there are important exceptions to this rule, prescribed by the CPA and special legislation.

Judges in Croatia are autonomous and independent, bound only by the Constitution, applicable international treaties, laws and other valid sources of law (Article 115 URH).[7] The autonomy and independence of judges is ensured by the National Judicial Council (Državno sudbeno vijeće), which is in charge of appointment, promotion, transfer and disciplinary accountability of judges.[8] Judges are trained professionals appointed for life.

Beside courts, the criminal justice system is composed of the police, the State Attorney Office and the Bar. The police service is organized within the Ministry of Interior, under the special organizational unit – the Police Directorate General. Once there are grounds for suspicion that a criminal offence prosecuted *ex officio* had been committed, the powers and duties of the police are regulated primarily by the CPA, especially conducting particular evidentiary actions.[9] For the needs of criminal proceedings, part of police officers may be appointed investigators (istražitelji) in criminal proceedings, who unlike the police officers who operate upon the order of the state attorney, appointed investigators may undertake complicated evidentiary actions even in the criminal proceedings for grave criminal offences.[10]

The State Attorney's Office (državno odvjetništvo) an autonomous and independent judiciary body, and is not a part of judicial or executive state authority. It is the public prosecution service, having power and duty to institute criminal proceedings against perpetrators of criminal offences in a public interest. The State Attorney General is the head of the Republic of Croatia State Attorney's Office that is organized according to the principle of a centralised vertical hierarchical structure. The subject matter and territorial jurisdiction of the state attorney offices is regulated in accordance with the subject matter and territorial jurisdiction of courts. There are county and municipal state attorney's offices, the Republic of Croatia State Attorney's Office and the Anti-Corruption and Organized Crime Prevention Office (USKOK). The State Attorney General is appointed by the Croatian Parliament, upon nomination by the Government, and after having considered the opinion of the Committee of Justice of Croatian Parliament. The appointment of county state attorneys, municipal state attorneys

[7] Ibid.
[8] Ibid.
[9] Ibid. p. 24.
[10] Ibid.

and their deputies is in the competence of the National Prosecutorial Council (Državnoodvjetničko vijeće).[11]

In Croatia, attorneys perform the autonomous and independent public service of providing legal assistance (Article 27 URH). The autonomy and independence of the legal profession proclaimed on the constitutional level is provided through the organization of Croatian Bar Association. In order to be able to practice law, all attorneys must be members of the Croatian Bar Association and local bar associations. An attorney may have a role of defence counsel, an attorney of the private prosecutor, subsidiary prosecutor or an injured party in criminal proceedings. According to the CPA, only an attorney may be retained as a defence counsel, though he may be replaced by an attorney trainee who has passed the Bar examination, but exclusively in proceedings before the municipal court for criminal offences for which a fine or imprisonment up to five years is prescribed by law, and never before the county court (Article 202(2) and 65(4) CPA).[12]

Enacting the new Criminal Procedure Act in 2008, the Croatian legislator abolished the traditional model of judicial investigation conducted by the investigating judge and attributed to the state attorney a role of dominus litis in the pre-trial proceedings. During the pre-trial proceedings, the state attorney conducts the investigation and performs evidentiary actions, in order to collect evidence for the indictment. The judicial control of the state attorney's investigative and prosecutorial activities during investigation is executed by the judge of the investigation (sudac istrage), as a single judge of the competent county court. Besides the judge of the investigation, there are other judicial authorities which have an obligation to assure judicial control in the phase of pre-trial proceedings, when deciding on the appeal from the ruling of a judge of the investigation.[13]

The Criminal Procedure Act enacted in 2008, which replaced the traditional judicial investigation with the state attorney's investigation, not only profoundly restructured the pre-trial criminal proceedings, but also considerably undermined the balance between efficient prosecution and punishment of offenders on the one hand, and the protection of the defendant's fundamental rights on the other hand, in favour of the procedural efficiency.[14] In 2012, the Constitutional Court obliged the legislators to harmonize the CPA with the Croatian Constitution and the Convention for the Protection

[11] The whole paragraph ibid. p. 24-25.
[12] Ibid. p. 27.
[13] Ibid. 25 – 26.
[14] Ibid. 29 – 30.

of Human Rights and Fundamental Freedoms (ECHR).[15] The harmonization implicated the need to restructure the proceedings, especially in the pre-trial phase, and to assure the compliance of the CPA provisions with the constitutional principles of proportionality, judicial control over the state attorney's investigative and prosecutorial authorities, fair trial guarantees, the protection of personal liberty and the respect for privacy, and with the principle of legality in criminal procedure law.[16] Following the Decision of the Constitutional Court, Croatian criminal procedure has been significantly reformed by the legislative amendment passed in November 2013 strengthening the defence rights, fundamental liberties and rule of law.

Croatia has implemented all six Directives, not all of them on time. The Directives were implemented explicitly through amendments of the Criminal Procedure Act, Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, Juvenile Court Act and other laws and regulations. Some Directives were mostly implemented *de facto*. The shortcomings in form of partial or incorrect implementation have been detected with regard to all six directives. The relevant national case law with regard to two directives have not been identified and in general there are not many judicial decisions referring to the directives. The major difficulty to conduct case law research was access to cases as in Croatia the case law of the lower courts is in principle not publicly accessible and even the case law of the Supreme Court is accessible only to a certain extent. The recent data are showing that the number of published decisions on the internet have been continuously reduced in the last years and now represent only 40% of the Supreme Court decisions.

[15] USRH U-I-448/2009, U-I-602/2009, U-I-1710/2009, U-I-18153/2009, U-I-5813/2010, U-I-2871/2011, 19 Jul. 2012, Official Gazette 91/12.
[16] See Đurđević, Z., Odluka Ustavnog suda RH o suglasnosti Zakona o kaznenom postupku s Ustavom, 2 Hrvatski ljetopis za kazneno pravo i praksu no 2/2012, 419-434.

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

6.1 Legislation

Directive 2010/64/EU was primarily transposed into Croatian law through two amendments of the Criminal Procedure Act (further on: CPA) which were adopted in 2013.[17] The latter came into force on 15 December 2013 and therefore the provisions of the Directive were transposed with a slight delay.[18] In regard to the European arrest warrant, the Directive was transposed through the amendments of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union in 2017[19]. The Directive was also *de facto* implemented through the Judiciary Act[20] and some other legislation.

Subject matter and scope

Article 1(1) of the Directive is not explicitly transposed or indirectly implemented in the provisions of the CPA. However, since this provision regulates only the subject matter of the Directive, it is not concluded that it raises an issue of conformity of Croatian law with the provisions of the Directive. In relation to this provision the conclusion is that *there is no need to transpose this particular provision into national legislation*.

[17] Act on Amendments to the Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), Official Gazette (*Narodne novine*), no. 56/2013 and Act on Amendments to the Criminal Procedure Act, Official Gazette, no. 145/2013. Due to transposition of other directives, some provisions were changed in 2017 in the Act on Amendments to the Criminal Procedure Act, Official Gazette, no. 70/2017.

[18] Pursuant to Art. 9(1) of the Directive deadline for the transposition was 27 October 2013.

[19] *Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije*, Official Gazette no. 102/17.

[20] *Zakon o sudovima*, Official Gazette, no. 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20.

Article 1(2) of the Directive was ***explicitly transposed and fully implemented*** in the CPA. In the Croatian criminal justice system, a person against whom law enforcement authorities are undertaking actions and measures to resolve the suspicion that he/she has committed a criminal offence, enjoys all the basic rights of the defence in criminal proceedings, including the right to interpretation and translation. According to Art. 64(1)(2) CPA one of the defendant's rights in the criminal proceedings is to use his/her native language or the language spoken and understood by him/her, including the sign language of the deaf and the deaf and blind. If the defendant does not understand the Croatian language, he/she has the right to an interpreter or translator or if he/she is deaf or deaf and blind, a sign language interpreter. Regarding the interpretation, the Art. 8(3) CPA provides that if an act within the proceedings is not being taken in the language which the person speaks and understands, oral translation or sign language translation and interpretation for the deaf and the deaf and blind of what this person or another person is saying and of the documents and any other written evidentiary material being adduced shall be provided. In order to ensure this right, a suspect is informed about the charge and his/her rights very early in the proceedings, at the time of his/her first contact with the police or other law enforcement authority in the capacity of a suspect (when summoned to be interrogated by the police[21], when arrested[22], and together with some other decisions on procedurally important actions[23]). The defendant has the right to interpretation and translation until the final determination of the question whether the suspect or the accused person has committed the criminal offence. In this regard, in Art 8(5) CPA it is explicitly stated that the defendant is entitled to translation until the conclusion of the proceedings by a final judgment and in proceedings on extraordinary remedies.

Article 1(3) of the Directive was ***explicitly transposed and fully implemented*** in Croatia. It was transposed with the amendments of the Misdemeanor Act (further on: MA) which were adopted in

[21] Art. 208a(2)(2) CPA.
[22] Art. 108a(1)(4) CPA.
[23] Art. 239(2)(1-8) CPA: „The letter of rights must be delivered to the accused person with:
1) search warrant,
2) a summons for the first interrogation,
3) ruling to conduct the investigation,
4) a summons for the evidence hearing,
5) the notification referred to in Article 213, paragraph 2 of this Act,
6) the ruling on the pre-trial detention,
7) an order to conduct an identification,
8) an order for expert examination against the person of the accused. “

April 2013[24] and the Directive applies not only to the proceedings before the courts, but also to the first instance misdemeanour proceedings conducted by the administrative bodies (for instance tax authorities or customs). According to Art. 87(2) MA the right to use their own language belongs to the parties, witnesses and others that participate in the proceedings. An oral translation of what they or others present, the document and other written evidence will be provided to them if the actions are not conducted in the language of that person. Translation by interpreter will be provided in each case if the person does not understand the language of the proceedings.

Article 1(4) of the Directive ***has been de facto implemented*** into Croatian law. There are no provisions in this regard in the Criminal Procedure Act, but it is implied.

Right to interpretation

Article 2(1) of the Directive was ***explicitly transposed and fully implemented*** in Croatia. Criminal Procedure Act provides the right to interpretation in Art. 8(3) CPA, and it is listed as a right of the defendant in Article 64(1)(2) CPA. The Article 280(1) CPA stipulates that the interrogation should be conducted through an interpreter where the Act so provides. The suspect or the accused person is informed of the right to interpretation when summoned by the police as a suspect (Art. 208a(2) CPA, arrested (Art. 108a(4) CPA) and in the letter of rights (Article 239(1) CPA).

Article 2(2) of the Directive was ***explicitly transposed and fully implemented*** in the CPA. According to the Art 8(8) CPA, the defendant who does not speak and understand the language in which the proceedings are conducted or is either deaf or mute or deafblind can request the translation of the conversations and the correspondence with his defence counsel that are required for preparing the defence, filing legal relief or a legal remedy or taking other actions within the framework of the proceedings where this is necessary for the exercise of procedural defence rights. The translation is provided at the request of the defendant.

Article 2(3) of the Directive was ***explicitly transposed and fully implemented*** in Croatia since Art. 64(1)(2) CPA lists a right to use the sign language of the deaf and the deaf and blind and the right to a sign language interpreter as one of the rights of a defendant. In addition to that, Art 8(3) CPA provides that the parties to and other participants in the proceedings shall be entitled to use their native language, including the sign language of the deaf and the deaf and blind. If an act within the proceedings is not being taken in the language which the person speaks and understands, sign

[24] Act on Amendments to the Misdemeanor Act (*Zakon o izmjenama i dopunama Prekršajnog zakona*), Official Gazette, no. 39/2013.

language translation and interpretation for the deaf and the deaf and blind of what this person or another person is saying and of the documents and any other written evidentiary material being adduced shall be provided. Art. 280(2) of the CPA on the interrogation of the defendant provides for assistance for persons with hearing or speech impediments: questions to the deaf defendant shall be posed in writing, and if the defendant is mute, he/she will answer in writing. If this kind of interrogation is not possible, a person who is able to communicate with the defendant shall be called upon to act as an interpreter.

Article 2(4) of the Directive was ***explicitly transposed but partially implemented*** in the Croatian criminal justice system. There is no specific procedure or mechanism in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter. It is only partially implemented through the provisions on the obligatory questions about the ethnicity and nationality of the defendant when he/she is interrogated for the first time (Art. 272(1) CPA) and the obligation to use an interpreter in a case of doubt whether the defendant understands the official language of the court (Art. 273(6) CPA).

Article 2(5) of the Directive is ***de facto implemented*** in the CPA. Namely, Art. 8 CPA provides only for the right to challenge a decision finding that there is no need for translation or that the quality of translation is not sufficient to safeguard the fairness of the proceedings. During investigation or simplified investigation, the defendant can file a written complaint for the protection of procedural defence rights to the State Attorney against the decision that there is no need for interpretation or against the non-sufficient quality of the interpretation (Art 239(1) and (2) CPA). In addition to that, Art. 491(1) CPA provides that, unless the appeal is explicitly barred by Act, the parties and persons whose rights have been violated may file an appeal against an order of the State Attorney or the judge of investigation as well as against other orders of the court of first instance. It is also possible to challenge the decision on interpretation or its quality in the appellate procedure, where the denial of the defendant's right to use his/her language is listed as one of the substantive violations of the provisions of criminal procedure (Art. 468(1)(3) CPA).

Article 2(6) of the Directive was ***explicitly transposed and fully implemented*** in the CPA where it is expressly stated that, where this does not constitute a violation of the procedural defence rights, the translation and interpretation can also be provided via the telephone or an audio-video device.

Article 2(7) of the Directive was ***explicitly transposed and fully implemented*** into Croatian law by the amendments of the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union in 2017. Amended Art 24(1) AJCCMEU provides that upon arrest of the requested person the police must inform that person about the rights provided in accordance with the rules of

domestic criminal procedure. In addition to that, Art. 24(2) AJCCMEU provides that the state attorney before interrogation must inform the requested person about the rights provided in accordance with the rules of domestic criminal procedure, among other, the right to interpretation and translation.

Article 2(8) of the Directive was ***explicitly transposed and fully implemented.*** Quality of the interpretation is secured through providing of the translation and interpretation through an interpreter (Art. 8(11) CPA). The Art. 123 of the Judiciary Act prescribes that the interpretation and translation are done by the permanent court interpreters, and the Art. 124 sets the requirements for such interpreters. As a permanent court interpreter, a person with finished university study, which speaks the appropriate foreign language and the language in official use and has a satisfactory level of general and legal knowledge can be appointed. The conditions and procedure for the appointment of permanent court interpreters, their rights and duties, as well as the amount of remuneration and reimbursement of expenses for their work are prescribed by the Minister of Justice in a regulation (Art 124(4) of Judiciary Act). CPA in Art 280(1) prescribes the interrogation of the defendant shall be conducted through an interpreter. Additionally, according to Art. 280(2) CPA, when there is no possibility of posing questions in writing to a deaf defendant, or if he is mute and cannot answer questions in writing, interrogation shall be conducted through a person who can communicate with the defendant. If the interpreter has not previously done so, he must take an oath that he will faithfully conduct duties (Art 280(3) CPA). The provisions of CPA that apply to expert witnesses shall accordingly apply to interpreters (Art 280(4) CPA).

Right to translation of essential documents

Article 3(1) and **Article 3(2)** of the Directive were ***explicitly transposed and fully implemented*** in the CPA. According to the Art. 8(4) CPA the defendant who neither speaks nor understands the language of the proceedings or who is deaf or mute or deaf and blind shall be entitled to translation. The Art 8(5) CPA provides that the defendant who does not speak and understand the language in which the proceedings are conducted or is either deaf or mute or deafblind shall be provided with a written translation of the instruction on his rights, the decision on the deprivation of liberty, the investigation order and the order for the taking of evidentiary actions, the indictment, the private charge, the summons, the court decision following the filing of the charges until the conclusion of the proceedings by a final judgment and in proceedings on extraordinary remedies. If the said documents are not available in the language which the defendant speaks and understands, they shall be translated to the defendant orally and a written translation thereof into the language spoken and understood by the defendant shall be provided to the defendant in the shortest possible time.

Article 3(3) of the Directive was ***explicitly transposed and fully implemented*** in the CPA. According to the Art 8(6) CPA, a written translation of a piece of evidence or a part thereof, when necessary for the exercise of procedural defence right, shall be ordered by the body conducting the proceedings may of its own motion or upon a reasoned written request of the defendant.

Article 3(4) of the Directive was ***explicitly transposed and partially implemented*** in the CPA. According to the Art 8(6) CPA, an oral translation or an oral summary of a piece of evidence or a part thereof may exceptionally be provided instead of a written translation under condition that procedural defence rights are not violated thereby and that the defendant has a defence counsel. The Art 8(6) CPA mentions only "a part of evidence", so the other essential documents must therefore be translated in full. The phrase "necessary for the exercise of procedural defence rights" includes the passages "relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them." It can be concluded that the Croatian law sets the higher standards in this regard.

Article 3(5) of the Directive was ***explicitly transposed and fully implemented*** in the CPA. According to the Art. 8(6) CPA, the defendant has the right to appeal against the decision rejecting his request to translate the evidence in writing or a part of it that the defendant deems necessary for the use of procedural rights of the defence. According to the Art. 8(10) CPA, the defendant is entitled to complain to the quality of the translation to the body conducting the proceedings. If such a complaint is founded, another interpreter shall be appointed. In addition to that, Art 8(9) CPA the court decision cannot be based on evidence obtained by violation of the right to translation, and in Art. 368(1)(3) CPA it is listed as a substantive violation of the provisions of criminal procedure.

Article 3(6) of the Directive has been ***de facto transposed and fully implemented*** into Croatian law. The Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union does not explicitly provide for a written translation of a European arrest warrant if the requested person does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State. Art. 24(3) AJCCMEU provides only that the state attorney has to inform the requested person about the content and basis for issuing a European arrest warrant. However, Art 24(1) AJCCMEU provides that the police have to inform the person upon arrest about the rights provided in accordance with the rules of domestic criminal procedure. Even though EAW is not explicitly mentioned as an essential document in Art. 8(5) CPA, it is a decision on the deprivation of liberty that has to be translated.

Article 3(7) of the Directive was ***explicitly transposed and fully implemented*** into Croatian law. According to the Art. 8(5) CPA if the listed essential documents are not available in the language which the defendant speaks and understands, they must be translated to the defendant orally and a

written translation thereof into the language spoken and understood by the defendant shall be provided to the defendant in the shortest possible time. Regarding other documents, an oral translation or an oral summary of evidence may exceptionally be provided instead of a written translation on condition that procedural defence rights are not violated thereby, and that the defendant has a defence counsel.

Article 3(8) of the Directive was ***explicitly transposed and fully implemented*** in the CPA. According to the Art 8(7) CPA, the defendant who does not speak and understand the language in which the proceedings are conducted or is either deaf or mute or deafblind, may waive his right to written translation after he has been instructed of the consequences of such waiver by the body conducting the proceedings. The waiver must be made freely and unambiguously and must be signed by the defendant.

Article 3(9) of the Directive was ***explicitly transposed and fully implemented*** into Croatian law through *supra*-cited provisions of 8(11) CPA and Art. 124 of the Judiciary Act setting prerequisites for the appointment of permanent court interpreters.

Costs of interpretation and translation

Article 4 of the Directive was ***explicitly transposed and fully implemented*** in the CPA. According to the Art 145(5) CPA the costs of the interpretation and translation into languages of minorities for the benefit of the defendant are provided by the Croatian state irrespective of the outcome of the proceedings.

Quality of the interpretation and translation

Article 5(1) of the Directive was ***explicitly transposed and fully implemented*** in the CPA through already mentioned provisions of Art. 8(11), Art. 123 of the Judiciary Act, which authorizes permanent court interpreters to interpret and translate, and Art. 124 of the same Act setting prerequisites for the permanent court interpreters.

Article 5(2) of the Directive was ***de facto transposed and fully implemented*** into Croatian law. The Art 124(5) of the Judiciary Act provides that each county court must keep a list of permanent court interpreters appointed for its area, and Art 124(6) that the list of permanent court interpreters for all courts shall be published on the website of the Ministry of Justice.

Article 5(3) of the Directive has been ***de facto transposed and fully implemented*** in the Croatian law. The Art. 130(1) of the Judiciary Act provides that the judges, lay judges, court clerks and employees, permanent court interpreters, experts and appraisers shall keep for themselves everything

they have learned about the parties and their rights, obligations and legal interests in the performance of judicial duties, ie in the performance of other duties, and keep secrecy of all information that was not the subject of public discussion during the court proceedings. This obligation continues even after the termination of work in court (Art. 131(1) of the Judiciary Act).

Training

Article 6 of the Directive has ***not been implemented*** into Croatian law. The training of judges, prosecutors and judicial staff involved in criminal proceedings is organized through the Judicial Academy. In the last five years no training program on the particularities of communicating with the assistance of an interpreter was organized.

Record-keeping

Article 7 of the Directive was ***explicitly transposed and fully implemented*** in the CPA through numerous different national provisions. In accordance with Art 8(3) CPA, if a particular act within the framework of the proceedings is not conducted in the language which the person speaks and understands, oral translation of what this person or other persons are saying and of the documents and other written evidentiary materials being presented shall be provided. It shall also be noted in the protocol that the instruction and statements by participants have been given. Moreover, according to the Art. 8(7) CPA, a defendant who does not speak and understand the language in which the proceedings are conducted or is either deaf or mute or deafblind, may waive his right to written translation after he has been instructed of the consequences of such waiver by the body conducting the proceedings. The waiver must be made freely and unambiguously and must be signed by the defendant.

Also, when taking action, it is prescribed in Art. 83(1) CPA that a protocol shall contain the name of the government authority before which an action is taken, the location at which the said action is taken, the date and exact time when the action in question commences and ends, the names of the persons present, including in what capacity they are present, which applies to interpreter, and the identification marking of the criminal case in which the action is taken. The introduction of the trial protocol always states the name of the court before which the trial takes place, the date, time and place of the session, the full name of the president of the panel, members of the panel, recorder, the prosecutors present, the accused and his defence counsel, the injured person and his statutory representative or proxy, interpreter, criminal offence under consideration and whether the trial is open or closed to the public (Art. 411(1) CPA).

6.2 Case-law

6.2.1 Which defendant has the right to interpretation and translation

The fundamental question of the right to interpretation and translation is how to determine if a suspect or a defendant "does not speak or understand the language of the criminal proceedings in question" (Art. 2 of the Directive). Contrary to the requirement of Art. 2(4) of the Directive, Croatia did not put in place a procedure or mechanism to determine whether suspects speak and understand the language of criminal proceedings or need the assistance of an interpreter. In view of that, the answer to that question was left to practice. Earlier research has shown that it is enough for the suspect to state that he does not speak or understand the Croatian language and that an interpreter is provided even for citizens of neighboring countries who fully understand the Croatian language.[25] In the absence of rules, this has been assessed as good practice which reduces the possibility of a wrong decision.[26]

Maybe because of this liberal approach in providing interpreters, there is no rich case law on this issue, but the Supreme Court of the Republic of Croatia in its two decisions set some guidelines for assessing whether in a particular case the defendant has the right to interpretation and translation. In the first case, *I Kž-Us 22/17-4*[27], the Supreme Court upheld the first-instance decision that two Slovenian citizens had the right to translate important documents regardless of their residence and work in Croatia and, according to the State Attorney, their knowledge of Croatian language. The Court found that "this fact alone is not sufficient to establish that they speak or understand the Croatian language to an extent that would not be prejudicial to their rights of defence and guarantees of fairness of proceedings, as the trial court correctly finds in the impugned decision. Therefore, that fact does not preclude their right to translate documents relevant to securing their rights of defence and guaranteeing the fairness of the proceedings into a language they understand."[28] Such a decision is in line with the standards of the European Court of Human Rights that the decision as to whether a defendant speaks the language of the proceedings well enough must be based on evidence and not on assumptions.

[25] Ivičević Karas, E.; Burić, Z.; Bonačić, M., Prava obrane u različitim stadijima hrvatskog kaznenog postupka: rezultati istraživanja prakse, Hrvatski ljetopis za kaznene znanosti i praksu 2(2016), pp. 525–526, 534, 538–539.

[26] Ibid., p. 543.

[27] VSRH, I Kž-Us 22/17-4, 27 April 2017.

[28] Ibid.

In contrast, in case *III Kr 153/10-3*[29], in the judgment rejecting the request for an extraordinary review of the final judgment, the Supreme Court found that the convict did not show in any way that she did not understand the Croatian language at the hearing, nor did she ask to use any other language. She stated at the hearing that she understood the indictment, presented her defence and responded to the questions of the State Attorney and the defence counsel logically and understandably. Also, she did not bring it into question at any time during trial or on appeal. As a basis for filing a request for extraordinary review of a final judgment, the CPA explicitly prescribes the fact that the applicant, contrary to his request, was denied the right to use his language at the hearing (Art 517(1)(2) CPA). Although the applicant did not make such a request at the hearing, the Court also considered whether there were indications that the defendant did not understand the Croatian language. Based on these two decisions, it can be concluded that standards on when the defendant has the right to interpretation and translation have begun to develop in court practice, but due to the small number of decisions it still cannot be stated that they are fully established.

6.2.2 The use of *ad hoc* interpreters

In the Croatian legal system, as a rule, interpretation is performed by permanent court experts (Art. 123 of the Judiciary Act). As an exception, the CPA prescribes the possibility of using interpreters who are not appointed permanent court interpreters, in which case such an interpreter should take an oath to faithfully convey the questions addressed to the defendant and the statements he will give (Article 280 CPA). Earlier research has shown that in practice *ad hoc* interpreters are used for lesser known languages, when permanent interpreters are not available due to the use of vacations, but also in languages such as Albanian and Arabic.[30] As such interpreters do not have to meet the requirements of the Regulation on Permanent Court Interpreters[31], which are aimed at ensuring the quality of interpretation, in practice there have been questions about the admissibility of the use of *ad hoc* interpreters.

In Case *I Kž 351/16-4*[32], the Supreme Court addressed the issue of the justification for the use of an *ad hoc* interpreter for the Romanian language and found that in the present case the conditions for its determination were met "because there was a risk of delay, due to the need for urgent examination of

[29] VSRH, III Kr 49/2019-3, 29 May 2019.

[30] Ivičević Karas, Burić, Bonačić, pp. 534–535.

[31] *Pravilnik o stalnim sudskim tumačima*, Official Gazette, no. 88/2008, 119/2008, 28/2013.

[32] VSRH, I Kž 351/16-4, 6 July 2016. It was confirmed in second instance judgment VRSH, I Kž 370/2017-10, 26 November 2019 of the Supreme Court.

the mentioned foreign national witnesses who were supposed to leave the Republic of Croatia." In another case, *III Kr 49 / 2019-3*[33], the Supreme Court justified the appointment of an *ad hoc* interpreter for the Romanian language by referring to Art. 309(4) CPA, which refers to experts, and prescribes that in the case when there are permanently appointed experts for which type of expertise, other experts can be appointed only if there is a danger of delay, if permanent experts are prevented and if it is required by other circumstances. It should be noted, however, that from the point of view of the protection of procedural rights of the defence, the key question is the quality of the interpretation in a particular case, and not whether it was performed by a permanent court or *ad hoc* interpreter. Perhaps for this reason, in the first case the court pointed out that at the evidentiary hearing "there were no objections from the defence or witnesses to the translation", and in the second that the convict had no objections to the translation until a certain date and that he "provides only irrelevant details regarding the accuracy of the translation."

In the first-mentioned case *I Kž 351/16-4*, the Supreme Court also considered another important issue, which is the effect of not taking the oath of an ad hoc interpreter in accordance with Art. 280 CPA. In that part, the Court established that the stated situation was not envisaged as a reason for the impossibility of using the testimony of witnesses in Art. 300 CPA and therefore does not lead to the illegality of such evidence. Such a decision is partly contrary to the earlier decision *I Kž 419/14-6*[34] of the Supreme Court in the same case, in which that court found that the fact that no oath was taken in accordance with Art. 280(3) CPA and the fact that the first instance court did not conduct control evidence by examining the interpreter and, if necessary, the judge of investigation, on the reasons why this was not done and whether there was a need for an oath constitutes a substantive violations of the provisions of criminal procedure listed in Art. 468(3) CPA. Assuming that the defence did not dispute the quality of the interpretation, but only the fact that the ad hoc interpreter did not take the statutory oath, such omission should not lead to the invalidity of the verdict because it did not violate the right to interpretation and translation.

6.2.3 Admissibility of an appeal against a decision refusing translation

The importance of case law for the proper transposition of the directives on the rights of the defence in criminal proceedings is perhaps best demonstrated by the Supreme Court Judgment *I Kž-Us 52/15-4*[35], which addressed the question of whether a special appeal is allowed against a decision rejecting

[33] VSRH, III Kr 49/2019-3, 29 May 2019.
[34] VSRH, I Kž 419/14-6, 19 January 2016.
[35] VSRH, I Kž-Us 52/15-4, 23 April 2015.

a defendant's request for translation *K-US-50/14*[36]. In the specific case, the Zagreb County Court instructed the defendant's defence counsel that no special appeal is allowed against the decision. The rationale for the decision was that it is a decision in preparation of hearings and judgments under Art. 491(3) CPA which can only be challenged in the appeal against the verdict and therefore rejected the defendant's subsequent appeal against that decision as inadmissible. On appeal against this decision, the Supreme Court found that it was a request filed to secure the right to defence as a component of the guarantee of a fair trial, and not a decision relating to the management of the proceedings by the court. Having regard to the provision of the Directive guaranteeing the right to challenge a decision stating that it is not necessary to translate certain documents or fragments thereof, the Court found that such a decision must be subject to review and that restricting the defendant's rights of defence "cannot be justified by economic and consecutive proceeding ".

This dispute arose because the Croatian legislator initially failed to transpose the right to appeal the decision which determines that it is not necessary to translate some documents or their excerpts (Art. 3(5) Directive), and Croatia therefore found itself in the company of six EU Member States which provided that such a decision could be challenged only in an appeal against the judgment.[37] The legislator eliminated the stated shortcoming in 2017 by amending Art. 8(6) CPA and introducing an appeal against the decision rejecting the defendant's request.

6.2.4 The right to interpretation and translation in cases conducted in absentia

In the already mentioned case, *I Kž-Us 52/15-4*, the Supreme Court also ruled on another important issue, the question of whether there is the right of the defendant to the interpretation and translation when tried *in absentia*. In Zagreb County Court Decision *K-US-50/14*, the defence counsel of the defendant tried *in absentia* was denied the request to translate the documentation on which the indictment was based as premature, i.e. unfounded. The County Court stated in the explanation that the defendant is not available to the judicial authorities of the Republic of Croatia and that he does not participate in the proceedings "as a defendant in a way that actively and directly participates in the conduct of evidence and presentation of evidence". Therefore, the Court established that Art. 8 CPA as well as Art. 3 of the Directive on the right to interpretation and translation cannot be applied to the defendant.

[36] County Court in Zagreb, K-US-50/14, 24 November 2014.
[37] European Union Agency for Fundamental Rights (FRA), *Rights of suspected and accused persons across the EU: translation, interpretation and information*, Luxembourg, 2016, p. 57.

On appeal, the Supreme Court revoked the challenged decision because "neither the provision of Art. 8. CPA/08 nor the provisions of Directive 2010/64/EU do exclude the right of the defendant to translate evidence presented in criminal proceedings, even in a situation where that defendant is being tried *in absentia*." Such an issue of restrictions of the right to interpretation and translation as a form of procedural sanction for a defendant who avoids trial and to reduce the costs and expedite proceedings may also occur in other states that allow the possibility of trial *in absentia*. Art. 1(2) of the Directive does not specify the exceptions from the rule that the right applies from the moment when the competent authority of a Member State notifies or otherwise informs a person that they are suspected or accused of having committed a criminal offense, and the Supreme Court correctly concluded that there is no possibility of introducing restrictions on this right in trials *in absentia*.

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

7.1 Legislation

Directive 2012/13/EU was transposed into Croatian law primarily through the amendments of the Criminal Procedure Act (further on: CPA) which were adopted in December 2013.[38] These amendments came into force on 15 December 2013, which means that the provisions of the Directive were transposed in time.[39]

Article 1 of the Directive **is not explicitly transposed or indirectly implemented** in the provisions of the CPA. However, since this provision regulates only the subject matter of the Directive, it is not concluded that this raises an issue of conformity of Croatian law with the provisions of the Directive.

Article 2(1) of the Directive is ***fully implemented*** in the CPA. In the Croatian criminal justice system, a person against whom law enforcement authorities are undertaking actions and measures in order to resolve the suspicion that he/she has committed a criminal offence, enjoys all the basic rights of the

[38] Act on Amendments to the Criminal Procedure Act (Zakon o izmjenama i dopunama Zakona o kaznenom postupku), Official Gazette (Narodne novine), No. 145/2013.

[39] Pursuant to Art. 11(1) of the Directive Member States were obliged to bring into force the laws, regulations
and administrative provisions necessary to comply with the Directive by 2 June 2014.

defense in criminal proceedings, including the right to be informed about the charge and his/her rights. Therefore, a suspect is informed about the charge and his/her rights very early in the proceedings, at the time of his/her first contact with the police or other law enforcement authority in the capacity of a suspect (when summoned to be interrogated by the police,[40] when arrested,[41] and together with some other decisions on procedurally important actions[42]). A suspect or an accused person enjoys all his/her basic rights of the defense, including the right to be informed about the charge and his/her rights until the conclusion of the proceedings (final determination of the question whether the suspect or the accused person has committed the criminal offence).

Article 2(2) of the Directive is ***fully implemented*** in Croatia. It was transposed with the amendments of the Misdemeanor Act (further on: MA) which were adopted in April 2013.[43] With these amendments, a new provision was inserted in the MA, Art. 109a.[44] In misdemeanor proceedings in Croatia, there is a possibility for police and other law enforcement authorities to sanction a person. However, in all those cases, a decision issued by a police officer or an officer of other law enforcement

[40] Art. 208a(2) CPA:
„The summons to a suspect must specify what the suspect is suspected of and the instruction regarding his/her right: ...“
[41] Art. 108(1) CPA:
„Upon arrest, the arrested person must be immediately provided with a written instruction on the rights referred to in Article 108a (1) of this Act.“
[42] Art. 239(2) CPA:
„The letter of rights must be delivered to the the accused person with:
1) search warrant,
2) a summons for the first interrogation,
3) ruling to conduct the investigation,
4) a summons for the evidence hearing,
5) the notification referred to in Article 213, paragraph 2 of this Act,
6) the ruling on the pre-trial detention,
7) an order to conduct an identification,
8) an order for expert examination against the person of the accused. “
[43] Act on Amendmants to the Misdemeanor Act (Zakon o izmjenama i dopunama Prekršajnog zakona), Official Gazette (Narodne novine), No. 39/2013.
[44] Art. 109a(1) MA:
„Prior to filing an indictment with the competent court or other body of proceedings against the perpetrator of the offense (…) the authorized prosecutor (…) is obliged to determine the exact address (…) of the perpetrator and provide him/her with written notice in a language he/she understands …“

authorities can be appealed before a court. Rights guaranteed by the Directive apply only in the proceedings before the court. For all those questions which are not explicitly regulated in the MA, provisions of the CPA apply.

Article 3(1) of the Directive is ***fully implemented*** in the CPA, in Arts. 108(1), 208a(2), and 239(2). All these provisions have been cited before. These provisions ensure that the suspect who is summoned for interrogation by the police, the arrested person, and the accused person who is participating in procedurally important actions are promptly informed about their procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively.

With regard to the **right of access to a lawyer**, it has been concluded that this guarantee is ***fully implemented*** in the CPA.

With regard to **any entitlement to free legal advice and the conditions for obtaining such advice**, it has been concluded that this guarantee is ***fully implemented in relation to the accused***, but only ***partially implemented in relation to the suspect and the arrested person***. In relation to the suspect, the letter of rights to the suspect who is summoned to be interrogated by the police only instructs the suspect about the right to a defense counsel, but does not contain information on the right to free legal assistance. However, there is a duty for police officers who are interrogating the suspect to inform him/her about this right before the interrogation begins. In relation to the arrested person, the letter of rights to the arrested person does not contain information on the right to free legal assistance, but only refers to the right of the arrested person to appoint a lawyer from the list of lawyers on duty.

With regard to the **right to be informed of the accusation**, it has been concluded that this guarantee is ***fully implemented*** in the CPA.

With regard to the **right to interpretation and translation**, it has been concluded that this guarantee is ***fully implemented*** in the CPA.

With regard to the **right to remain silent**, it has been concluded that this guarantee is ***fully implemented*** in the CPA.

Article 3(2) of the Directive has been only ***partially implemented*** in the CPA. In Croatian law, the suspect and the accused are informed about the charge and their rights via letter of rights. Only exceptionally, there is a possibility for the information to be given orally (at the time of the arrest). There is an obligation, but it is not a general one, not only to inform the suspect and the accused about the charge and their rights, but also to make sure that they have understood their rights. The CPA determines the content of the letter of rights only in general terms and does not contain an obligation

for the letter of rights to be written in simple and accessible language. There is no general obligation to take into account specific needs of vulnerable suspects and vulnerable accused persons when informing them about their rights.

Article 4(1) of the Directive has been ***fully implemented*** in the CPA. With regard to the arrested person, there is an obligation to deliver a letter of rights to the arrested person immediately at the time of the arrest. However, if this is not possible, information is given orally, and the letter of rights shall be delivered afterwards, when the arrested person is brought to the police station. The CPA does not explicitly foresee the obligation for the police to give the arrested person an opportunity to read the letter of rights, however, this obligation can be inferred from the provision which provides that the arrested person shall be asked whether he/she understood the letter of rights. If he/she did not understand the letter of rights, he/shall be instructed about his/her rights by the police in a manner which is understandable to him/her. The arrested person has the right to keep the letter of rights during the time of deprivation of liberty. A person in pre-trial detention is handed a written letter of rights. Croatian law does not regulate the obligation of the authorities to give the person in pre-trial detention an opportunity to read the letter of rights and to keep it in their possession throughout the time that they are deprived of liberty. There is a third category of persons deprived of liberty - persons in custody. An arrested person may be kept in custody up to 48 hours from the moment of the arrest. The public prosecutor decides on custody. All the rights of the arrested persons also apply to persons kept in custody.

Article 4(2) of the Directive has been ***fully implemented*** in the CPA. All the guarantees contained in this provision (right of access to the materials of the case, right to have consular authorities and one person informed, right of access to urgent medical assistance, and the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority) have been fully implemented in the provisions of the CPA.

Article 4(3) of the Directive has ***not been implemented*** into Croatian law, either officially or indirectly. There is no information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release in the letter of rights to the arrested person or the person in pre-trial detention.

Article 4(4) of the Directive has ***not been implemented*** into Croatian law, either officially or indirectly. The CPA determines the content of the letter of rights only in general terms and there is a widespread opinion that the language used in the letter of rights is not simple and accessible enough.

Article 4(5) of the Directive has been ***fully implemented*** in the CPA. The suspect and the accused person who do not speak or understand Croatian language have the right to receive a written Letter of rights in a language which they speak or understand. If a letter of right is not available in that language, it shall be translated to him/her orally. In the latter case, a written Letter of rights in a language which he/she speaks and understands shall be delivered to the suspect and the accused as soon as possible.

Article 5(1) of the Directive has been ***fully implemented*** in the provisions of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (further on: AJCCMEU). AJCCMEU has been amended in 2013 in order to transpose this provision of the Directive.[45] In accordance with Article 5(1) of the Directive national law provides that the arrested person in the European Arrest Warrant proceedings shall be informed about his/her rights in writing.

Article 5(2) of the Directive has ***not been implemented*** into Croatian law, either officially or indirectly. AJCCMEU does not explicitly determine the content of the letter of rights. With regard to its content, the Act refers to the CPA. As already mentioned with regard to the content of the letter of rights to the arrested person in the CPA, there is a widespread opinion that the language used in the letter of rights is not simple and accessible enough.

Article 6(1) of the Directive has been ***fully implemented*** in the CPA. Croatian law provides that the suspect and the accused person are provided with information about the criminal offence they are suspected or accused of having committed. The suspect is informed about this in the summons for his/her interrogation by the police. The accused is informed about this in the letter of rights to the accused person, which is delivered to him/her together with decisions on some procedurally important actions. Croatian law fulfills the requirements of the Directive in securing that the suspect and the accused person are given this information promptly. Information given must include the factual description of the offence, as well as its (preliminary) legal classification. Having that in mind, it may be concluded that information is given in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defense.

[45] Act on Amendments to the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (Zakon o izmjenama i dopunama Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije), Official Gazette (Narodne novine), No. 81/2013.

Article 6(2) of the Directive has been ***fully implemented*** in the CPA. The arrested person is informed in the letter of rights on the reasons for the arrest and on the grounds for suspicion that he/she has committed a criminal offence.

Article 6(3) of the Directive has been ***fully implemented*** in the CPA. Croatian law ensures that, at latest in the indictment (in which the merits of the accusation are submitted to the court), detailed information is provided on the accusation, including the nature and legal classification of the offence, as well as the nature of the participation of the accused person.

Article 6(4) of the Directive has ***not been implemented*** into Croatian law. Croatian law does not contain a provision which would explicitly or indirectly transpose the obligation to inform promptly the suspect or the accused person of any changes in the information given in accordance with Article 6 of the Directive, where this is necessary to safeguard the fairness of the proceedings.

Article 7(1) of the Directive has been ***partially implemented*** in the CPA. A provision of the CPA, which enables the person in pre-trial detention to have access to all the materials which are necessary to effectively challenge the lawfulness of the detention, does not apply to arrested persons or the person in custody.

Article 7(2) of the Directive has been ***fully implemented*** in the CPA. Both, the suspect/accused person and the defense counsel, have the right to access all the materials contained in the case file, and not only the material evidence in the possession of the competent authorities. Full access to the case file for the suspect/accused and his/her defense counsel safeguard the fairness of the proceedings and enable them to prepare the defense.

Article 7(3) of the Directive has been ***fully implemented*** in the CPA. Croatian law enables early access to all the materials of the case, much before the submission of the merits of the accusation to the judgment of a court. Once the accused and his/her defense attorney gain access to the case file, they have the right to inspect the case file at any time, without limitations.

Article 7(4) of the Directive has been ***partially implemented*** in the CPA. Croatian law goes beyond what the Directive allows. It enables the public prosecutor and the court to deny the defendant not only the rights of access to certain materials, but to the case file in its entirety.

Article 7(5) of the Directive has been ***de facto implemented*** into Croatian law. Although there is no explicit provision which would guarantee that the access to the case file is provided free of charge, in practice it is always provided free of charge.

Article 8(1) of the Directive has been ***fully implemented*** in the CPA. Croatian law enables that the provision of information to the suspects and the accused persons is noted using the recording procedure specified in national law.

Article 8(2) of the Directive has been ***fully implemented*** in the CPA. If the suspect or the accused person is not properly informed in accordance with the provisions of the Directive, the statement that the suspect has given to the police and all the evidence obtained as a result of that statement may not be used as evidence before the court.

Article 9 of the Directive has ***not been*** either explicitly or de facto ***implemented*** into Croatian law.

7.2 Case-law

There has not been much case-law in Croatia in which the courts interpreted national provisions transposing the provisions of the Directive 2012/13/EU. Among the jurisprudence of the Supreme Court of the Republic of Croatia, which is available online, only three decisions have been identified that dealt with issues in relation to the application of the provisions of the Directive in Croatia. These decisions dealt with three separate issues: the moment at which a person acquires the status of the suspect (and needs to be informed about his/her rights and the charge), right to information in the context of transition from misdemeanor to criminal zone of responsibility, and the application of the rights guaranteed by the Directive 2012/13/EU (and Directive 2013/48/EU) in the international legal assistance proceedings (transfer of prisoners).

In the ruling *I Kž 161/2019-4*, the Supreme Court of the Republic of Croatia decided when a person acquired the status of a suspect in criminal proceedings, and thus the right to be informed of what he is charged with and his rights (including the right to access a defense counsel). The defense claimed that the person acquired the status of a suspect already after the police legitimized him, having information that he possessed a certain amount of drugs in the bushes near the beach. The Supreme Court did not accept the position of the defense and agreed with the position of the first instance court according to which the person acquired the status of a suspect only after, following identification, the person handed over a PVC bag containing brown lumpy- powdery substance characteristic of the drug heroin. According to the Supreme Court, it was only at that time that the grounds for suspicion that the person had committed a criminal offense emerged, so the police acted correctly when they informed the suspect of the accusation against him and his rights only at that time. Since the police acted in accordance with the law, there was no reason to exclude the drugs temporarily seized from the suspect from the case file as illegal evidence. This position of the Supreme Court has been

criticized in the literature and counter-arguments have been offered pursuant to which a person acquired the status of the suspect already at the moment when he/she gave a self-incriminating statement.[46]

In the ruling *I Kž 506/2018-4*, which dealt with the right to information in the context of transition from misdemeanor to criminal zone of responsibility, the Supreme Court concluded that the decisive moment for assessing this situation was the moment at which the appellant was informed of what he was charged with. At that moment, he was charged with a misdemeanor. As soon as he moved from the misdemeanor to the criminal zone of responsibility, he was informed that he was charged with a criminal offense. The appellant has been duly informed of what he is charged with, and therefore there is no reason to consider the evidence obtained by the search to be illegally obtained evidence. This position of the Supreme Court was welcomed in the literature.[47]

In the judgment *I Kž 598/2018-7*, the Supreme Court excluded the application of the Directive 2012/13/EU and the Directive 2013/48/EU in the procedure for the transfer of convicted persons which was undertaken pursuant the provisions of the Council of Europe Convention on the Transfer of Sentenced Persons and the (Croatian) Act on International Legal Assistance in Criminal Matters. The Supreme Court cited the provisions of Arts. 2 of both Directives, which limit their scope of application to criminal proceedings and to the execution of a European arrest warrant. The court was right because all proceedings for international legal assistance, including extradition proceedings, are not criminal proceedings within the meaning of the jurisprudence of the European Court of Human Rights. Therefore, not all the rights of defence guaranteed to suspects and defendants in criminal proceedings are applied in these proceedings. This applies to both the right of access to a lawyer and the right to information. The directives harmonizing the rights of the defence explicitly extend their scope to surrender proceedings under a European arrest warrant, but this does not change the conclusion that this is not a criminal case either. There would be an obligation for the Croatian authorities to guarantee these rights to the convict in the procedure of taking over the execution of a foreign court judgment if the provisions of the directives explicitly extended them to that procedure, but they do not do so.[48]

[46] Ivičević Karas/Burić/Bonačić, *Neka pitanja usklađenosti hrvatskog kaznenog procesnog prava s direktivama o pravima obrane - analiza sudske prakse*, Hrvatski ljetopis za kaznene znanosti i praksu, 2(2020), pp. 546-548.
[47] *Ibid*., pp. 558-559.
[48] *Ibid.*, p. 560.

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

8.1 Legislation

As concerns **Article 1** of the Directive, the **specific transposition was not required**. This Directive was transposed into Croatian law with the Act on Amendments of the Criminal Procedure Act of 2017,[49] as well as with two legislative amendments of the Act on Judicial Cooperation with the Member States of the European Union (AJCCMEU) – the one of 2017,[50] and the other of 2019.[51] Provisions of this Directive were not transposed in time, since, pursuant to Art. 15(1) of the Directive, Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 27 November 2017. The transposition process took longer than initially envisaged, as two parliamentary elections were held after the summer 2015, when the first draft legislative amendment was prepared, making it practically impossible to conduct and conclude the entire legislative process before July 2017.

Article 2(1) of the Directive containing a substantive definition of the suspect was **explicitly transposed and fully implemented** into Croatian CPA. Article 202(2)(1) defines a suspect as "the person with respect to whom there exist grounds for suspicion that he/she committed a criminal offence and against whom the police or the state attorney is taking acts for the purpose of clarifying that suspicion". The substantive definition of the suspect determines the moment from which defence rights guaranteed by this Directive apply, and that is from the moment in which the "grounds for suspicion" against a concrete person start to exist and police or the state attorney take action to clarify that suspicion. The transposition of this provision moved the limits of the defence rights to the earliest stages of the proceedings, i.e. to the stage of police inquiries during which the police could

[49] Act on Amendments to the Criminal Procedure Act (Zakon o izmjenama i dopunama Zakona o kaznenom postupku), Official Gazette (Narodne novine), No. 70/2017.

[50] Act on Amendments to the Act on Judicial Cooperation with the Member States of the European Union (Zakon o izmjenama i dopunama Zakona o pravosudnoj suradnji s državama članicama Europske unije), Official Gazette (Narodne novine), No. 102/2017.

[51] Act on Amendments to the Act on Judicial Cooperation with the Member States of the European Union (Zakon o izmjenama i dopunama Zakona o pravosudnoj suradnji s državama članicama Europske unije), Official Gazette (Narodne novine), No. 70/2019.

traditionally conduct informative conversations with suspects, without prior instruction on rights and without the presence of defence counsel.[52] In addition, Article 65(1) CPA proclaims that the "defendant may be represented by a defence counsel before the commencement of and during the entire course of criminal proceedings and proceedings regarding extraordinary legal remedies", while "if not otherwise prescribed by this Act, the provisions on the defendant shall also apply to the suspect" (Article 202(3) CPA), which actually guarantees the general right of the suspect (before the commencement of criminal proceedings) and of the defendant (during the entire criminal proceedings) to the defence counsel.

Article 2(2) of the Directive was **explicitly transposed and fully implemented** in Article 24(1) AJCCMEU, stating that "immediately upon the arrest of a person requested for the purpose of executing a European arrest warrant, the police will inform that person in writing of the rights of the arrested person, which rights s/he exercises in accordance with the provisions of domestic criminal procedural law".

Article 2(3) of the Directive was **explicitly transposed and fully implemented**. Provision of Article 208 paragraph 5 CPA regulates a situation where a person, informally questioned by the police in a capacity of a "citizen" or presumptive witness, becomes a suspect as defined in Article 202(2)(1) CPA during the questioning. That person may no longer be questioned informally, i.e., without being warned of his/her rights, including the right to a defence counsel. If the police fails to comply with this provision, the statement given by the suspect, as well as all the evidence obtained as a result of that statement, cannot be used as evidence and must be excluded from the case file (Article 208.a (8) CPA).

Article 2(4) of the Directive **has not been officially transposed** into Misdemeanors Act. Although the Misdemeanor Act stipulates that, where that law does not contain the relevant provisions on particular issues of procedure, the provisions of the CPA will apply (Article 82(3))[53], it is difficult to assess whether this actually ensures the transposition of the provisions of the Directive. The answer could be given by researching the practice of misdemeanor courts.

[52] Ivičević Karas, Pomicanje granica prava na branitelja pod utjecajem europskog kaznenog prava, Hrvatski ljetopis za kazneno pravo i praksu, 2(2015), pp. 364-366, 381.

[53] Misdemeanor Act (Prekršajni zakon), Official Gazette (Narodne novine), No. 107/07, 39/13, 157/13, 110/15, 70/17, 118/18.

Article 3(1) of the Directive was **de facto fully implemented** in several legislative provisions (for example in Article 5, Article 8(8), Article 64(1) 3-6 CPA). Even before the Directive, the defendant had the right to consult the defence counsel before the first questioning. After the transposition of the Directive, the right is guaranteed to the suspect as well, i.e. in the earliest phases of proceedings. In addition, the CPA guarantees confidentiality of communication. Numerous provisions regulating the right to defence counsel serve to make that right practical and efficient.

Article 3(2) of the Directive 2013/48/EU was **indirectly fully implemented**. There is no explicit legislative provision guaranteeing access to a lawyer without undue delay. However, it is explicitly prescribed that a defendant may have a defence counsel before commencement and during the entire criminal proceedings (Article 65(1) CPA) and s/he must be warned of that right in the letter of rights which the suspect/defendant receives at certain points of proceedings according to Article 239 CPA, or at the moment of arrest (Article 108 CPA).

Article 3(2)a of the Directive was **explicitly and fully implemented** in Article 273(2,3,5) and 208.a CPA. Even before the transposition of the Directive, the defendant had the right to be informed of his/her right to retain defence counsel and to have defence counsel present at his/her questioning (Article 65(2) CPA and 273 CPA). Since the transposition of the Directive, the right to defence counsel is granted to suspects as well (Article 208.a CPA).

Article 3(2)b of the Directive was **explicitly transposed and fully implemented** in several legal provisions. Article 67(2) stipulates that "defence counsel shall be authorised to be present at evidence collecting acts of recognition, confrontation and event reconstruction when the defendant takes part in those acts" and the defendant must be informed of that right (Article 278(2), 301(6), 305(6) CPA).

Article 3(2)c of the Directive was **explicitly transposed and fully implemented**. Article 65(2) CPA stipulates that the defendant shall be instructed on his/her right to retain defence counsel "immediately upon his/her arrest or the performance of another act provided for" by the CPA. Yet, even though the CPA does provide a right to defence counsel to arrestee, and regulates it in detail in Article 108(7) CPA, the problem is that the possibility to communicate with the defence counsel prior to interrogation is limited to up to 30 minutes, even in the most complex cases. This may constitute an unjustified restriction of the right to access to a lawyer.

Article 3(2)d of the Directive was **de facto fully implemented** into national legislation. The CPA explicitly prescribes that the defendant and the defence counsel must be informed in due time of the

hearing in which the court decides on ordering, prolonging and vacating investigative imprisonment (Article 129(2) CPA). The summons for trial "must be served on the accused so that there is sufficient time between the service of the summons and the day of the hearing to prepare the defence, and at least eight days" (Article 383(3) CPA). As concerns other hearings before the court, there is no such explicit requirement of "due time".

Article 3(3)a of the Directive was **de facto transposed and fully implemented**. The Croatian CPA does not explicitly proclaim the right of the suspect and defendant to meet in private with defence counsel. However, it may be understood that this right is de facto guaranteed through the right to communicate with defence counsel in complete confidence, which should then imply privacy of the meeting. The defendant has the right to communicate with defence counsel freely and without hindrance (Article 64(1)5 CPA), while the right to unrestricted, undisturbed and confidential conversation with a defence counsel is guaranteed to the arrestee, the person in custody and the prisoner, ie a defendant in investigative imprisonment (Articles 108/7), 114, 139(5) CPA). Even precautionary measures “may not restrain the right of a defendant to unimpeded communication with his defence counsel” (Article 98(4) CPA).

Article 3(3)b of the Directive was **explicitly transposed and fully implemented**. The Croatian CPA guarantees the right of the suspect and defendant to have a defence counsel present and participate effectively in the questioning. Article 276(4) CPA stipulates: “When the defendant is finished giving his/her statement, s/he shall be asked questions where necessary in order to present a piece of evidence, fill in any gaps or eliminate any contradictions or ambiguities in his/her statement. During that part of the questioning, the defendant may not consult with his/her defence counsel on how to respond to a particular question asked. Defence counsel may, however, suggest to the defendant to not reply to a particular question asked. After the body conducting the questioning finished asking questions, questions may also be asked by defence counsel”. This provisions applies to questioning of the suspect as well (Article 208.a(7) CPA). The fact that such participation has taken place must always be entered into protocol and recorded, since any interrogation of the suspect and the defendant must be audio-video recorded.

Article 3(3)c(i), (ii) and (iii) of the Directive was **explicitly transposed and fully implemented**. According to Article 67(2) CPA, “defence counsel shall be authorised to be present at evidence collecting acts of recognition, confrontation and event reconstruction when the defendant takes part in those acts” and the suspect and defendant must be informed of this right.

Article 3(4) of the Directive was **explicitly transposed and fully implemented**. Any arestee, suspect or defendant, who has not retained defence counsel or defence counsel is unable to come to the interrogation or to the search of a home, shall be given the possibility to choose and retain defence counsel from the list of lawyers on call. The list of lawyers on call for the area of a particular county is compiled by the Croatian Bar Association, and submitted to the state attorney and the competent police administrations.

The provision **Article 3(5)** of the Directive so far **has not been implemented**. The Croatian CPA does not provide the possibility to postpone the right to access to a lawyer due to geographical remoteness of the arrestee, or of any suspect or defendant.

Article 3(6)(a) and (b) of the Directive were **de facto transposed and fully implemented**. According to the Article 108.b(1) CPA "where there is an urgent need to avoid the serious and grave consequences for the life, liberty or physical integrity of a person or the risk of concealment or destruction of evidence, the state attorney may order the police to delay informing", of the arrest, the defence counsel and a member of the arrestee's family, or other person chosen by the arrestee. Consequently, the access to a lawyer is also (indirectly) delayed.

Article 4 of the Directive was **explicitly transposed and fully implemented**. As it was explained regarding the Article 3(3)a of the Directive, the confidentiality of communication is guaranteed to suspects and defendants, including in cases of deprivation of liberty (see *supra*). It is not specified that this principle of confidentiality applies to particular types of communication, but this can be inferred from the legislative wording.

Article 5(1) of the Directive was **explicitly transposed and only partially implemented**. Article 108(5)2) CPA prescribes the obligation of the police to inform immediately of the arrest the defence counsel (chosen by the arrestee or appointed by the duty), a member of the arrestee's family or another person designated by the arrestee, as well as the competent consulate or embassy. Yet, this obligation concerns only the arrestee, and not a person placed into custody or pre-trial detention. Therefore, this provision of the Directive is only partially implemented.

Article 5(2) of the Directive was **explicitly transposed and only partially implemented**. Article 1085(5)5) prescribes that the police shall immediately inform of the arrest the parent or the guardian if the arrestee is a child, but does not provide exceptions, in terms that a parent, or holder of parental responsibility of the child, would not be informed of the arrest if it would be contrary to the best

interests of the child, in which case another appropriate adult should be informed. Article 202(37) defines a child as a person under the age of eighteen years.

Article 5(3)a of the Directive was **explicitly transposed and fully implemented,** while **Article 5(3) b was explicitly transposed and only partially implemented**. Where there is "an urgent need to avoid the serious and grave consequences for the life, freedom or physical integrity of a person or the risk of concealment or destruction of evidence", the state attorney may order the police to delay informing (of the arrest) the defence counsel and a member of the arrestee's family, or other person chosen by the arrestee (Article 108.b CPA). The provision of the Directive is only partially implemented since the CPA does not require that the criminal proceedings could be "substantially" jeopardized in order to allow the delay of informing.

Article 5(4) of the Directive **was not implemented** into national law. According to Article 108.b CPA, the state attorney may order the police to delay informing (of the arrest) the defence counsel and a member of the arrestee's family, or other person chosen by the arrestee, but not a parent or a legal guardian of the child arrestee. They must always and immediately be informed of the arrest. In addition, according to Juvenile Courts Act (Article 63(1))[54], the custody officer must inform the competent social welfare center of the arrest of the child-suspect.

Article 6(1) of the Directive was **explicitly transposed and partially implemented**. Although the CPA provides the right of the arrestee and the prisoner in the pre-trial detention, to communicate with a relative, or another person of his/her choice, the same right is not guaranteed to a detainee held in police detention unit according to Article 112(1) CPA (the arrestee may be detained between the arrest and ordering the pre-trial detention). The detainee has the right to communicate only with his defence counsel freely and without impediment and supervision (Article 114 CPA).

Article 6(2) of the Directive was **explicitly transposed and fully implemented**. According to Article 108(8) CPA, "the arrestee may, at least while the arrest is in progress, communicate with at least one third party of his/her own choice. That right may be restricted only where necessary in order to protect the interests of the proceeding or other important interests". Although the right to receive visits by relatives is guaranteed, visits may be prohibited if they may be prejudicial to the conduct of the proceedings, without any guarantee of proportionality prescribed by the law. However, detainees

[54] Juvenile Courts Act (Zakon o sudovima za mladež), Official Gazette (Narodne novine), No. 84/11, 143/12, 148/13, 56/15, 126/19.

may have telephone conversations with a particular person at least once a day, under prison house rules and under supervision of the prison administration (Article 139(4) CPA).

Article 7(1) of the Directive was **explicitly transposed and partially implemented**. Suspects or accused persons who are non-nationals and who are deprived of liberty do have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. Yet, the CPA does not explicitly proclaim the right of suspects or accused persons, who have two or more nationalities, to choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate. In addition, a detainee (prisoner) does not have the right to receive visits from the consular representative, but it is on the judge of investigation (or the president of the panel during the trial) to approve such a visit (Article 139(2) CPA).

Article 7(2) of the Directive was **explicitly transposed and fully implemented**. Article 116 CPA prescribes that "consular and diplomatic representatives may visit their nationals who have been arrested or are held in custody, converse with them and assist them in choosing defence counsel". The same is prescribed with regard to defendants in investigative imprisonment, i.e. pre-trial detainees (Article 142 CPA).

Article 8(1)a, b and c of the Directive were **explicitly transposed and fully implemented**. The temporary derogation regulated in Article 108.b(1) CPA actually provides a delay in informing of the arrest the defence counsel, as well as a delay in informing a family member or another person chosen by the arrestee, if "there is an urgent need to avoid the serious and grave consequences for the life, freedom or physical integrity of a person or the risk of concealment or destruction of evidence". It does not provide a derogation of the right to a defence counsel, although the result is the same - the access of the arrestee to a lawyer may be postponed for up to 12 hours, under conditions prescribed by law. The temporary derogation regulated in Article 108.b CPA is allowed only if there is "an urgent need", according to the principle of proportionality. The temporary derogation from Article 108.b(1) CPA may last only as long as the grounds therefore exist, but no longer than 12 hours from the moment of the arrest. The possibility to delay informing the defence counsel of the arrest does not depend on the type or seriousness of the offence, but on the nature and seriousness of consequences for the life, freedom or physical integrity of a person, or on the urgent need to avoid the risk of concealment or destruction of evidence. Although it is not quite clear from the legislative text, it should be interpreted that there must be a serious and severe risk of concealment or destruction of evidence. **Article 8(1)d** of the Directive was **de facto implemented**. There is no explicit provision

that the delay in informing the defence counsel of the arrest must not prejudice the overall fairness of the proceedings. Yet, there are general provisions regulating different elements of the fair trial, and grave violation of the right to a fair trial, guaranteed by the Constitution and the ECHR, constitutes a substantive violation of criminal procedure which is a ground to appeal (Article 468(2) CPA). In addition, since Article 108.b(3) stipulates that "during the delay the arrestee may be questioned only in respect of the circumstances which brought about the notification delay", the result of the interrogation of the arrestee could not be used as evidence in criminal proceedings, or it would have to be excluded as unlawful evidence (Article 468(2) CPA).

Article 8(2) of the Directive was **de facto and partially implemented**. The temporary derogation under Article 3(6) of the Directive is implemented in a way that the state attorney may decide to delay notification of the defence counsel on arrest. The state attorney must write a written warrant, specifying the ground for the notification delay in the concrete case, and it will be attached to the report on the arrest and bringing (Article 108.b(2) CPA). Yet, the notification delay may not be challenged before the court and therefore this provision of the Directive is only partially implemented.

Article 8(3) of the Directive was **de facto and partially implemented**. The state attorney decides on the notification delay. The state attorney must write a written warrant, specifying the ground for the notification delay in the concrete case, and it will be attached to the report on the arrest and bringing (Article 108.b(2) CPA). However, the lawfulness of the notification delay may not be challenged before the court. Therefore, this provision of the Directive is only partially implemented.

Article 9(1)a of the Directive was **explicitly transposed and fully implemented**. An arrestee, a suspect and a defendant must be instructed on his/her right to retain defence counsel and to have defence counsel present at his/her questioning. If the arrestee, or a suspect, or a defendant states that s/he does not want defence counsel, the criminal proceeding body shall acquaint him/her in a simple and understandable manner with the meaning of the right to defence counsel and the consequences of waiving that right. If thereafter the arrestee/suspect/defendant still does not want to retain defence counsel, the act may be proceeded with, unless the presence of defence counsel is mandatory according to the law (Article 65(2), 108(7), 208.a(4), 273(2) CPA).

Article 9(1)b of the Directive was **explicitly and fully implemented**. The CPA does not prescribe explicitly that the waiver of the right to a defence counsel must be given voluntarily. Yet, it is implicitly prescribed in provisions of Article 65(2) CPA, which stipulate that the defendant must first be informed in a straightforward and understandable manner with the meaning of the right to

defence counsel and the consequences of waiving that right, and that only if afterwards the defendant still does not want to retain defence counsel, the act may be proceeded with (unless the defendant is required by law to have defence counsel). Therefore, the main prerequisite for continuing with the action is that the defendant still does not want to retain defence counsel, so obviously the waiver must be voluntary.

Article 9(2) of the Directive was **explicitly transposed and fully implemented**. The audio video recording of the questioning of the suspect (Article 208.a(6) CPA) and of the defendant (Article 273(2) CPA) will include the information on the rights, and on possible consequences of a waiver of the right to defence counsel, as well as the waiver. The warning and the statement of the defendant or the suspect, on use of right to retain a defence counsel, must be recorded and also "entered into the protocol" (Article 275(3) CPA).

Article 9(3) of the Directive was **explicitly transposed but only partially implemented**. Article 274 CPA enables the suspect and defendant to revoke a waiver of the right to defence counsel subsequently during later interrogation. However, they are not informed of such possibility. The suspect or defendant may revoke the waiver during the entire proceedings, but it is not explicitly prescribed.

Article 10(1) of the Directive was **explicitly transposed and fully implemented**. Article 24(1) and (2) of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (AJCCMEU)[55] guarantee to requested person the right of access to a lawyer in the Republic of Croatia as an executing Member State. Requested person is guaranteed all the rights that the arrested person has according to the CPA.

Article 10(2)(a) of the Directive was **explicitly transposed and fully implemented**. Article 24(2) AJCCMEU prescribes: "Upon arrest, the police shall instruct the requested person that he or she is entitled to a defence attorney in the Republic of Croatia even when the defence is not mandatory, with the warning that the decision on the costs of such a defence attorney will depend on the person's financial position which will be established later. If a European arrest warrant has been issued for the purpose of criminal prosecution, the police will inform the requested person upon arrest

[55] Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije), Official Gazette (Narodne novine), No. 91/10, 81/13, 124/13, 26/15, 102/17, 68/18, 70/19, 141/20.

that he or she is entitled to request a lawyer in the issuing State. The police shall inform without delay the competent county court of the requested person's request for a defence attorney, who shall then appoint the defence counsel, and the State Attorney's Office for the purpose of informing the competent authority of the issuing State of the request for a defence attorney in that state". In that manner the requested persons can exercise his/her rights effectively and without undue delay from deprivation of liberty.

Article 10(2)(b) of the Directive was **explicitly transposed and fully implemented**. A requested person, immediately upon arrest, must be informed in writing by the police of his/her rights, which rights s/he exercises in accordance with the provisions of domestic criminal procedural law (Article 24(1) AJCCMEU). This information includes the right for the defence lawyer to be present at the questioning of the requested person and the right to communicate freely, without interference and confidentiality with him/her (Article 24(3)(3) AJCCMEU) (since supra the domestic criminal procedural law applies, see comment to Article 3(3)(a) of the Directive).

Article 10(2)(c) of the Directive was **explicitly transposed and fully implemented**. The requested person has the right to have a defence counsel present at the questioning and the right to communicate freely, without interference and confidentiality with him/her (article 24(3)(3) AJCCMEU). A record is made of the examination of the requested person (Article 24(5) AJCCMEU) (since supra the domestic criminal procedural law applies, see comment to Article 3(3)(b) of the Directive).

Article 10(3) of the Directive was **explicitly transposed and fully implemented**. According to Article 24(3) AJCCMEU, the requested person, before questioning, must be informed of his/her rights "which s/he exercises in accordance with the provisions of domestic criminal procedural law" including "the right for the defence lawyer to be present at the questioning of the requested person and the right to communicate freely, without interference and confidentiality with him/her" and "the right to be informed of the deprivation of liberty by the person designated by the requested person or the consular authority with whom he has the right to communicate". The AJCCMEU does not regulate the right from Article 9 of the Directive, concerning waiver of the right to access to a lawyer, but it contains a general reference to provisions of domestic procedural law, which regulate the issue. "If the competent authority of the issuing State has requested a restriction on the right to inform a third party, or the right to communicate with a defence attorney, the state attorney shall act in accordance with this request, if it does not contravene the legal order of the Republic of Croatia (Article 24(6) AJCCMEU).

Article 10(4) of the Directive was **explicitly transposed and fully implemented**. The police must inform the requested person upon arrest that s/he is entitled to request a defence counsel in the issuing state (Article 24(2) AJCCMEU). Similarly, the state attorney must inform the requested person before questioning that s/he has "the right to appoint a lawyer in the issuing state" and "the right to request that, in the issuing State, a defence lawyer be charged with the issuing State in the proceedings for the European arrest warrant when the European arrest warrant is issued for the purpose of prosecution" (Article 24(3) AJCCMEU). "A person against whom a European arrest warrant has been issued in the Republic of Croatia has the right, after being arrested in the executing State, to appoint a defence counsel of his/her choice in the Republic of Croatia. The appointed counsel in the Republic of Croatia has the right, in addition to his powers in accordance with the provisions of domestic criminal procedural law, to take all actions to provide information and advice to the defence counsel of that person in the executing State with a view to effectively exercising that person's rights in the surrender process" (article 17.a(1) AJCCMEU).

Article 10(5) of the Directive was **explicitly transposed and fully implemented**. "If the requested person wishes to exercise the right to a lawyer in the issuing State, the State Attorney shall inform the competent authority of the issuing State without delay" (Article 24(7) AJCCMEU). "If the requested person, in respect of whom a European arrest warrant has been issued, is appointed an ex-officio defence counsel, the issuing authority shall, without delay, inform the competent authority of the executing State of the arrest of the requested person. The notification shall include information on the ex-officio defence counsel that are required to communicate with the defence counsel" (Article 17.a(2) AJCCMEU). "Upon receipt of the notification that the requested person wishes to appoint a defence counsel in the Republic of Croatia, the issuing authority shall, without delay, for ease of selection, submit to the competent authority of the executing State a list of attorneys providing information and advice in European arrest warrant proceedings, which is compiled by the Croatian Bar Association" (Article 17.a(3) AJCCMEU).

Article 10(6) of the Directive was **explicitly transposed and fully implemented.** Article 24(7) AJCCMEU explicitly prescribes that "the exercise of the right to a defence lawyer in the issuing State does not affect the time limits for the execution of a European arrest warrant".

Article 12(1) of the Directive was **indirectly transposed and fully implemented**. In case the state attorney conducts the investigation, the defendant may file a written complaint to the judge of investigation (Article 239.a CPA). In case of fact finding activity (simplified investigation), for

criminal offences punishable with imprisonment up to five years, the defendant may file a written complaint to the state attorney. If the state attorney does not accept it, s/he must deliver the complaint to the judge of investigation who will make a final decision (Article 239.a CPA). The accused person may point at possible lapses during the investigation and simplified investigation before the indictment panel (Article 350(3) CPA). The violation of defence rights may, at any stage of procedure, be challenged through the request for exclusion of unlawful evidence gathered through violation of specific right. That is particularly so with regard to the right to defence counsel, having in mind strict exclusionary rules proclaimed in Article 208.a(8) CPA, with regard to police interrogation of the suspect/arrestee, and in Article 280 CPA with regard to interrogation of the defendant.

Article 12(2) of the Directive was **indirectly transposed and fully implemented.** The CPA prescribes that there is a substantive violation of criminal procedure provisions "if the right to a fair trial guaranteed by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms has been gravely violated" (Article 468(2) CPA).

8.2 Case-law

In the case law of the Supreme Court of the Republic of Croatia, which is available online, the provisions of national legislation transposing the provisions of the Directive have so far been interpreted in several decisions, as well as in several decisions of county courts, which are also available online. These decisions dealt with four separate issues: 1) the moment at which a person acquires the status of the suspect and therefore has the right to be assisted by defence counsel before and during police interrogation, 2) the problem of mixing procedural roles (citizen/suspect), 3) right to be assisted by a defence counsel during identity parades and 4) right to be assisted by a defence counsel during home search.

8.2.1. The moment when a person acquires the status of the suspect

In the ruling I Kž 716/2018-4,[56] the Supreme Court interpreted conditions under which a person (or "a citizen") becomes a suspect. In the concrete case, the defendant and defence counsel filed an appeal with the Supreme Court against the county court's decision rejecting the motion to exclude the illegal evidence, including official notes from police officers. The Supreme Court rejected the appeal as

[56] VSRH, I Kž 716/2018-4, 10 January 2019.

unfounded, stating, *inter alia*, that the appellant had been stopped and identification checked, and handed over from the inside of the car a certain content which the police officers assessed as marijuana, at which time the grounds for suspicion were formed that he had committed a criminal offense of unauthorized production and trafficking of drugs from Art. 190 of the Criminal Code and at that time became a suspect. The appellant was then arrested and immediately informed of his rights, while a written instruction on his rights was served on his arrival at the official police premises. He was questioned as a suspect only after he waived his right to counsel. The Supreme Court confirmed the correctness of the conclusion of the First Instance Court that the police officers acted in full accordance with Art. 208, 208.a and 208.b of the CPA because it follows from the file that they stopped collecting information at the moment when the grounds for suspicion arose, i.e. at the moment when the appellant became a suspect. In addition, the appellant did not specify what the omissions of the police officers would consist of, but only the violation in general of Art. 208.a, Art. 208.b and the provisions of Directive 2013/48/EU. Also, the appellant did not state what exactly the violation of the defendant's right to defence would consist of, so according to the assessment of the Supreme Court, it is not a question of illegal evidence from Art. 10 para. 2 p. 2. CPA.[57] Yet, it is possible to object to the described reasoning of the Supreme Court that the circumstances, under which a person handed over drugs to police officers, were not considered in more detail.

8.2.2. The problem of mixing procedural roles (citizen/suspect)

The issue of mixing procedural roles (of a citizen and a suspect) builds on the issue of determining the moment in which a person acquires the status of a suspect. In the Supreme Court ruling I Kž-Us 88/2018-4,[58] the defendants, through the defence counsel, filed appeals against the decision of the county court rejecting their motions to exclude the evidence as illegal, namely the records of the examination of witnesses because these witnesses, already at the very beginning of their testimony, charged themselves with criminal offenses and became suspects which meant, according to the appellant, pursuant to Art. 2 paragraph 3 of Directive 2013/48 / EU, that they should have been warned about the right to counsel, and not about the duty to testify truthfully. The appellants also referred to the judgment of the Grand Chamber of the ECtHR Ibrahim and Others v. The United

[57] Ibid.
[58] VSRH, I Kž-Us 88/2018-4, 22 November 2018.

Kingdom, which the Supreme Court found unfounded. The Supreme Court noted that the VII Amendment to the CPA accepted the definition of a suspect in the material sense in accordance with Directive 2013/48/EU, and therefore the police may collect information from citizens until the grounds for suspicion that a person has committed or participated in the commission of a criminal offense appears. After that moment, the police may further interrogate that person only in the capacity of a suspect, in a strictly prescribed form and with prior instruction on rights in accordance with Art. 208, Art. 208.a and Art. 208.b of the CPA, and the failure of the police to act in the prescribed manner would result in the suspect's statement being illegal evidence. However, if persons in the pre-trial proceedings were examined as witnesses and did not change their procedural status during the proceedings, and were warned of the possibility of refusing to answer certain questions, the testimonies obtained in this way are not illegal evidence *ex judicio* within the meaning of Art. 10 para. 2 p. 2. CPA.[59] This reasoning of the Supreme Court has been criticized in the literature, for it is the duty of every procedural body conducting the interrogation - the police and the public prosecutor, to warn a witness who acquired the status of a suspect during the interrogation of the danger of self-accusation and other defence rights. This is especially important if the witness charges himself with the same offense for which criminal proceedings are being conducted. Namely, in that case, in accordance with the principle of legality, except in exceptional cases, the witness in that criminal procedure must acquire the status of a suspect.[60]

8.2.3. Right to be assisted by a defence counsel during identity parades

So far, the most common questions related to the interpretation of the provisions of the Directive 2013/48/EU in the analyzed case law concern the evidentiary action of the identity parades. In the ruling Kžm 13/2018-4,[61] the Supreme Court clarified the meaning of the right to counsel during that evidentiary action, as well as the possibility for the suspect to waive the right to defence counsel. In appeal to the Supreme Court, the defendant alleged that his right to a defence was violated due to misinterpretation and incorrect application of the provisions of Directive 2013/48/EU by the first instance court, which rejected the request to exclude the record of identity parades as illegal evidence. The Supreme Court rejected the defendant's appeal as unfounded. The Supreme Court first stated that the evidentiary actions of identity parade were carried out before the entry into force of Amendments

[59] Ibid.

[60] Ivičević Karas/Burić/Bonačić, *Neka pitanja usklađenosti hrvatskog kaznenog procesnog prava s direktivama o pravima obrane - analiza sudske prakse*, Hrvatski ljetopis za kaznene znanosti i praksu, 2(2020), pp. 556-558.

[61] VSRH, Kžm 13/2018-4, 10 May 2018.

to the Criminal Procedure Act, which transposed Directive 2013/48/EU, and regardless of that, the first instance court correctly applied the mentioned Directive and other relevant domestic and international legal sources, including Art. 6 para. 3 (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court pointed out that the essence of legal sources guaranteeing the right to defence counsel "is in the duty to actually allow the defendant access to counsel during certain procedural actions", which means that the defendant must be "clearly and in understandable manner warned that he has the right to counsel". However, if it is not the case of the so-called mandatory defence, the defendant may waive the right to counsel, and the waiver must be voluntary and unequivocal.
In the concrete case, at the time of taking the evidentiary action of identity parade, the rules on mandatory defence did not apply, and the defendant was properly warned about the right to a defence counsel before taking any evidentiary action, and waived that right, first in writing and then orally. At the same time, there is no data that would indicate at least the suspicion that the waiver of the right to counsel was not voluntary and unambiguous, so the identity parade does not constitute illegal evidence obtained in violation of Art. 10 para. 2 pt. 2 CPA.
In relation to the objection on the manner of conducting the identification, because all other persons on the line of recognition were differently disguised than the defendant, which, in the opinion of the defendant, indirectly referred to him, the Supreme Court accepted the conclusion of the first instance court saying that it is a matter of credibility of evidence, which will be discussed at the trial, and not the issue of illegality of evidence in terms of Art. 10 para. 2 pt. 2 CPA.[62]

Similarly, the Pula-Pola County Court ruled in Kž-294/17-.[63] The Pula-Pola County Court ruled on the defendant's appeal against the decision of the Pula-Pola Municipal Court rejecting the defence counsel's motion to exclude the record on the defendant's identity parade as illegal evidence. The defence, inter alia, argued that the impugned decision violated the accused's right to defence counsel under Art. 26. of Directive 2013/48/EU. According to the defence, after the accused was arrested on reasonable suspicion of committing the crime of aggravated theft, an identity parade was carried out in such a way that the accused was among other persons in the identification line, and there is no information that he was notified that identification will be carried out, what is the content of that action, nor information that the accused was aware of the right to defence counsel. According to further allegations of the defence, there is no information that the accused waived his right to a defence counsel, including in the record of identity parade. The County Court rejected the appeal as

[62] Ibid.
[63] Županijski sud u Puli–Pola, Kž-294/17-, 8 September 2017.

unfounded, finding that the trial court had correctly found that the defendant had received an instruction on rights prior to the identity parade, as the recognition record was accompanied by an invoice on the instruction to the accused immediately prior to the identity parade. In addition, the court emphasized that the accused had already been informed about his rights, including the right to a defence counsel of his choice and the right to a defence counsel appointed from the list of duty lawyers, at the time of his arrest, as he confirmed with his signature the receipt of the letter of rights. The arrest report stated that the defendant had been warned of the right to counsel, but waived that right, which he confirmed by signing, and the defendant did not request counsel subsequently, although he again received instruction on rights just before carrying out the identity parade. The Court found that it also follows from the record of the first examination of the accused that he waived his right to counsel. Since the present case was not a case of mandatory defence, that the accused was properly warned of the right to counsel, that there was no evidence to suggest that the waiver of the right to counsel was not voluntary and unambiguous, the court found that the identity parade did not violate the defence rights, nor Art. 26 of Directive 2013/48/EU, and it is not illegal evidence.[64] The Supreme Court drew a similar conclusion as well in the ruling I Kž 223/17.-4.[65]

In the ruling I Kž 389/17-4,[66] the Supreme Court additionally interpreted Article 3 paragraph 2c of the Directive 2013/48/EU. The defendant filed an appeal through defence counsel with the Supreme Court against the decision of the county court rejecting her request to exclude the records on identity parade as illegal evidence. The Supreme Court rejected the appeal as unfounded, finding that the identity parade was performed in full compliance with Art. 301 of the CPA, which was in force at the time, rendering unfounded the appellant's complaint that, although her defence counsel was present at the identity parade, she did not sign the record, as a result of which her control over the compilation of the records was lacking. The Supreme Court pointed out that Art. 301 para. 7 of the CPA does not stipulate the obligation to sign the minutes by the defence counsel and that although the said provision, which was in force at the time of undertaking, did not provide for that, the defence counsel attended the defendant's identification parade in accordance with Art. 3 paragraph 2c of Directive 2013/48/EU. The Supreme Court added that the appellant's objection could only relate to the assessment of the credibility of the evidence, but could not be the basis for a finding of illegality of the identity parade.[67]

[64] Ibid.
[65] VSRH, I Kž 223/17.-4, 25 April 2017.
[66] VSRH, I Kž 389/17-4, 24 August 2017.
[67] Ibid.

However, in another ruling I Kž 34/2018-4,[68] the Supreme Court concluded that the records on the identity parade were to be excluded as illegal evidence. In that case, the state attorney filed an appeal with the Supreme Court against the decision of the County Court, which excluded the records on the defendant's identity parade and the accompanying photo-documentation as illegal evidence. The Supreme Court rejected the appeal as unfounded, arguing that the first-instance court had correctly concluded that the evidentiary actions were illegal evidence within the meaning of Art. 10 para. 2 p. 2. CPA. Although the defendant was provided with a written letter of rights, including the right to counsel, in the records of identity parade, or in any other record related to these evidentiary actions, the defendant did not state whether he waived his rights to counsel. In the case of conducting the evidentiary action of identity parade from Art. 301 of the CPA, especially when the object of recognition is the defendant, it is necessary to instruct the defendant on the right to a defence counsel who can attend the identity parade, and the provisions of Art. 273, paragraphs 2, 3 and 5. CPA should apply, from which it undoubtedly follows that the body conducting the identity parade is obliged to enter in the record the defendant's statement on his decision regarding the right of the defence counsel to be present at the identity parade. "The purpose of these legal norms is to effectively and truly provide the defendant with the right to professional assistance of defence counsel, and at the same time, by taking all actions determined by law, to reduce the defendant's complaints about the violation of the right to defence counsel to a minimum." Considering that the defendant claims that the police denied him the right to counsel and that he did not explicitly waive that right, and bearing in mind "especially the imperative norm of the need for a material trace in writing on the record of warnings on the right to counsel and the statement of the defendant, which is missing here", the Supreme Court upheld the first-instance court's finding that there had been a violation of the guaranteed rights of the defence. Finally, the Supreme Court added that the evidentiary actions of the identity parade were not carried out even in accordance with Art. 3 (3) (c) of Directive 2013/48 / EU.[69] This ruling of the Supreme Court is particularly relevant because the CPA in case of violation of the right to counsel during identity parades did not provide for *ex lege* illegality of evidence as a procedural sanction, but left the possibility for the identity parade record to be *ex judicio* illegal evidence, if so assessed by the court.[70]

[68] VSRH, I Kž 34/2018-4, 8 March 2018.

[69] Ibid.

[70] Ivičević Karas/Burić/Bonačić, *Neka pitanja usklađenosti hrvatskog kaznenog procesnog prava s direktivama o pravima obrane - analiza sudske prakse*, Hrvatski ljetopis za kaznene znanosti i praksu, 2(2020), pp. 552-554.

Similarly, the Zagreb County Court ruled in 1 Kž-1211/2017-3.[71] The state attorney filed an appeal with the Zagreb County Court against the decision of the Zagreb Municipal Criminal Court, which excluded from the case file as illegal evidence the record on identity parade, photo documentation of the identity parade, and the report on forensic-technical search of the scene. The Zagreb County Court rejected the appeal as unfounded, stating that according to Art. 306, paragraph 6 of the CPA, if the object of the identity parade is the defendant, the defendant must be instructed on the right to a defence counsel who can attend the identity parade, and the provisions of Art. 273, paragraphs 2, 3 and 5 and of Art. 275 of the CPA apply in an appropriate manner. From the provision of Art. 273 para. 2 of the CPA it undoubtedly follows that the defendant must explicitly state whether or not he wants to take defence counsel and his statement must be entered in the record. It is not enough that the defendant has only been informed of the right to counsel before being subjected to the identity parade, so that the defendant can exercise that right consistently and effectively. If the defendant's will is not expressed and stated in the record, this calls into question the defendant's right to a defence counsel and the defence counsel's ability to attend the identity parade. Since in the specific case the record of the identity parade did not include an explicit statement of the accused (ie the suspect at the time of identity parade) whether he wanted to take counsel, the evidentiary action of identity parade is not legal evidence because it was obtained in violation of constitutionally guaranteed rights of defence, as well as other evidence arising from it, namely photo documentation and the report. This evidence cannot be used as bases for a court decision in accordance with Art. 10 para. 2 p. 2 CPA and therefore must be excluded from the case file in accordance with Art. 86, paragraph 1 of the CPA.

Finally, in one case[72] Zagreb County Court clarified that, in relation to the evidentiary action of identification of an object, the same standards of the right to a defence counsel do not apply, as to the evidentiary action of identification parade, in which the object of identification is a suspect. In this case, the accused's defence counsel filed an appeal with the county court against the decision of the municipal court rejecting his proposal to exclude the record on identification of object and the accompanying photo documentation as illegal evidence, because he was not informed about the action and was not invited to attend. The county court rejected the appeal as unfounded, assessing that the first instance court correctly determined that the evidence was not illegal, after analyzing Directive 2013/48/EU, which was essentially the basis for the appeal. The county court assessed that the first-instance court correctly determined that Art. 3. p. 3. Directive 2013/48/EU and Art. 311, paragraphs

[71] Županijski sud u Zagrebu, 1 Kž-1211/2017-3, 19 December 2017.
[72] Županijski sud u Zagrebu, 7 Kž-155/2019-3, 26 February 2019.

1, 2, 3 and 4 of the CPA do not prescribe that the body conducting the identification of objects informs or invites the defence counsel or the defendant to be present. The fact that the defence counsel was not informed about the identification action does not make this action illegal evidence, and in addition, none of the defence counsel's allegations is included in the catalog from Art. 10 para. 2 of the CPA which prescribes the conditions when it comes to illegal evidence.[73]

8.2.4. Right to be assisted by defence counsel during home search

Another issue considered by the Supreme Court, in the light of Directive 2013/48/EU, was the right to be assisted by defence counsel during home search. In one case,[74] defence filed an appeal against the decision of the county court rejecting the proposal to exclude, *inter alia*, the records of the search of the home and other premises and certificates of temporary seizure of items. The Supreme Court rejected the appeal as unfounded. In the appeal, the defendant basically pointed out that during the search of home and other premises, his right to defence was violated by the fact that no defence counsel was summoned, and it was a case of mandatory defence. The Supreme Court stated that, although according to Art. 66, paragraph 1, point 3 of the CPA, the defendant must have a defence counsel from the issuance of the decision ordering custody or pre-trial detention against him, Art. 253 para. 1 of the CPA stipulates that before the search a person will be warned that he has the right to inform a defence counsel who may be present at the search. The Directive 2013/48/EU guarantees the right to access a lawyer in criminal proceedings at such a time and in such a manner as to practical and effective exercise of the rights of the defence (Article 3 of the Directive), provided that the waiver of the right of access to defence counsel is possible if the suspect or accused person is warned orally or in writing, in simple and comprehensible language, with clear and sufficient information, on the content of the right of access to a lawyer and the possible consequences of waiving that right, and if the waiver is given voluntarily and unambiguously (Article 9 of the Directive). In order for this right to be essentially exercised, it is necessary for the defendant to be clearly and in an understandable manner warned that he has the right of access to defence counsel, which is also served by the letter of rights from Article 239 of the CPA… ". Therefore, since the defendant immediately after his arrest received a letter of rights, which includes the right to a defence counsel and that he took a defence counsel, and before the search he was instructed on the right to inform the defence counsel of the search, which the defendant refused and signed a record to which he had no remarks, "and as there is no doubt that the defendant would not be instructed on this right in an understandable manner", during

[73] Ibid.
[74] VSRH, I Kž 251/2020-4, 21 May 2020.

the specific search there was no violation of the provisions of the CPA, nor the right of defence, because the defendant was not denied real access to a defence counsel. Considering that, according to the record, all relevant provisions of the CPA were observed during the search and no violation of the defendant's right to defence or any other right was established, the Supreme Court concluded that this was not illegal evidence.[75]

Similarly, in another ruling I Kž-Us 149/2017-4,[76] in relation to the appellate allegation that the searches were conducted illegally because one defendant was arrested during the search and the search of the home continued, and the search of the business premises was conducted the next day without the presence of a mandatory defence counsel, the Supreme Court pointed out that Art. 66, para. 1, pt. 4 of the CPA, to which the defendant referred, stipulates "that the defendant must have a defence counsel during the proceedings for a criminal offense for which criminal proceedings are instituted ex officio if he is deprived of liberty or is serving a prison sentence in another case, and this was not the case here." In addition, the records of the search of the home and other premises show that the defendant was informed of the right to counsel and that he waived that right, so that the competent authorities acted in accordance with Article 253 para. 1 and 3 of the CPA, and not contrary to Directive 2013/48 / EU either, as the defendants were not denied the right to defence counsel.[77]

[75] Ibid.
[76] VSRH, I Kž-Us 149/2017-4, 30 May 2018.
[77] Ibid.

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

9.1 Legislation

Directive has been implemented by the 2019 amendments of the Juvenile Court Act and the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union, but some provisions of the directive were already implemented in the previously existing provisions of the Juvenile Court Act (JCA), the Criminal Procedure Act (CPA) and the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (AJCCMEU).

Scope

Article 2(1) of the Directive was ***de facto/indirectly and fully implemented.*** The Juvenile Courts Act is *lex specialis* in relation to the Criminal Procedure Act, so all the rights guaranteed by the CPA and the JCA are applied from the earliest moment when a child is suspected in the criminal proceedings.

Article 2(2) of the Directive was ***explicitly transposed and fully implemented*** by the 2019 Act on Amendments the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union. [78] It prescribed rights that a requested child has to be informed of (Article 24.d(1))

Article 2(3) of the Directive was ***explicitly transposed and fully implemented.*** The juvenile criminal law applies in Croatia to children who were under age of 18 when the offence was committed and who did not reach the age of twenty-three when the jurisdiction of a juvenile court ceases (Articles 2, 36 and 48 JCA). However, it must not but can be applied also to so-called young adult perpetrators who were 18 to 21 years of age when they have committed offence until they reach twenty-three years of age (Articles 104, 105 and 107 JCA). The provisions excepted from the application to the accused that has reached the age of 18, are also excluded in the Croatian law (Article 48(2) JCA).

[78] Act on Amendments to the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (Zakon o izmjenama i dopunama Zakona o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije), Official Gazette (Narodne novine), No. 70/2019.

Article 2(4) of the Directive was ***explicitly transposed and fully implemented*** by provision of Article 208 paragraph 5 CPA regulates situation where a person, informally questioned by the police in a capacity of a "citizen", or presumptive witness, becomes a suspect as defined in Article 122 CPA during the questioning. That person may no longer be questioned informally, i.e., without being warned of his/her rights, including the right to a defence counsel. If the police fail to comply with this provision, the statement given by the suspect, as well as all the evidence obtained as a result of that statement, cannot be used as evidence and must be excluded from the case file (Article 208.a paragraph 8 CPA).

Article 2(6) of the Directive **is not implemented**. According to the Art 82(1) of the Misdemeanor Act the procedural provisions of the Act apply not only before courts having jurisdiction in criminal matters, but also before all other bodies conducting misdemeanor proceedings (for instance tax or customs authorities). Therefore, the limitation of the scope of the application of the Directive from this provision is not implemented.
The Misdemeanor Act, Article 86 lists the rights of the arrested or detained person. These rights do not cover all the rights from the Directive. However, there is an additional provision of Art. 82(3) which stipulates that the provisions of the Criminal Procedure Act and the Juvenile Courts Act shall be applied in an appropriate manner, when appropriate to the purpose of the misdemeanor procedure, if the MA does not contain provisions on certain issues of procedure. Therefore, it can be concluded that Directive applies fully when the child is deprived of liberty.

Definitions

Article 3 of the Directive was ***de facto/indirectly transposed and partially implemented***. All the definitions from Article 3 are fully implemented. However, the last provision is partially implemented by provision: where the age of the victim is unknown and it is probable that the victim has not yet turned eighteen, it shall be presumed that the victim is a child (Article 44(3) CPA). This provision relates only to victims but Croatia does not have a similar provision for a child perpetrator.

Right to information

Article 4 (1)(a) of the Directive was ***de facto transposed and fully implemented***. Article 108(1) of the Criminal Procedure Act provides the obligation to inform a child promptly. The child will be informed about the letter of rights according to the CPA (Article 108a (1), 208a (2), 208.a(3), 239 (1), 273(1)) and JCA (Article 53a(1)). Letter of rights to minors, beside the content of letter of rights for

adults referred to in Article 108a (1), Article 208a (2) and Article 239 (1) of the CPA must include additional notification notifications that will follow in the implementing provisions of Article 4.

Article 4(1)(a)(i) of the Directive was ***explicitly transposed and fully implemented*** by Article 53.a(3) JCA that requests that Letter of rights to the minor shall be handed or delivered to the parent or guardian.

Article 4 (1)(a)(ii) of the Directive was ***de facto/indirectly transposed and fully implemented*** by provision that letter of rights to the arrested person shall include a notice on the right to a lawyer of his/her own choosing or to a lawyer appointed from the list of attorneys on duty (Article 108a (1) point 3), the summons to a suspect must specify what the suspect is suspected of (Article 208a (2) point 1) and the letter of rights to the accused person must contain notice that s/he has the right to take a defense counsel of his choice, or that, when provided for in this Act, s/he will be appointed a defense counsel ex officio or at the expense of budgetary funds if s/he is unable to cover the costs of defense according to his/her financial status (Article 239 (1) point 5).

Article 4(1)(a)(iii) of the Directive was ***explicitly transposed and fully implemented*** by provison that inquiry of criminal offenses and criminal proceedings against the minor are secret (Article 53.a(1) point 2).

Article 4(1)(a)(iv) of the Directive was ***explicitly transposed and fully implemented*** by provision on the right to be accompanied by a parent, guardian or other appropriate adult (Article 53.a(1) point 3 of the JCA).

Article 4(1)(a)(v) of the Directive was ***explicitly transposed and fully implemented*** by provision that the detainee must be notified of the right to temporary legal assistance of the defense attorney at the expense of the budget (Article 72.a(3)) and 239(1) point 5 of the 2019 Act on Amendments to the CPA)

Article 4(1)(b)(i) of the Directive was ***explicitly transposed and partially implemented*** by Article 53.a(1) point 4 of the JCA that provides that the information necessary for the assessment of his / her psychophysical development and information on personal and family circumstances will be obtained in the proceedings against the minor. However, the individual assessment was not introduced as a right but as the obligation of the competent authorities.

Article 4(1)(b)(ii) of the Directive was ***explicitly transposed and fully implemented*** by 53.a(1) point 5 of the JCA that provides for the right to a medical examination, including the right to medical assistance.

Article 4(1)(b)(iii) of the Directive was ***explicitly transposed and partially implemented*** by 53.a(1) point 6 of the JCA that provides that s/he may be subject to precautionary measures or provisional measures and, as a last resort, to an investigative prison in accordance with the provisions of this Law. However, a child is not informed about the right to periodic review of detention.

Article 4(1)(b)(iv) of the Directive was ***explicitly transposed and fully implemented*** by 53.a(1) point 3 of the JCA that provides for the right to have a parent, guardian or other appropriate adult referred to in paragraph 4 of this Article selected by the minor or the special guardian referred to in paragraph 5 of this Article, handed in or delivered the same lettre on rights to be served or delivered to the minor.

Article 4(1)(b)(v) of the Directive was ***explicitly transposed and fully implemented*** by 53.a(1) point 7 of the JCA on the right not to be tried in his/her absence..

Article 4(1)(b)(vi) of the Directive was ***explicitly transposed and fully implemented*** by 53.a(1) point 8 of the JCA that provides for the right to file remedies.

Article 4(1)(c) of the Directive was ***not implemented***.

Article 4 (2) of the Directive was ***de facto transposed and partially implemented***. There is an obligation for a police officer who is conducting the interrogation of the suspect to make sure that the suspect understood his/her rights (Article 208.a(3) CPA). There is an obligation for police officers to make sure that the arrested person understood the letter of rights (Article 108(6) CPA). Obligation of other interrogating authority is prescribed by 273(1).

Article 4(3) of the Directive was ***explicitly transposed and fully implemented*** by 53.a(1) 1st sentence of the JCA.

Right of the child to have the holder of parental responsibility informed

Article 5(1) of the Directive was ***explicitly transposed and fully implemented*** by the 2019 JCA that in Article 3.a(3)-(6) ensured that the holder of parental responsibility is provided with the bill of rights for children. The implementation of "as soon as possible" is not explicit in the CPA or JCA. However, it can be presumed that the letter of rights is provided at the same time as it provided to the child. It is implemented in the by-laws. Regulation on the admission and treatment of arrestees and detainees and on the records of detainees in a police detention have the same obligation for the police in case the arrested person is a minor (Article 10(3)).

Article 5(2) of the Directive was ***explicitly transposed and fully implemented*** by the 2019 JCA by Article 53.a(4) and (5) point 5.

Article 5(3) of the Directive was ***explicitly transposed and fully implemented*** by the 2019 JCA by Article 53.a(6).

Assistance by a lawyer

Article 6(1) of the Directive was ***de facto/indirectly implemented.*** The Juvenile Courts Act does not explicitly state (in Article 1.a JCA) that the Directive 2013/48/EU is transposed into the Croatian legal system through its provisions. However, as the CPA applies subsidiary (Article 3 JCA), the Directive is implicitly transposed through its provisions.

Article 6(2) of the Directive was ***explicitly transposed and fully implemented.*** The JCA prescribes mandatory defence in criminal proceedings against juveniles. There is a principal provision on mandatory defence, also guaranteeing the right to defence counsel throughout the entire proceedings (Article 54(1 and 3) JCA). The right to exercise that right effectively is guaranteed within numerous provisions that will be analyzed below. Even if the rule on mandatory defence applies in general, the JCA provides an exception if the state attorney decides on the ground of principle of discretionary prosecution (Article 72 JCA). In that case, the minor has the right to defence counsel (Article 54(2) JCA), but the defence is not mandatory.

Article 6(3) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Under Article 54(a) CPA the juvenile must have a defense counsel from the first action taken on grounds of suspicion that s/he committed the criminal offense until the criminal proceedings are finally terminated, when deciding to replace the correctional measure with the correctional institution measure and at the subsequent pronouncement of juvenile imprisonment.

Article 6(3)(a) of the Directive was ***explicitly transposed and fully implemented.*** This provision is implemented in Article 53.a(1) JCA, which stipulates that the letter of rights given to a juvenile at the time of arrest and before the questioning by the police or the state attorney, must contain all information provided for adult defenders according to the provisions of the CPA, supplemented with additional information. This information includes the right to a defence counsel (of his/her own choice). In addition, when questioning is the action taken on grounds of suspicion that the juvenile committed the criminal offense, the rule on mandatory defence applies in virtue of Article 54(1) JCA. The JCA does not regulate in detail the questioning of the juvenile suspect or defendant, therefore regarding the right to have assistance of a defence counsel before and during the questioning, the provisions of the CPA apply. Prior to the first interrogation the defendant may consult with the defence counsel about his/her rights, which shall be entered into the protocol (Article 273(5) CPA).

The arrestee referred shall be entitled to unrestricted, undisturbed and confidential conversation with his/her defence counsel as soon as s/he retains him/her or as soon as the decision on the appointment of defence counsel is taken, and where s/he is to be questioned, such communication may not last for more than thirty minutes (Article 108(3) CPA). **Limiting the communication of the arrestee with the defence counsel to up to thirty minutes may constitute an unjustified limitation of the right to access the lawyer.**

Article 6(3)(b) of the Directive was ***de facto transposed and fully implemented.*** If actions listed in paragraph 4 point (c) of the Directive are taken when a juvenile is a suspect or defendant, a rule on mandatory defence from Article 54(1) JCA applies. In addition, the CPA guarantees the right of the suspect and defendant to be assisted by a defence counsel at the confrontation, reconstruction and identity parades.

Article 6(3)(c) of the Directive was ***de facto transposed and fully implemented.*** This provision is implemented in Article 53.a(1) JCA, which stipulates that the letter of rights given to a juvenile at the time of arrest and before the questionning by the police or the state attorney, must contain all information provided for adult defenders according to the provisions of the CPA, supplemented with additional information. This information includes the right to a defence counsel (of his/her own choice). In addition, when questioning is the action taken on grounds of suspicion that the juvenile committed the criminal offense, the rule on mandatory defence applies in virtue of Article 54(1) JCA.

The CPA prescribes that the letter of rights must be given to the arrested juvenile immediately (Article 108(1) CPA), and the arestee has the right to communicate with the defence counsel as soon as s/he

chose the defence counsel, or after the decision on the appointment (Article 108(7) CPA). The CPA does not guarantee explicitly such a right for a suspect or defendant placed under custody or in pre-trial detention, since these are cases of mandatory defence.

Article 6(4)(a) of the Directive was ***de facto transposed and fully implemented.***
Under the CPA all defendants, arrestees and detainees including children have the right to communicate with the defence lawyer freely, confidentially and without hindrance (Articles 64(1) point 5, 108(7), 114, 139(5) and 98(4)). As mentioned above, limiting the communication of the arrestee with the defence counsel to up to thirty minutes may constitute an unjustified limitation of the right to access the lawyer.

Article 6(4)(b) of the Directive was ***de facto transposed and fully implemented*** by the provisions of the CPA that guarantee effective participation of the defence lawyer (Articles 87(2), 208.a(7), 276(4)) and recording that fact (Articles 76(4), 275(2-4)**.**

Article 6(4)(c)(i-iii) of the Directive was ***de facto transposed and fully implemented.*** Under Article 54(1) of the CPA the juvenile must have a defense counsel from the first action taken on grounds of suspicion that s/he committed the criminal offense until the criminal proceedings are finally terminated, when deciding to replace the correctional measure with the correctional institution measure and at the subsequent pronouncement of juvenile imprisonment. This provision on mandatory defence includes identity parades, confrontations and reconstructions of the scene of a crime, when a juvenile is a suspect or defendant.

Article 6(5) of the Directive was ***de facto transposed and fully implemented.*** Under the CPA all defendants, arrestees and detainees including children have the right to communicate with the defence lawyer confidentiality (Articles 64(1) point 5, 108(7), 114 and 139(5)). As mentioned above, limiting the communication of the arrestee with the defence counsel to up to thirty minutes may constitute an unjustified limitation of the right to access the lawyer.

Article 6(6) of the Directive was ***not implemented.*** In Croatian law there is no derogation from paragraph 3 that ensures that children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. Even if the rule on mandatory defence applies in general, the JCA provides an exception if the state attorney decides on the ground of principle of discretionary prosecution (Article 72 JCA). In that case, the minor "may have a defence counsel" (Article 54(2) JCA). So, the right to a defence counsel is not derogated, the minor may be assisted by

a defence counsel, but the defence is not mandatory. However, in cases referred to in point (a) and point (b) of this paragraph the defence is mandatory.

Article 6(7) of the Directive was ***explicitly transposed and fully implemented*** through the rule on mandatory defence (Article 54(1) JCA).

Article 6(8)(a) of the Directive was ***de facto transposed and partially implemented.*** Under Article 108.b(1-3) CPA where there is an urgent need to avoid the serious and grave consequences for the life, liberty or physical integrity of a person or the risk of concealment or destruction of evidence, the state attorney may order the police to delay informing the defence counsel and a member of the arrestee's family, or other person chosen by the arrestee (the persons referred to in Article 108a, paragraph 1, points 3 and 5, of this Act) for as long as the grounds therefor exist but no longer than 12 hours from the moment of the arrest.

Yet, there is no explicit obligation for the competent authorities, when applying these provisions, to take the child's best interests into account. Even if the decision may only be taken on a case-by-case basis by the state attorney, it cannot be submitted to judicial review. Yet, the child may only be questionned about circumstances which brought about the notification delay, and not about the criminal offence (Article Article 108.b(3) CPA), so this is not a questioning stricto sensu.

Article 6(8)(b) of the Directive was ***de facto transposed and partially implemented.*** Under Article 108.b(1-3) CPA the state attorney may order the police to delay informing (of the arrest) the defence counsel and a member of the arrestee's family, or other person chosen by the arrestee. The provision of the Directive is only partially implemented since the CPA does not require that the criminal proceedings could be "substantially" jeopardised. There is no explicit obligation for the competent authorities, when applying these provisions, to take the child's best interests into account. Even if the decision may only be taken on a case-by-case basis by the state attorney, it cannot be submitted to judicial review. Yet, the child may only be questioned about circumstances which brought about the notification delay, and not about the criminal offence, so this is not a questioning stricto sensu.

Right to an individual assessment

Article 7(1) of the Directive was ***de facto transposed*** by the following provisions.

Article 7(2) of the Directive was ***explicitly transposed and fully implemented*** by Article 78(1) of the JCA that states: In the proceedings against the minor, in addition to the facts pertaining to the criminal

offence, the data necessary for the evaluation of his/her psychophysical development and information on personal and family circumstances will be obtained.

Article 7(3) of the Directive was ***explicitly transposed and fully implemented*** by Article 78(1) of the JCA that states: A report will be requested from the county welfare office about these circumstances, and if a correctional measure has been applied to the minor, a report on the application of the measure will be obtained.

Article 7(4)(a) of the Directive was ***de facto transposed and fully implemented*** by Article 5(1) point 1 and Article 7(1) point 2 of the Regulation on the work of expert associates non-legal profession in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts

Article 7(4)(b) of the Directive was ***de facto transposed and fully implemented*** by Article 6 of the Regulation on the work of expert associates' non-legal profession in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts

Article 7(4)(c) of the Directive was ***de facto transposed and fully implemented*** by Article 5(1) point 1, 8 and 10 and Article 7(1) point 1 of the Regulation on the work of expert associates' non-legal profession in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts

Article 7(5) of the Directive was ***explicitly transposed and fully implemented*** as not only the court but a public prosecutor can during the pretrial-procedure collect information and order individual assessment of the juvenile (Article 78(3) CPA, Article 3 the Regulation on the work of expert associates non-legal profession in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts**)**

Article 7(7) of the Directive was ***explicitly transposed and fully implemented.*** The individual assessments shall be performed by a physician, psychologist or educator (Article 78(4) JCA) and the minor's parent, his or her guardian and other persons who can provide the necessary information will be involved (Article 78(4) JCA). Also, expert associates in the public prosecutor's offices and courts are persons who have completed a university degree in social pedagogy, social work or psychology (Article 2 the Regulation on the work of expert associates' non-legal profession in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts).

Article 7(8) of the Directive was ***de facto transposed and partially implemented.***
The Regulation on the work of expert associates in non-legal professions in matters of juvenile delinquency and criminal law protection of children in the state attorney's offices and the courts requires assessment during the temporary placement of the minor (Article 65, paragraph 4 ZSM). However, there is no other provision that ensures the update of the individual assessment in the course of proceedings.

Right to a medical examination

Article 8(1) of the Directive was ***explicitly transposed and partially implemented***. The Art. 63(8) JCA provides that the body conducting the action or conducting the procedure shall provide the arrested juvenile with a medical examination without delay when special circumstances related to the juvenile's health condition justify such examination or at the request of the juvenile, defense counsel or parents, guardians and other appropriate adult chosen by the juvenile. accepted as such by the body conducting the proceedings or carrying out the action or by the special guardian. The provision does not mention the assessment of general mental and physical condition of the juvenile as an objective of medical examination. However, the provision is assessed to be partly implemented due to the fact that the request that the examination should be as non-invasive as possible is omitted. Art 78(4) JCA additionally stipulates that, where it is necessary for the assessment of the minor's health condition, psychophysical development or characteristics, the opinion of a doctor, psychologist or pedagogue shall be sought. An opinion may also be sought from a health, social or other institution.

Article 8(2) of the Directive was ***explicitly transposed and fully implemented*** since Art 63(8) JCA provides that the results and conclusion of the medical examination shall be given in writing and shall be taken into account when determining the juvenile's ability to be examined and to participate in other evidentiary actions.

Article 8(3) of the Directive was ***explicitly transposed and fully implemented***. Art. 63(8) JCA provides that a medical examination shall be carried at the request of the juvenile, defense counsel or parents, guardians and other appropriate adults chosen by the juvenile. accepted as such by the body conducting the proceedings or carrying out the action or by the special guardian.

Article 8(4) of the Directive was ***explicitly transposed and partially implemented***. Art. 63(8) JCA provides that the results and conclusion of the medical examination must be given in writing.

However, not this, or any other provision, stipulates that the medical assistance shall be provided where required.

Article 8(5) of the Directive was ***not implemented***. There is no provision that another medical examination should be carried out where the circumstances require.

Audiovisual recording of questioning

Article 9(1) of the Directive was ***explicitly transposed and fully implemented***. The Art. 76(4) JCA provides that the interrogation of minors conducted by the police and the state attorney shall be recorded with an audio-video device.

Article 9(2) of the Directive was ***not implemented***. The Art 76 JCA does not provide for any exception from the obligation of audio-video recording of the interrogation of minors when conducted by the police and state attorney. Therefore, this provision is not implemented.

Article 9(3) of the Directive was ***not implemented***. The Juvenile Courts Act and Criminal Procedure Act do not have any provisions in this regard, but it can be regarded as implied.

Limitation of deprivation of liberty

Article 10(1) of the Directive was ***de facto and partially implemented.*** The arrest and police detention have strict time-limits of duration (Art. 63 JCA). Art. 66(1) CPA provides that the pre-trial detention can be imposed on a juvenile only as a last resort, in proportion to the gravity of the offense and the expected sanction, in the shortest necessary time and only if its purpose cannot be achieved by precautionary measures, temporary accommodation or pre-trial detention in a home. However, it is a partial implementation since it does not implement a request that due consideration shall be taken of the age and individual situation of the child. The total duration of pre-trial detention of juveniles is set in Art. 77(1) and (2) CPA and it may not exceed one half of the duration of detention of the adult defendants.

Article 10(2) of the Directive was ***de facto and fully implemented***. Art 66(1) JCA stipulates that a pre-trial detention can be imposed on a juvenile only as a last resort. According to the Art. 63(2) and (3) JCA the juvenile judge must interrogate the arrested juvenile within twelve hours of his surrender to the custody supervisor and then order a pre-trial detention or release the arrested juvenile. There is

a right to appeal against the decision of the juvenile judge. In pre-trial proceedings the pre-trial detention may last for a maximum of one month. For justified reasons, it can be extended for another month at most, and if a preparatory procedure against a juvenile is being conducted for a maximum of another month (Art. 77(2) JCA). After the submission of the proposal for imposing a juvenile sanction, the existence of legal conditions for further application of the measure of pre-trial detention by placement in a closed institution until the decision becomes final has to be examined every month from the day the previous decision becomes final (Art. 77(2) JCA). In addition to ex officio review, the CPA in Art. 128 provides that the defendant and his defence counsel may file a motion to the court to vacate investigative imprisonment from the moment the indictment is handed over until the judgment becomes final. CPA also stipulates that a case in which investigative imprisonment has been ordered shall be dealt with especially urgently (Art. 122(3) CPA).

Alternative measures

Article 11 of the Directive was ***de facto and fully implemented.*** The Art. 66(1) JCA provides that the pre-trial detention will be imposed, among other, only if its purpose cannot be achieved by precautionary measures, temporary accommodation or pre-trial detention in a home. The specific rules on precautionary measures and temporary accommodation are provided in Art 64 and Art. 65 JCA. In comparison to adult perpetrators, the Juvenile Courts Act does not provide for a bail.

Specific treatment in the case of deprivation of liberty

Article 12(1) of the Directive was ***de facto and fully implemented.*** Art. 63(5) JCA provides that a juvenile has to be separated from adult detainees in the (police) detention unit. In regard to pre-trial detention, the envisaged closed prison institutions are still not established, and the juveniles are detained in special prison units for juveniles within the existing prisons. Art. 13(5) of the Regulation on Household Order in Prisons for Execution of Detention stipulates that a juvenile prisoner has to be accommodated separately from an adult.

Article 12(2) of the Directive was ***not implemented.*** JCA and Regulation on the admission and treatment of arrestees and detainees and on the records of detainees in a police detention unit provide for no exception from the rules in Art. 63(5) JCA and Art. 10a(3) of the Regulation that a juvenile has to be separated from the adult detainees in the police detention unit, nor when it is considered to be in the child's best interest, nor in the exceptional circumstances.

Article 12(3) of the Directive was ***explicitly transposed and fully implemented***. Art. 66(2) JCA provides that a juvenile who reaches the age of eighteen during pre-trial detention shall remain in a closed institution if this is justified in view of the circumstances concerning the juvenile and if it is in the best interests of other juveniles placed with him.

Article 12(4) of the Directive was ***explicitly transposed and fully implemented***. Art. 66(2) provides that a juvenile's best interest is a prerequisite for detaining him or her with young adults: "a juvenile who reaches the age of eighteen during pre-trial detention shall remain in a closed institution… if it is in the best interests of other juveniles placed with him."

Article 12(5)(1) of the Directive was ***de facto and partially implemented***:

a) the physical and mental developments are ***fully implemented*** with several provisions of the Regulation on Household Order in Prisons for Execution of Detention. Art. 15(3) of the Regulation provides that the juvenile prisoners shall be provided with food in accordance with the opinion of a doctor and Art. 19(2) of the Regulation that they are allowed ten visits per month lasting at least thirty minutes, and visits by representatives of the competent social welfare centre. In addition to that, the Regulation has provisions on the accommodation (Art. 13(4) of the Regulation), personal hygiene (Art. 14 of the Regulation), health (Art. 16 of the Regulation), movement in the open air (Art. 17 of the Regulation) and free time activities (Art. 25 of the Regulation).

b) the education and training, including where the children have physical, sensorial or learning disabilities are only ***partially implemented*** through the provision that during the placement in a closed institution, the juvenile should be provided with work and instruction useful for his upbringing and occupation. However, taking into account Art 124(4) of the Juvenile Courts Act, i.e. that the closed prison institutions are not yet established and that the Regulation on Household Order in Prisons for Execution of Detention does not mention education and training at all, it can be concluded that this right is not implemented.

c) the effective and regular exercise of their right to family life is ***fully implemented.*** Art. 19(2) and (4) of the Regulation on Household Order in Prisons for Execution of Detention provide ten visits per month lasting at least thirty minutes, or visits of a longer duration in justified cases. Art. 21(3) of the Regulation obligates the prison to provide the prisoner who does not have his own funds with the equipment for correspondence with his family, and Art. 22(1) of the Regulation provides for telephone calls to persons approved by the competent court.

d) the access to programmes that foster the development and the reintegration into society is ***partially implemented*** through the Art. 24(1) Regulation on Household Order in Prisons for Execution of Detention which allows prisoners to work in the prison premises in accordance with the possibilities of the prison, and outside the prison under supervision with the approval of the competent court. The Art. 66(3) JCA which stipulates that the juvenile should be provided with work and instruction useful for his upbringing and occupation is unfortunately not applied since the closed prison institutions are not yet established.

e) respect for their freedom of religion or belief is ***fully implemented.*** According to the Art. 26(1) of the Regulation on Household Order in Prisons for Execution of Detention, religious rites are organized for a large number of prisoners of the same religion, and a prisoner may be visited by a religious official upon the approval of the competent court. In addition to that, the meals would be appropriate to religious requirements (Art. 15(1) of the Regulation).

Article 12(5)(2) of the Directive was ***not implemented***. There is no explicit provision that the measures taken should be proportionate and appropriate to the duration of the detention. However, the Regulation on Household Odred in Prisons for Execution of Detention in many cases quantifies the exercise of certain rights. For instance, the number of visits per month and their duration (Art. 19(2) of the Regulation), the time for the movement in the open air (Art. 17(1) of the Regulation), the organization of the activities in free time according to the possibilities of the prison (Art 25(1) of the Regulation), the regulation of the work in accordance with the possibilities of the prison (Art. 24(1) of the Regulation) and organization of the religious rites only for a large number of prisoners (Art. 26(1) of the Regulation. In this regard, it has to be stated that the exercise of the rights is not connected to the duration of the detention as stated in the Directive.

Article 12(5)(3) of the Directive was ***de facto and fully implemented.*** Regulation on the admission and treatment of arrestees and detainees and on the records of detainees in a police detention unit, which deals with the cases of the deprivation of liberty other than detention (arrest and police detention). In Art. 3 provides that the detention must be carried out in such a way as not to offend the person and dignity of the detainee, while preserving his physical and mental health, taking care to fulfill the purpose for which detention was ordered and to maintain the necessary order in the detention police unit and in Art. 8 that the detainee has to be provided with the necessary health care immediately. Art. 20, Art. 21, Art. 24, and Art 25 of the Regulation contain additional rules in this regard.

Article 12(5)(4) of the Directive was ***not implemented***. The right to education and training, including where the children have physical, sensory or learning disabilities, the effective and regular exercise of the right to family life and the access to programmes that foster their development and their reintegration into society are not implemented in the situations of deprivation of liberty other than (pre-trial) detention, ie during police detention.

Article 12(6) of the Directive was ***not implemented***. The Juvenile Courts Act does not implement the requirement that the children who are deprived of liberty can meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements. According to the Art 18a(1) of the Regulation on the admission and treatment of arrestees and detainees and on the records of detainees in a police detention unit stipulates that the parent, guardian, or professional employee of the social welfare centre must be present during the admission of the juvenile to the detention police unit, ie his release, but it does not regulate it in a form of a meeting with juvenile.

Timely and diligent treatment of cases

Article 13(1) of the Directive was ***de facto and partially implemented.*** Art. 4 JCA provides those criminal proceedings against a minor, against a young adult and in cases of criminal protection of children are urgent, and Art. 59 JCA that bodies participating in juvenile proceedings and other bodies and institutions requesting information, reports or opinions shall act most urgently in order to complete the procedure as soon as possible. The Croatian provisions do provide those cases involving children are urgent, but the request that they are treated with "due diligence" is missing.

Article 13(2) of the Directive was ***de facto and partially implemented.*** Art. 53(2) JCA provides that when examining the juvenile and taking other actions in which the juvenile is present, s/he will be treated with caution, so that, given the psychological development and personal characteristics of the juvenile, the conduct of criminal proceedings does not harm the development of her/his personality. The provision precedes the Directive and does not contain all the elements required by it. The request of the treatment in a manner that respects dignity is omitted. Besides that, the provision provides that the treatment has to be appropriate given the "psychological development and personal characteristics" of the juvenile instead of the "age, maturity and level of understanding". The "special needs" (including any communication difficulties) are also not mentioned.

Right to protection of privacy

Article 14(1) of the Directive was ***de facto and fully implemented.*** Art. 60 JCA provides that the inquiries and proceedings against a minor are secret. The content and course of the proceedings against the minor or the decision made in that procedure may not be published without the approval of the competent authority and only the part of the proceedings, or only the part of the decision may be published, but then the name of the minor and other information on the basis of which it may be concluded which minor is involved should not be stated (Art. 60(1) to (3) JCA). When delivering the decision on conducting the preparatory procedure, the state attorney warns the injured party and the victim that the procedure against the minor is secret and that disclosing the secret is a criminal offence (Art. 75(3) JCA). And finally, according to the Art 34 JCA, the provision of the Criminal Code on the public announcement of a verdict does not apply to a juvenile perpetrator of a criminal offense.

Article 14(2) of the Directive was ***de facto and fully implemented.*** The Art. 388(1)(1) CPA provides that the council shall exclude the public for all or part of the trial to protect a person under the age of eighteen. In addition to that, Art. 60(1) JCA provides that the inquiries and proceedings against a minor are secret.

Article 14(3) of the Directive was ***not implemented.*** The Juvenile Courts Act has the provision in Art 60(1) that the inquiries and proceedings against a minor are secret. However, the competent authority can approve the publishing of the content and course of the proceedings against the minor, but then the name of the minor and other information on the basis of which it may be concluded which minor is involved should not be stated (Art 60 (2) and (3) JCA). This solution is contrary to the rule that the records referred to in Article 9 cannot be publicly disseminated.

Article 14(4) of the Directive was ***de facto and partially implemented.*** The Criminal Code in Article 307 prescribes that the violation of the secrecy of the proceedings is a criminal offence punishable by up to three years imprisonment. The example of self-regulatory measures is the Article 16 of the Code of Honour for Croatian Journalists, However, it only requests for special attention when reporting on children and minors: “That special attention and responsibility is required when reporting on accidents, family tragedies, illnesses, children and minors, in court proceedings, respecting the presumption (presumption) of innocence, integrity, dignity and feeling of all parties to the dispute.”

Right of the child to be accompanied by the holder of parental responsibility during the proceedings

Article 15(1) of the Directive was ***explicitly transposed and fully implemented***. Art. 53b(1) JCA provides that a minor has the right to be accompanied by his or her parents or guardian during the court hearing and court proceedings.

Article 15(2) of the Directive was ***explicitly transposed and fully implemented***. Art. 53b(3) JCA provides that if both parents or guardian are unavailable or their identity is unknown or there are circumstances that would significantly jeopardise criminal proceedings or the escort of the parent or guardian is contrary to the best interests of the minor, the minor is entitled to be accompanied by another appropriate adult chosen by himself and accepted as such by the body conducting the proceedings or conducting the action. In addition to that, Art. 53b(4) JCA provides that if the minor has not selected another suitable adult or if in relation to that other relevant adult selected by the minor there are circumstances that have not been accepted by the body conducting the procedure or conducting the action, that authority shall request the appointment of a special guardian for the minor to accompany him during the actions.

Article 15(3) of the Directive was ***explicitly transposed and fully implemented***. Art. 53b(3) JCA provides that the minor will have the right to accompany his parents or guardian during the continuation of court hearing or court proceedings when the earlier circumstances cease to exist.

Article 15(4) of the Directive was ***explicitly transposed and fully implemented***. Art. 53b(2) JCA provides that the juvenile shall have the right to be accompanied by the parent or guardian during other actions in the proceedings of which he is present if it is in his/her best interests and if the presence of the parent or guardian will not jeopardise the criminal proceedings.

Right of children to appear in person at, and participate in, their trial

Article 16(1) of the Directive was ***explicitly transposed and fully implemented***. The Art. 53(1) JCA stipulates that a minor cannot be tried *in absentia*. The Art. 53a(2) JCA provides that a minor always has to be taught orally in an understandable way about the meaning of the rights from the instruction. It is the duty of the authority taking action to ensure that the minor has understood the instruction on rights. The minor is invited to a panel session (art, 84(1) JCA). At the session, the president of the panel has to determine the identity of the minor, inform him of the rights referred to in Article 239 (1) CPA and ensure that the juvenile has understood the instruction on rights. The president also instructs the juvenile that he may, but need not, make a statement about the commission of the criminal offence (Art. 85(1) and (2) JCA).

Article 16(2) of the Directive was ***de facto implemented***. Since the JCA does not provide for *in absentia* trials of children, it is not needed to implement this provision on the right to a new trial or to another legal remedy.

European arrest warrant proceedings

Article 17 of the Directive was ***explicitly transposed and fully implemented***. Act on Amendments to the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (2019) in Art. 24d(1) stipulates that, if the requested person is a child (under the age of 18), the police shall, upon arrest, immediately inform her of her rights under Article 24, paragraph 3 of the Act and of the following rights: a) the right to inform the legal representative of the child of all the rights of the child referred to in Article 24, paragraph 3 of this Act and this paragraph, and the right to accompany the legal representative of the child during the procedure, b) the right to protection of privacy, the right to medical examination and medical assistance, c) the right to restrict imprisonment and the use of alternative measures, including the right to periodic review of detention. Among other things, the Act stipulates that proceedings before a judge of investigation and proceedings before an extra-judicial panel shall be conducted with appropriate application of regulations governing the treatment of juvenile offenders, unless otherwise provided (Art. 24d(4) AJCCMEU) and that the procedure shall be carried out while securing the right to accompany the legal representative of the child and during the hearing before the court (Art. 24d(5) AJCCMEU).

Right to legal aid

Article 18 of the Directive was ***de facto and fully implemented***. Art. 54(1) JCA provides that a juvenile must have a defence attorney from the first action taken on grounds of suspicion that he/she committed the criminal offense until the criminal proceedings have been legally concluded. The juvenile must also have a defence attorney when deciding to replace the correctional measure with a facility correctional measure and at the subsequent imposition of juvenile prison. Since the JCA requests that children who are suspects or accused persons in criminal proceedings have a defence attorney throughout the proceedings, the right to legal aid is also ensured and the question of the costs of legal aid will be resolved in the final judgement.

Remedies

Article 19 of the Directive was ***de facto and fully implemented***. The JCA provides for specific remedies for children who are suspects or accused persons in criminal proceedings only in regard to their detention. In other cases, the remedies provided in Criminal Procedure Act can be used. According to the Article 239a CPA after the delivery of the decision on conducting the investigation, the defendant who considers that he has been denied or violated a certain right contrary to the law, may submit a written complaint to the State Attorney. According to the Article 213b CPA, the defendant has the right to file an objection with the investigating judge if the State Attorney has not made a decision on a crime report after the expiration of six months from its entry in the register of crime reports or from the arrest. According to the Art, 226(3) CPA in the course of the investigation the defendant may file a complaint against the delaying of the proceedings or other irregularities.

Training

Article 20(1) of the Directive was ***explicitly transposed and fully implemented.*** The Police Duties and Powers Act in Art 18(1) provides that police authority over minors, young adults and in matters of health, development and upbringing and criminal law protection of children shall be exercised by a specially trained police officer for juveniles, who shall take care to protect the best interests of minors and protect their privacy. Croatia explicitly prescribed that only specially trained police officers for youth can treat children. However, unlike the Directive, it did not prescribe which specific training these persons must undergo. The Art. 126 CPA provides, however, that the Ministry in charge of Justice and the Judicial Academy provide conditions for professional development of persons working in juvenile delinquency and criminal protection of children, organizes in cooperation with courts, state attorney's offices, scientific-educational institutions and lawyers' associations occasional professional consultations, seminars, knowledge tests and other forms of additional professional training of judges, state attorneys and other professionals in these jobs.

Article 20(2) of the Directive was ***de facto transposed and fully implemented.*** The Juvenile Courts Act provides both for judges (including jurors) and prosecutors with special competence in criminal proceedings involving children and for their specific training. Juvenile judges and juvenile state attorneys must have a strong preference for the upbringing, needs and benefits of juveniles and have a basic knowledge of criminology, social pedagogy, youth psychology and social work for young people (Art. 38 JCA). Juvenile lay judges are appointed from the ranks of professors, teachers,

educators, and other persons who have work experience in professional educational work with young persons.

Article 20(3) of the Directive was ***de facto transposed and fully implemented.*** Croatia promotes the specific training of lawyers who deal with criminal proceedings involving children by requesting that all ex-officio defence counsel must have a strong inclination in that regard and be on the list of youth lawyers of the Croatian Bar Association (Art. 54(4) JCA). However, if the minors's defence counsel is chosen by the juvenile or other authorized persons, the request is only that he is a lawyer (Article 54(3) of Juvenile Courts Act).

Article 20(4) of the Directive was ***de facto transposed and fully implemented.*** The basis for it is Art 126 CPA stipulating that the Ministry in charge of Justice and the Judicial Academy provide conditions for professional development of persons working in juvenile delinquency and criminal protection of children, organizes in cooperation with courts, state attorney's offices, scientific-educational institutions and lawyers' associations occasional professional consultations, seminars, knowledge tests and other forms of additional professional training of judges, state attorneys and other professionals in these jobs.

9.2 Case-law

Since the research of the jurisprudence was conducted only four months after the Directive's transposition, no national case law has been identified.

10 Directive (EU) 2016/1919: Legal aid

10.1 Legislation

The main transposing law is Act no. 126/19 amending the Criminal Procedure Act (CPA) which was adopted in December 2019. In addition, Act no. 70/2019 which amends the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union (AJCCMEU) was adopted in July 2019. The amendments to the CPA and AJCCMEU entered into force after the Directive's transposition deadline of 5 May 2019. The amendments to the CPA entered into force on 1 January 2020 and those to the AJCCMEU entered into force on 1 August 2019.

In Croatia, the system of legal aid in criminal proceedings is a mixture of three different forms of legal assistance at the expense of the State budget: provisional legal assistance of a defence attorney (provisional legal aid), legal assistance of a defence attorney (legal aid *stricto sensu*), and mandatory defence.

As regards provisional legal aid, after suspects or arrested persons express their wish to have access to a legal aid lawyer, an application is made by the authority (usually the police), which is undertaking the measure (arrest) or a procedural action (interrogation and other evidence-gathering actions), which triggers the right to legal aid. That authority must immediately inform the judge of investigation about the wish of the suspect or the arrested person, and the judge of investigation must render a decision on the appointment of a provisional legal aid lawyer. Both means and merits tests are applied in taking this decision. There is a system of judges of investigation on duty, which ensures that these decisions are undertaken swiftly, but the law does not clearly require that provisional legal aid is granted without undue delay.

The CPA does not provide a decisional process on the granting of provisional legal aid, but only the decision on the appointment of a provisional legal aid lawyer. This is because every arrested person has the right to provisional legal aid. Also, every suspect who is suspected of a criminal offence punishable by more than five years imprisonment and who is participating in individual evidence-gathering actions has the right to provisional legal aid. There is no possibility to refuse provisional legal aid.

Once suspects or arrested persons acquire the status of accused persons, that is, when the public prosecutor has made a decision to start criminal proceedings against the person (i.e. opened simplified investigation or investigation against the person), they are eligible to legal assistance of a defence attorney at the expense of the State budget (legal aid). The accused person needs to make a reasoned request for legal aid to the State Attorney, before the indictment has been filed, or to the court, after the indictment has been filed. A decision on the granting of legal aid is made by the State Attorney, or the president of the panel or by the judge. Both the merits and means test apply. In case of a negative decision for the accused, there is a possibility of an appeal against the reasoned written ruling. In case of a positive decision on the granting of legal aid, the president of the court renders a decision on the appointment of a legal aid lawyer.

The CPA prohibits the carrying out of a procedural action before a decision has been taken on the merits of a request for legal aid and before a legal aid lawyer has been appointed, except in urgent cases. This is intended to ensure that decisions on legal aid are rendered swiftly but, again, the law does not clearly require that legal aid is granted without undue delay.

In certain situations, the CPA requires that a defence attorney represents the suspect or the accused person. These are the cases of mandatory defence. The costs of legal representation in the case of mandatory defence are borne by the State. In these cases, if the suspect or the accused person does not choose a defence attorney, a defence attorney will be appointed to him/her. A decision on the appointment of a mandatory lawyer will be rendered by the president of the court, on the proposal of the judge, the state attorney, or the police. The law does not clearly require this is done without undue delay.

There is no decision on the granting of mandatory defence, only a decision on the appointment of a mandatory defence lawyer, and no further merits or means tests are applied.

The Croatian law foresees cost recovery – a convicted person may be obliged to repay the costs of legal aid if it is established that he/she has the means to do so.

In all three scenarios described above, the Bar Association provides the court with a list of lawyers who are willing to act as ex officio lawyers in criminal proceedings from which the legal aid lawyer is appointed.

Article 1(1) of the Directive has been ***indirectly implemented*** into Croatian law. The subject matter of the Directive is reflected in the transposing legislation. The latter establishes the right to legal aid for suspects and accused persons in criminal proceedings, as well as for persons who are the subject of EAW proceedings.

Article 1(2) of the Directive has been ***indirectly implemented*** into Croatian law. The way that the Directive on legal aid was transposed into Croatian law did not limit the rights provided by Directives 2013/48/EU and (EU) 2016/800.

Article 2(1)(a) and (b) have been ***fully implemented*** into Croatian law. In relation to Article 2(1)(a), the arrested person has the right to legal aid from the moment of the arrest. For other categories of persons who are deprived of liberty for the needs of criminal procedure – persons in custody and in pre-trial detention – provisions on mandatory defense apply. Provisions on mandatory defense in Croatian law have the same effect as the provisions on legal aid. The costs of mandatory defense are covered by the State. However, at the end of the proceedings, if the accused is found guilty, he/she may be ordered to cover the expenses of mandatory defense, if he/she has the means to do so. In relation to Article 2(1)(b), costs of mandatory defense are paid by the State. However, at the end of the proceedings, if the accused is found guilty, he/she may be obliged to reimburse the expenses of mandatory defense, if he/she has the means to do so.

Article 2(1)(c) has been only ***partially implemented*** into Croatian law. Croatian law grants the right to free legal aid to those suspects and accused persons who are required or permitted to participate in individual evidence-gathering actions. With regard to evidence gathering actions covered, Croatia law goes above the demands of the Directive because it grants the right to free legal aid also to those suspects and accused persons who are to be interrogated by the police, the investigator or the public prosecutor. However, Croatian law is not in line with the Directive because it limits this right only to those suspects and accused persons who are prosecuted for criminal offences for which a sentence of imprisonment of more than five years is prescribed.

Article 2(2) of the Directive has been only ***partially implemented*** into Croatian law. With regard to the requested person, the provisions of the Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union are not clear enough to guarantee a right to legal aid for the requested person arrested in Croatia.

Article 2(3) of the Directive has been ***fully transposed*** into Croatian law. A person who was not initially a suspect or an accused persons but becomes a suspect or an accused persons in the course of questioning by the police also has the right to legal aid under Croatian law.

Article 2(4) of the Directive ***has not been implemented*** into Croatian law. The Directive has not been officially transposed into the Misdemeanors Act. Although the Misdemeanors Act stipulates that, where that law does not contain the relevant provisions on particular issues of procedure, the provisions of the Criminal Procedure Act will apply (Article 82(3)), it is difficult to assess whether this actually ensures the transposition of the provisions of the Directive.

Article 3 of the Directive has been ***fully transposed*** into Croatian law. In Croatia, Directive on legal aid has been transposed through 3 legal institutes - provisional legal assistance of a defence attorney at the expense of the budget, legal assistance of a defence attorney at the expense of the budget and mandatory defence. In all three cases, the costs of legal assistance are covered by the State. However, if, at the end of the proceedings, in a judgment in which the accused has been found guilty it is established that he/she has enough means to cover the costs of legal assistance, he/she will be obliged to do so.

Article 4(1) of the Directive has been only ***partially implemented*** into Croatian law. With regard to the arrested person, Croatian law applies the means test. There is a statutory presumption that in the case of the arrestee the merits test is fulfilled. With regard to suspects and accused persons who participate in individual evidence gathering actions, a means test is applied. In the latter situation, merits test is also applied, but there is a statutory presumption that the merits test is met only in case

of criminal offences punishable by imprisonment of more than five years, which is contrary to the provisions of the Directive.

Article 4(2) of the Directive has been ***fully implemented*** into Croatian law. With regard to free legal assistance for suspects and accused persons, Croatian law applies both, the means test and the merits test.

Article 4(3) of the Directive has been ***fully implemented*** into Croatian law. When applying the institute of the defense attorney at the expense of the budgetary funds, Croatian law applies the means test. The accused is required to make it probable that he/she is unable to cover his/her defense expenses without endangering his/her own dependency and the maintenance of his/her family or persons he/she is legally obliged to support. In order to show his/her financial situation, he/she is required to submit evidence. When applying the institute of provisional legal assistance of a defence counsel at the expense of budgetary funds, Croatian law applies the means test. However, in order to fulfill this test, it is enough for the suspect or the accused person to make a statement that, owing to his/her financial situation, he/she is not able to cover the costs of legal assistance.

Article 4(4) of the Directive has been only ***partially implemented*** into Croatian law. When applying the institute of a defence counsel at the expense of budgetary funds, Croatian law applies the merits test and takes into account the complexity, severity and special circumstances of the case. When applying the institute of provisional legal assistance of a defence counsel at the expense of budgetary funds, Croatian law applies the means test. This test is applied differently with regard to the arrested person, on one side, and with regard to the suspect and the accused person who is required or permitted to attend certain evidence-gathering actions. With regard to the arrested person, there is a statutory presumption that the merits test is fulfilled in all cases. With regard to the suspect and the accused person who are not deprived of liberty, there is a statutory presumption that the merits test is only fulfilled in cases of criminal offences punishable by imprisonment of more than five years. The latter statutory presumption is not in accordance with the provisions of the Directive.

Article 4(5) of the Directive has been ***fully implemented*** into Croatian law. The right to free legal assistance for the arrested persons activates already at the moment of the arrest. If the person has not been arrested, the right to legal aid is activated before the questioning by the police, public prosecutor or the investigator, or before individual evidence-gathering actions are carried out.

Article 4(6) of the Directive has been ***fully implemented*** into Croatian law. In Croatian law, legal aid is granted only for the purpose of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.

Article 5(1) of the Directive has been only ***partially implemented*** into Croatian law. Under Croatian law, upon arrest, the requested person is informed by the police that he/she has is entitled to a defense attorney in the Republic of Croatia, also when the defense is not mandatory, with the warning that the decision as to who will bear the costs of such a defense attorney will depend on the person's subsequently determined financial status. The purpose of this provision was to transpose the provisions of the Directive into Croatian law. However, this provision is not clear enough to be fully in line with the provisions of the Directive.

Article 5(2) of the Directive ***has not been implemented*** into Croatian law. There is no right for the requested person who has appointed a lawyer in Croatia which acts as the issuing Member State to appoint a legal aid lawyer.

Article 5(3) of the Directive has only been ***partially implemented*** into Croatian law. Croatia applies a means test. However, the criteria for its application are not precisely prescribed by law.

Article 6(1) of the Directive has been ***fully implemented*** into Croatian law. A decision on the appointment of a defence counsel in the case of provisional legal assistance of a defence counsel at the expense of the budget is made by the judge of investigation. A judge is immediately informed about the request of the suspect and the accused person. A defence attorney is assigned by the judge of investigation. A decision to grant a request for a defence counsel at the expense of the budget is made by the public prosecutor, the president of the panel or the individual judge. If the decision was to grant a request, the defence counsel is assigned by the president of the court.

Article 6(2) of the Directive has been ***fully implemented*** into Croatian law. All decisions on legal aid are made by written and reasoned rulings (of the public prosecutor or the judge).

Article 7(1) of the Directive has been only ***partially implemented*** into Croatian law. The fact that the lawyer appointed ex officio (including a legal aid lawyer) receives only 30 percent of the remuneration he/she would be entitled to as a chosen lawyer affects the quality of the legal aid in a negative way.

Article 7(2) of the Directive ***has not been implemented*** into Croatian law.

Article 7(3) of the Directive ***has not been implemented*** into Croatian law.

Article 7(4) of the Directive has only been ***partially implemented*** into Croatian law. A provision of Art. 73(4) CPA whereby a defendant may for justified reasons only ask for the appointed defence

counsel to be replaced by another, does not apply to requested persons in the EAW proceedings, but only to the suspect and the accused person in the criminal proceedings.

Article 8 of the Directive has been only ***partially implemented*** into Croatian law. The right of appeal which is guaranteed by Art. 72(4) CPA to the accused who has been denied the right to legal aid, does not apply to requested persons arrested in the framework of the EAW proceedings.

Article 9 of the Directive has been only ***partially implemented*** into Croatian law. In deciding on the need to appoint a defence counsel at the expense of the budget, special circumstances of the case are also taken into consideration. These special circumstances include individual circumstances of the suspect or the accused person, including his/her vulnerability. There is no comparable provision in relation to the provisional legal assistance of a defence attorney at the expense of the budget.

Overall, the transposition of Directive (EU) 2016/1919 by Croatia is ***partially complete***. Main issues in Croatia relate to a restrictive merits test, the quality of legal aid services and the lack of training. The strict requirements for the merits test mean that some suspects will be easily excluded from the right to legal aid, thereby limiting the scope of the national law in relation to the scope of the Directive. There is a lack of specialisation and training of legal aid lawyers, their low remuneration, and the lack of training of staff involved in the legal aid decision-making.

10.2 Case-law

No national law has been identified. The research has included the jurisprudence of the Supreme Court of the Republic of Croatia and the High Criminal Court of the Republic of Croatia which is available on the following web page: https://sudskapraksa.csp.vsrh.hr/search

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

11.1 Legislation

The Directive was transposed by the Amendment of the Criminal Procedure Act from 2019.[79] However, it has introduced only one provision (Article 3(2) CPA) related to the burden of proof and other implementing provisions already existed in the Criminal Procedure Act.[80]

Presumption of innocence is a constitutional principle in Croatia proclaimed in Article 28 of the Constitution of the Republic of Croatia that reads "Everyone is presumed innocent and may not be held guilty of a criminal offence until such guilt is proven by a final court judgment." It is repeated by Article 3(1) of the CPA.

Article 2 of the Directive is ***de facto transposed and fully implemented*** as it applies to all suspects and accused persons, natural as well as legal persons. It applies to all stages of the criminal proceedings from the moment when a person is suspected or accused until the final judgment (Article 3(1) CPA). As soon as a person becomes a suspect, he/she must be informed about the right to silence and therefore the summons to a suspect to be interrogated by the police must specify what the suspect is suspected of and the instruction regarding his/her right not to provide information or answer questions (Article 208.a(2)(3) CPA), the Letter of rights to the arrested person, accused person with coercive or probative procedural act shall include a notice on the right to remain silent (Article 108.a(1)(2); Article 239(2) CPA).

Public references to guilt

Article 4(1) of the Directive was ***de facto/indirectly transposed and fully implemented.*** There are no special provisions forbidding public statements referring to a suspect or an accused as being guilty made by public authorities. However, it is generally proclaimed in the Article 3(1) CPA and it is well known and recognized by public authorities, media and citizens that it is forbidden to refer to the defendant during criminal proceedings as being guilty. Croatia was in 2010 found responsible for a breach of the presumption of innocence because of the statements of the President of the Republic, the Prime Minister or the Minister of the Interior (Peša v. Croatia, April 8, 2010 §§ 149).

The second sentence of Article 4(1) of the Directive is implied in the provisions of the CPA that requires certain level of suspicion for preliminary decisions of a procedural nature such as grounds

[79] Act on Amendments to the Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), Official Gazette (*Narodne novine*), no. 126/2019

[80] The Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), Official Gazette (*Narodne novine*), no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17 i 126/2019

of suspicions for conducting inquiries (Article 207(1)), a reasonable suspicion for conducting investigation (Article 216(1)), incriminating evidence for indictment (Article 341(2) CPA and so on).

Article 4(2) of the Directive was ***de facto/indirectly transposed and fully implemented.*** The measures available in the event of a breach of the obligation in Article 4(1) are mostly available outside the criminal justice system as compensation for damages. Within the criminal procedure and in the appellate proceedings when a first instance judgment has been rendered the remedies are related to the admissibility of evidence and the request for recusation of a judge. However, during the pre-trial and trial procedure there is no particular remedy related to the violation of the presumption of innocence. If a judge refers in a judicial decision or makes a public statement to a suspect or an accused person as being guilty, s/he shall be recused from the trial as being partial (Article 32(2) CPA). Under Article 21(1) Media Law a publisher who causes other damage by information published in a media is required to compensate for it. So, if a newspaper breaches the obligation not to refer to a suspect or accused person as guilty, its publisher can be sued before civil court for damages. Under Article 19(2) of the Law on Obligations, the rights of the person include reputation, honor, dignity, privacy of personal and family life and under Article 1100(1) In the event of a violation of a person's rights, the court shall, if it finds that the gravity of the violation and the circumstances of the case justify it, award a fair financial compensation.

Article 4(3) of the Directive was ***de facto/indirectly transposed and fully implemented.*** The CPA provides for the possibility that public authorities disseminate information on the criminal proceedings that are in public interest during the inquiry (pre-investigation) and the investigation. Under Article 206.f(3), although the activity undertaken in the course of an inquiry shall be secret the body undertaking it may, where the public interest so requires, inform the public of the course of the inquiry in the manner laid down in a special act. The competent authority shall do the same with regard to the further stages of the criminal proceedings that are as a rule not secret. Under Article 9(1) of the Act on Police Affairs and Powers The police, at their own discretion or upon request, directly or through the mass media, inform about events and occurrences within their scope that are of interest to the citizens, about the measures taken and the safety conditions in the area.

Presentation of suspects and accused persons

Article 5(1) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Under Rules on Household Order in Prisons for Execution of Detention decision on restraining measure during bringing in and out detainees is not general but individual specific one-time measure as the necessity of tying (restraining) as a special measure for maintaining order and security, shall be assessed by each bringing in and out of prisoners (Article 30(1)). Under the same Act the decision on restraining

measures at the trial or public judicial hearing is made by the court and not the police (Article 30(2)). Under the Regulation on the Method of Operation of Police Officers as a rule bringing or apprehending a child or a minor is carried out by police officers in civilian clothes in an official vehicle without police markings (Article 70), and exceptionally, a police officer shall tye (restrain) a person s/he is apprehending, bringing in or arresting if s/he threatens to escape, resist or attack a police officer, injure him/herself or injure another person (Article 133(6)), and a police officer will not tie a minor, a pregnant woman in a visible state of pregnancy, older and visibly sick or helpless person and seriously disabled, unless such person directly threatens the life of a police officer, the life of another person or his/her own life (Article 133(7)). Pursuant to the Juvenile Courts Act tying (restraining) a minor is a measure that is applied as a last resort and only while the minor is dangerous and therefore a minor shall be brought in, without tying him/her, by police officers in civilian clothes and in a vehicle without police markings, unless this is not possible due to circumstances and exceptionally a minor may be tied if he/she is dangerous to his/her own or other's life or safety (Article 55(2 and 3)).

Article 5(2) of the Directive was ***de facto/indirectly transposed and fully implemented.*** The Execution of Prison Sentence Act enables the application of measures of physical restraint that are required for case-specific reasons for reasons listed in Article 5(2). It differentiates special measures and means of coercion. The special measures are hand tying and, if necessary, tying the legs with handcuffs or straps and may be applied to an inmate or a prisoner who has been detained if she or he endangers order or security of threatens to endanger order and security (Article 135(1)(2) point (6) and 135 (4)). Handcuffing should not be used as a punishment but solely for the purpose of restricting movement and may last for a maximum period of twelve hours in twenty-four hours (Article 138(1)(2)). Means of coercion are: 1) interventions to escort prisoners and defense techniques, 2) a stick, 3) a sprayer with permissible innocuous substances, 4) electric paralyze, 5) water jets, 6) irritating chemical agents, 7) firearms. They may be applied only when it is necessary to prevent the escape of a prisoner, physical assault on an official or other person, infliction of injury on others, self-injury, intentionally causing material damage, or to overcome the passive or active resistance of the prisoner (Article 141(1)). When special measures and means of coercion are applied to a prisoner who has been detained, the prison warden will notify the court that ordered detention on application of the measure (Article 135(4) and 141(5)). The Article 133(1-5) of the Regulation on the Method of operation of a Police Officer prescribes the manner of tying hands and legs. The hands are tied to person's back using binders (handcuffs) or other appropriate restraining means (belt, rope, tensioning strap, etc.) and exceptionally where there are reasonable grounds for doing so, when a person is under the supervision of at least two police officers, the person's hands may be tied in front. Only where the

use of the tying hands does not achieve the purpose of the tying, the legs may also be tied. The police officer shall use the means in such a way that the tying does not cause unnecessary physical pain or injury to the related person. As a rule, only one person is tied by one tying means, and exceptionally two persons of the same sex can be bound by the same means.

Burden of proof

Article 6(1) of the Directive was ***explicitly transposed*** by implementation provision of Article 3(2) of Act on Amendments to the CPA from 2019[81] that reads "Unless otherwise provided by law, the burden of proof in the process of establishing the guilt of a suspect, defendant or accused lies with the prosecutor." However, the Criminal Procedure Act[82] already contained provisions that ensured that the burden of proof is on the prosecution without prejudice to the judge's obligation to seek evidence and the right of the defence to submit evidence. The court and the state bodies participating in the criminal proceedings shall examine and determine with equal care both the facts incriminating the defendant and the facts to the benefit of the defendant (Article 9(1), CPA). The State Attorney's Office, the investigator and the police shall resolve independently and impartially any doubts about a criminal offence prosecuted *ex officio* and gather with equal care information on both the defendant's guilt and his/her innocence (Article 9(1), CPA). The defendant shall have the right to defend him/herself in person, propose evidence and participate in evidentiary and other procedural actions, and at the trial, or be assisted by a defence counsel of his/her own choice retained from the ranks of the Bar (Article 5(1) 1st sentence and 64(1) point 9, CPA).

There are two cases of reversed burden of proof prescribed by Criminal Code where the defendant has to prove that his/her statement is truthful. One is extended confiscation of proceeds of offence within the competence of the Office for the Suppression of Corruption and Organized Crime when if the perpetrator has or had property disproportionate to his/her lawful income, it shall be presumed that such property represents a material gain from the offences, unless the perpetrator makes it probable that its origin is lawful. The other is the offence of slander when a person who before anyone

[81] The Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), Official Gazette (*Narodne novine*), no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17 i 126/2019

[82] The Criminal Procedure Act (*Zakon o izmjenama i dopunama Zakona o kaznenom postupku*), Official Gazette (*Narodne novine*), no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17 i 126/2019

else, makes or disseminates a statement of fact which may harm his/her honor or reputation, has to prove that his/her statements are truthful and not false.

Article 6(2) of the Directive was ***de facto/indirectly implemented.*** The CPA already proclaimed that doubt regarding the existence of the facts which constitute the elements of the definition of the criminal offence, or which are conditions for the implementation of the criminal law, shall be decided in the judgment by the court in a manner which is more favourable for the defendant (Article 3(3)) and that the court shall render a judgment of acquittal if it has not been proven that the accused committed the offence s/he is charged with (Article 453(3) point 3).

Right to remain silent and right not to incriminate oneself

Article 7(1) of the Directive was ***de facto transposed and fully implemented.*** The right to remain silent is explicitly listed as the right of the defendant stated in the letter of the rights or oral warnings to the arrested and accused person during the criminal proceedings. The defendant shall have the right to present or not present his defence, refuse to provide an answer to a question asked, or to remain silent when questioned (Article 64(1) point 7 CPA). The letter of rights to the arrested person shall include a notice on the right to remain silent (Article 108.a(1) point 2 CPA) and the letter of rights for defendant must include information that s/he is not required to present his defence or answer questions (Article 239(1) point 2 CPA). The summons to a suspect must specify what the suspect is suspected of and the instruction regarding his/her right not to provide information or answer questions (Article 208.a(2) point 3 CPA).

Article 7(2) of the Directive was ***de facto transposed and partially implemented.*** Contrary to the right to remain silent which is explicitly stated in the letter of the rights or oral warnings to the arrested and accused person during the criminal proceedings, the privilege against self-incrimination is not stated in the letter of the rights. The right not to incriminate oneself is ensured through the right to remain silent and the CPA provisions that forbid the competent authorities to gather evidence from the defendant. Under Article 208(5) of the CPA if the grounds for suspicion of having committed or participated in the commission of a criminal offense arise in relation to the person from whom the police are collecting information during collection of information, it shall cease collecting information. Police may no longer collect information from that person, but may interrogate him as a suspect under the provisions of Article 208a of this Act. Under Article 261(4) of the CPA the seizure of objects shall not apply either to the defendant or persons who are exempted from the duty to testify.

It is forbidden to use force, threat, deceit or other similar means against the defendant in order to obtain from him/her a statement or a confession (Article 276(5) CPA). The defendant must be asked

questions clearly, accurately and explicitly, so that s/he may understand them completely. It may not be started from the assumption that the defendant confessed something s/he did not confess, nor may questions be asked that already contain an answer to be given (Article 277(1) CPA).

A witness is not required to answer particular questions if it is likely that s/he would thus expose him/herself or his/her close relative to criminal prosecution, grave embarrassment or considerable material damage and the authority conducting the proceedings shall instruct the witness thereof (Article 286(1) CPA).

The powers of the judge of investigation and the State Attorney to retain, open and deliver to him/her letters, telegrams and other shipments addressed to or sent by the defendant shall not apply to letters, telegrams and other shipments between the defendant and his/her defence counsel (Article 339(7) CPA).

In order to preserve the presumption of innocence and the right not to incriminate themselves, all statements and other materials made during the guilty plea negotiations between the accused and the prosecutor shall be removed from the file and cannot be used in the trial (Article 362(1 and 2) CPA).

There are two cases of violation of the Directive:

Temporary seizure of written notices of the defendant to the defence counsel is not permitted unless the defendant requires otherwise (Article 262(1) point 2, CPA), except in cases of criminal offences of penal protection of children (Art. 262/4 CPA). This exception **violates** the right to remain silent and right not to incriminate oneself and therefore the Directive as there are no case-specific reasons when the seizure would apply, but a defendant does not have these rights for a wide range of offences prescribed by Article 113 of the Juvenile Courts Act.[83]

The provision of Article 125(1) point 8 of the CPA violates the privilege of self-incrimination as detention ordered in case of reasonable suspicion that a defendant will destroy evidence or influence witnesses (Article 123(1)(2) CPA) will be abolished if he/she pleads guilty and describes the offence circumstantially and in detail. So, if a defendant incriminates him/herself and gives detailed information to the prosecutor how s/he committed the offence s/he will be released from prison.

Article 7(3) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Beside previously mentioned cases in which the competent authorities cannot require from the defendant to

[83] Juvenile Courts Act (Zakon o sudovima za mladež), Official Gazette (Narodne novine), No. 84/11, 143/12, 148/13, 56/15, 126/19.

surrender the objects and evidence to them, forbids the seizure of the communication between the defendant and the defence lawyer as well as interrogation of the *de facto* suspect without warnings (letter of rights), they can apply all the evidentiary measures, including through use of coercive powers or secretly, against the defendant such as: search, seizure or secret evidentiary measures such as surveillance and interception. The following provision relates only to the collection of evidence which has an existence independent of the will of the suspect or accused persons.

The search of a defendant shall be conducted by a person of the same sex, unless this is not possible due to circumstances of the search conduct. When searching a person, the body of the searched person shall not be penetrated nor shall artificial body parts or artificial organs attached to the body (artificial limbs, etc.) be taken off. It can be conducted by the police and the State Attorney (Article 251 CPA).

The physical examination of the defendant may be carried out also without the defendant's consent if this would not cause any harm to his/her health and if the evidence cannot be obtained in any other way (Article 326(1) CPA). In the case of criminal offences punishable by imprisonment for a term of five years or by a more severe penalty the physical examination of the defendant in the course of which body cavities are entered, or organ substitutes or aids attached to the body detached from it shall be carried out without the defendant's consent in cases where it is not possible to obtain evidence in any other way and where this can be done without causing any harm to the defendant's health (Article 326(3) CPA). The physical examination shall be performed by a physician and ordered by the court (Article 326(7 and 9) CPA).

Surgery on the defendant can be performed by order of the court only if the objects by means of which a criminal offence was committed are present in his/her body and cannot be otherwise taken out, only in case of listed serious criminal offence. In taking the decision on the surgery, the court shall, in order to avoid jeopardising the defendant's life and the risk of surgery, take into account the necessity of removing the aforementioned objects (Article 326(5) CPA).

Beside the defendant, blood and urine samples shall be taken from another person by a medical professional also without the said persons' consent if this would not cause any harm to their health and if this is necessary for establishing a fact that is of relevance to the criminal proceedings (Article 326(6) CPA).

The competent body may order the performance of a molecular genetic analysis enabling a comparison of the biological traces taken from the scene of crime or any other place at which any trace of a criminal offence is present with the biological samples taken from the defendant or enabling the identification of a particular person or a comparison of the said traces or samples with the results

of molecular genetic tests obtained pursuant to this Act or other acts (Article 327(1) and (2) point 2 CPA). The taking of samples of biological material from the defendant and the performance of molecular genetic analysis on the said samples shall be ordered by the State Attorney's Office (Article 327(5) CPA).

Article 7(4) of the Directive was ***de facto/indirectly transposed and fully implemented.*** As a rule, the Croatian Criminal Justice System does not provide for lower or remitted sentences due to cooperative behaviour of suspects and accused persons. However, there are three exceptions when a punishment may be remitted. Two are provided by the Criminal Code in case of cooperation of the leader or member of a criminal organisation (Article 102(3) CC) and a person who gives a bribe at the request and reports the offence before it is discovered or before s/he finds out that the offence has been discovered (the giving a bribe in business dealings (Article 253(3) CPA), the giving a bribe (Article 294 CPA) and the giving bribe for trading in influence (Article 296 CPA)). The third is provided by the Criminal Procedural Act in case of guilty plea (Article 360 and Article 417.a (6 and 7) CPA).

Article 7(5) of the Directive was **not implemented**. There are no provisions that the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned. However, they are implied in the right to remain silent and the privilege against self-incrimination and have been confirmed by the case law of the Supreme Court of the Republic of Croatia.

Article 7(6) of the Directive was ***de facto/indirectly transposed and fully implemented.*** In case of offences punished by a fine or imprisonment up to five years, a judge on the indictment of the State Attorney may render a judgment on a penal order, without holding a trial (Article 540(1) CPA). It will rely only on the written records and other materials in the file. However, the defendant may object against it without stating the reasons after which the criminal proceedings continue as usual by submitting the indictment to the indictment panel (Article 542(2) CPA).

Right to be present at the trial

Article 8(1) of the Directive was ***de facto/indirectly transposed and fully implemented.*** The Constitution of the Republic of Croatia guarantees the suspected, accused or indicted person to be present at his/her trial insofar as s/he is at the disposal of the court (Article 29(2)(5))

In the Croatian criminal justice system, the presence of the accused at the trial is not only his/her right (Article 64(1)(9) CPA) but also his/her obligation. It is also the obligation of the competent authorities conducting the criminal proceedings to ensure the presence of the defendant at the trial, as his/her presence is an indispensable element of the fair trial. The criminal trial can be fair, justified and legitimate if the defendant is present at the trial, and has actual and not only normative right to defend him/herself from the charges. In order to ensure the defendant's presence at the trial the competent authorities can use coercive measures such as compulsory appearance, arrest, bail, pre-trial detention (e.g. Article 402(1) CPA).

The provision that enables the court panel to exceptionally decide that the accused be temporarily removed from the courtroom if the co-accused or witness refuses to give a statement in his/her presence or if the circumstances indicate that they would not tell the truth in the presence of the accused (Article 438 CPA). Taking into account the technological possibilities that exist today that can enable an accused to follow the witness interrogation, this provision **violates the defendant's right to be present at the trial**.

Article 8(2)(a) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Under Article 383(7) in the summons the accused shall be informed of the consequences of not appearing at the trial (Articles 402 and 404). If the proceedings are conducted for an offence punishable by imprisonment up to twelve years, and the accused who was duly summoned did not appear, or the summons cannot be served to him because he changed the address and did not notify the court thereof, or if it is obvious that he avoids to receive the summons, the court may decide to conduct the trial in the absence of the accused if the accused was warned previously that he may be tried in absence and if he has already given his statement regarding the charge in the presence of the defence counsel (Article 404(3) CPA).

Article 8(2)(b) of the Directive was ***de facto/indirectly transposed and partially implemented.*** Pursuant to Article 66(1) point 7 of the CPA the defendant must have a defense counsel during trial stages taking place in the defendant's absence (Article 404, paragraphs 2 and 3). Under Article 404(5) of the CPA where proceedings are being conducted for a criminal offence punishable by a fine or by imprisonment for a term of up to five years, the trial may be held in the absence of the accused who was duly summoned but failed to appear or upon whom the summons could not be served because s/he changed his/her address without having informed the court thereof or where it is evident that s/he is avoiding service of the summons, on condition that his/her presence is not necessary and that prior to the trial s/he was interrogated or responded to the charge. This provision is not violating the right of the accused to be present at the trial as required by Article 8(2) of the Directive. However, the trial

in absentia under this provision is possible without representation by a defence lawyer. Also it is not required that the accused has been informed, in due time, of a trial and of the consequences of non-appearance.

Also, as a trial *in absentia* is considered to be contrary to the defendant's right to a fair trial and rights of defence, such as the right to be informed of the accusation, to be heard by the judge and to examine witnesses, the Croatian Criminal Procedure Act guarantees a person sentenced in absentia the right to a retrial in his/her presence.

The Act on Judicial Cooperation in Criminal Matters with the Member States of the European Union in Article 21(2)(2) also partially implemented this provision as it is sufficient for execution of an EAW that the requested person was represented at the trial by a defence lawyer appointed by the person concerned or by the requesting state but the additional condition that the person had to be aware of the scheduled trial was omitted.

Article 8(3) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Pursuant to Article 179(1) of the CPA the final judgment shall be executed after it is duly served and when there are no legal obstacles to its execution. Under Article 174(2) of the CPA when a defendant is tried *in absentia*, decisions and letters are served on his defense counsel and are thus deemed to have been duly served.

Article 8(4) of the Directive was ***de facto/indirectly transposed and fully implemented.*** An accused may be tried in his absence only where there are especially important reasons for putting him/her on trial and it is not possible to try him abroad or to have him/her extradited or s/he is on the run or out of reach of the state bodies (Article 402(3) of the CPA). From the issuance of the order for the conduct of the trial *in absentia* (Article 402, paragraphs 3 and 4), during his absence the defendant must have a defence counsel (Article 66(1)(6) CPA).

The provision of Article 483(3) of the CPA gives to the accused tried *in absentia* much higher protection than it is required by the EU law in if she/he is deprived of freedom, as in case of an appeal *in favorem* of the accused, the court shall *ex officio* order the retrial. Otherwise, under Article 497(3) of the CPA the court will reopen the criminal proceeding if the convicted person or his/her defence counsel may file within one year from the day the convicted person finds out about the final judgment a request for the reopening of the proceeding specifying the convicted person's address for service and the convicted person promises to comply with the court summons. Under Article 504(2) of the CPA if the trial was held in absence of the defendant (Article 402 (3 and 4) CPA), a request for the reopening of criminal proceedings may also be submitted by the parties and defence, regardless of the presence or absence of the convicted person.

Article 8(5) of the Directive was ***de facto/indirectly transposed and partially implemented.*** If the accused disturbs order or fails to comply with direction of the president of the panel concerning the maintenance of order, the president of the panel shall warn or punish him/her by a fine not exceeding HRK 50,000.00. To punish the accused by fine in this case is an exception in the Croatian criminal proceedings and it violates the presumption to be innocent. If any such person continues to disturb order and not to obey directions of the president of the panel, the president of the panel may order him/her to be removed from the courtroom (Article 396(1) CPA). Under Article 396(2) of the CPA the accused may be removed from the courtroom for a limited period of time and for the whole duration of the presentation of evidence if he disturbs order repeatedly. Before the presentation of evidence is completed, the president of the panel shall call in the accused and inform him/her about the course of the trial. If the accused continues to disturb order and offend the dignity of the court, the president of the panel may remove him/her again from the courtroom. In such a case, the trial shall be concluded in the absence of the accused and the judgment shall be communicated to him/her by the president of the panel or by a judge who sits as a member of the panel in the presence of the court reporter.

Article 8(6) of the Directive was ***de facto/indirectly transposed and fully implemented.*** In case of offences punished by a fine or imprisonment up to five years, a judge on the indictment of the State Attorney may render a judgment on a penal order, without holding a trial (Article 540(1) CPA). It will rely only on the written records and other materials in the file. However, the defendant may object against it without stating the reasons after which the criminal proceedings continue as usual by submitting the indictment to the indictment panel (Article 542(2) CPA).

Article 8(7) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Under Article 497(3) of the CPA the court will reopen the criminal proceeding if the convicted person or his/her defence counsel may file within one year from the day the convicted person finds out about the final judgment a request for the reopening of the proceeding specifying the convicted person's address for service and the convicted person promises to comply with the court summons. Article 498 refers to the revision of the final judgment without the reopening of criminal proceedings in cases where the court is required to revise previous judgments regarding the decisions on sentences and impose an aggregate sentence. Under Article 501 of the CPA criminal proceedings terminated by a final judgment may be reopened to the benefit of the defendant, regardless of his/her presence: 1) if the judgment is proven to have been based on a false document, recording or false testimony of a witness, expert witness or interpreter; 2) if the judgment is proven to have resulted from a criminal offence committed by the State Attorney, judge, lay judge, investigator or a person who carried out evidence collecting actions; 3) if new facts or new evidence are presented which alone or in relation

to previous evidence appear likely to lead to the acquittal of the person who was convicted or to his/her conviction on the basis of a more lenient criminal law provision; 4) if a person was convicted more than once for the same offence or more than one person was convicted for the same offence which could have been committed only by one person or by some of them; 5) if in the case of conviction for an extended criminal offence or any other offence which under law includes several acts of the same kind, new facts or new evidence are presented indicating that the convicted person did not omit an act included in the adjudicated offence, provided that these facts are likely to affect substantially the fixing of punishment.

Remedies

Article 10(1) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Effective remedies are missing with regard the public references to guilt (Article 4) and requesting a new date for the trial (Recital 34)

Article 10(2) of the Directive was ***de facto/indirectly transposed and fully implemented.*** Under Article 10 of the CPA the court decisions may not be founded on evidence obtained in an illegal way (illegal evidence). *Inter alias,* illegal evidence is evidence obtained in a way representing a violation of fundamental human rights to defence guaranteed by the Constitution, domestic law and international law and obtained in a way representing a violation of criminal procedure provisions expressly provided in this Act. However, according to the principle of proportionality evidence obtained in violation of the defence in proceedings for serious forms of criminal offenses within the jurisdiction of the county court, where the interest of prosecution and punishment of the perpetrator prevails over the violation of rights, shall not be considered illegal. This does not apply to evidence in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings as they are expressly provided in the CPA and the principle of proportionality does not apply. Under Article 468(2) of the CPA a substantive violation of criminal procedure provisions exists if the judgment is founded on illegal evidence (Article 10) and if the right to a fair trial guaranteed by the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms has been gravely violated. The court at second instance shall always by virtue of the office review whether the trial was, contrary to the provisions of this Act, held in the absence of the accused and his defence counsel (Article 476(1) point 1 CPA).

11.2 Case-law

There is one decision of the Constitutional Court and four judgments of the high courts that are interpreting the provisions of the Directive and are available online. Two decisions of the Supreme Court of the Republic of Croatia are dealing with the admissibility of the judgment based on agreement of the parties as evidence in the criminal proceeding against the accused who although did not pleaded guilty is in that judgment expressly by name mentioned as joint perpetrator of the criminal offence for which is accused.[84] The decision of the Constitutional Court[85] and other two decisions of regular courts are dealing with the question whether the danger of reoffending based on conducting other proceedings against the same defendant as grounds for detention is violating the presumption of innocence.[86]

11.2.1. Admissibility of guilty plea final judgment stating the name of the accused as co-perpetrator

The Supreme Court in its decision VSRH, I Kž Us 26/2020-11 of 12 June 2020 upheld the decision of the 1st instance court to reject as unfounded the appeals of two accused proposing to exclude judgment based on agreement of the parties from the case file as illegal evidence due to violation of the presumption of innocence. The impugned judgment based on agreement of the parties concluded by the witness in the criminal proceeding who recognized its guilt to have committed criminal offence of abuse of position and authority joint with appellants was part of the case file and as evidence should be read at the trial. The judgment was not written in line with Article 4 (1) of the Directive and its interpretation taken in the judgment of the ECJ No. C-377/18 of 5 September 2019 where is stated that it is not precluded that an agreement in which the accused person recognises his/her guilt in exchange for a reduction in sentencing, which must be approved by a national court, expressly mentions as joint perpetrators of the criminal offence in question not only that person but also other accused persons, who have not recognised to be guilty and are being prosecuted in separate criminal proceedings, on the condition that that *reference is necessary for the categorisation of the legal liability of the person who entered into the agreement* and, second, that *same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and that their*

[84] VSRH, I Kž Us 26/2020-11 of 12 June 2020 and VSRH, I Kž-Us 122/2020-4 of 24 March 2021.
[85] Constitutional Court of the Republic of Croatia, U-III-4298/2020 of 20 October 2020.
[86] VSRH II Kž 4/2021-4 of 13 January 2021 and the High Criminal Court of the Republic of Croatia II Kž-97/2021-5 of 7 April 2021.

guilt has not been legally established. In the absence of such clarification, that agreement is likely to present those persons as being guilty, whereas their guilt has not yet been legally established, contrary to Article 4(1) of Directive 2016/343.

The Supreme Court stated that although it is true that the judgment based on agreement of the parties was not made in accordance with Article 4 (1) of the Directive and that it is contrary to the position taken in the judgment of the ECJ No. C-377/18 of 5 September 2019, given that for other defendants who have not pleaded guilty, among whom are and the accused, in the introduction, the ordering part, and the statement of reasons of the judgment, it is not explicitly state that they did not plead guilty, that separate criminal proceedings are being conducted against these persons and that their guilt has not been established in accordance with the law. However, the stated circumstances do not indicate that in the specific case, due to the stated omission, it is illegal evidence in the sense of Art. 10(2) CPC/08 as they are drafted in accordance with the relevant provisions of the 2008 Criminal Procedure Act. The Directive on the presumption of innocence does not even address the issues of legality and admissibility of certain evidence. That is in the domain of the assessment of national courts on the basis of national legislation. It is up to national law to provide an effective remedy to protect violated rights.

Reading the judgment of conviction based on agreement of the parties in the criminal case against the two defendants/appellants did not call into question their presumption of innocence, nor of other persons mentioned in the factual description of offence in the said judgment. In respect of guilt and criminal responsibility that judgment applies exclusively to the person found guilty and not to the other persons stated in the factual description. In addition, the appellants will be allowed, in separate proceedings against them, to examine in a contradictory proceeding as witnesses the persons who reached and concluded the agreement, and thus to examine and question all those facts relating to the incriminations in relation to which these defendants reached an agreement. The indication of the name and surname of the appellant and the nature of the *tempore criminis* in the operative part of that judgment was necessary solely and exclusively for the purpose of determining the qualification of liability of the defendant who reached and concluded a plea agreement.

The omission in the judgment based on agreement of the parties to include statements required by the ECJ judgment C-377/18 does not mean that the accused, arguing with the facts stated in the factual description of the offence in the ordering part of the judgment and disputing the findings arising from the mentioned judgment, do not have the possibility in a contradictory proceeding to call into question the proper assessment of the reliability of the statements of the accused on the basis of which the judgments based on the parties' agreement were rendered and that in this separate proceeding against

them they dispute with all available evidence the claim of the State Attorney's Office about their involvement in the commission of criminal offenses concerning the convicted person, in which factual description of the operative part they are mentioned with full name and surname.

According to ECtHR judgments, the presumption of innocence is violated only if the court decision contains a clear and unambiguous statement that a certain person has committed a certain criminal offense which has not yet been established by a final judgment. However, in complex criminal proceedings against several defendants, when assessing the guilt of an individual, it is allowed to mention the fact of the participation of third parties against whom separate criminal proceedings will later be conducted. However, the information provided must be only that which is strictly necessary for the analysis and determination of the legal responsibility of the accused person, and the reasoning of the court decision must avoid premature pleading guilty to those third parties.

It was also requested by the appeals that the Supreme Court of the Republic of Croatia, pursuant to Article 18a of the Criminal Procedure Act and Article 267 of the Treaty on the Functioning of the European Union, applies to the Court of Justice for a preliminary ruling on whether Article 4 (1) of shall be interpreted in a manner contrary to the provisions of national law. The Supreme Court expressed its opinion on the submission of a preliminary question to the ECJ. It is exclusively on the national court to decide completely independently whether the need for an appropriate interpretation of EU law exists in a particular case. The Supreme Court deems that the issue of legality, that is, the admissibility of evidence is not relevant and crucial to this particular criminal case.

The decision of the Supreme Court is not in line with the Article 4(1) of the Directive and it breaches the presumption of the innocence for the following reasons: a) it is not clear why the judgment based on agreement of the parties is necessary for the analysis and determination of the legal responsibility of the accused person, b) the burden of proof was reversed as the court expressly stated that the accused is allowed to examine in a contradictory proceeding as witnesses the persons who reached and concluded the agreement, and thus to *examine and question all those facts relating to the incriminations in relation to which these defendants reached an agreement*. Therefore, the judgment based on agreement of the parties does not serve only for the categorisation of the legal liability of the person who entered into the agreement but as evidence with regard to the facts that form elements of crime in the judgment that should be disproved and therefore are taken as established. That reverses the burden of proof and violates the presumption of innocence. The burden of proof is on the prosecutor and the incriminating fact in the indictment should be proved by evidence. The factual description of offences for which the witness is convicted in the judgment based on agreement of the parties is not evidence and the prosecutor cannot prove commission of the offence by the accused by

the final judgment from another proceeding where the accused did not participate and was not an accused.

Additionally in this case it is undisputed that the judgment based on agreement of the parties violates the presumption of innocence as it is not written in line with the ECJ interpretation of the Article 4(1) Directive and according to the Croatian law the court is required to decide on its legality applying the principle of proportionality in line with the article 10(3) of the CPA which was not done.

Ruling VSRH, I Kž-Us 122/2020-4 of 24 March 2021.

By the decision of the Zagreb County Court, the motion of the accused to exclude from the case file the ordering part of judgments based on the agreement of the parties was rejected as unfounded. The accused filed an appeal against this decision to the Supreme Court arguing that the court did not give reasoning for its thesis that stating his name and surname in the verdict based on agreement of the parties was necessary *for the categorisation of the legal liability of the person who entered into the agreement*. The appeal was rejected. The Supreme Court stated that it is true that the judgment based on agreement of the parties was not made in accordance with Article 4 (1) of the Directive and that it is contrary to the position taken in the judgment of the ECJ No. C-377/18 of 5 September 2019. However, this is not the situation that would be under CPC/08 resolved through the institute of illegality of evidence.

Article 10 CPA/08 prescribes that the institute of illegally obtained evidence refers to the manner of obtaining evidence, i. e. that the illegality of evidence arises from certain irregularities in obtaining it. The same provision further specifies what specific irregularities must be involved in order for certain evidence to be illegal and that a court decision cannot be based on it. The appellant did not state nor did this court find that some of the irregularities prescribed or to which is referred to in Article 10 of the CPA/08 exist.

The Court also found that the Trial Chamber in the impugned decision provided guarantees against violation of the presumption of innocence's principle, emphasizing that reading the ordering part of judgments based on agreement of the parties concerning other accused during the evidentiary proceedings against them will not call into question the presumption of innocence. The stated verdicts regarding guilt and criminal responsibility refer exclusively to the persons found guilty, and not to other persons stated in the factual description of the offence. The appellants will be allowed, in separate proceedings against them, to examine in a contradictory proceeding as witnesses the persons who reached and concluded the agreement, and thus to examine and question all those facts relating to the incriminations in relation to which these defendants reached an agreement.

For the same reasons as the previously analyzed decision of the Supreme court, this decision is not in line with the Article 4(1) of the Directive and it breaches the presumption of innocence.

Additionally, the ruling is based on the incorrect statement that illegality of evidence is referred only to the manner of obtaining evidence. The evidence that is legally obtained can become illegal evidence for reasons that are not related to any irregularities in its obtaining but in its use as evidence at the trial. These are e.g., police and state attorney's record on information provided by citizens that can be used as evidence before indictment but not before (Article 86 CPA) and the agreement of the parties if the parties desist from the agreement before the judgment is passed (Article 362 CPA).

Furthermore, in this case as in the previous one it is clear that the judgment based on agreement of the parties violates the presumption of innocence as it is not written in line with the ECJ interpretation of the Article 4(1) Directive and according to the Croatian law the court is required to decide on its legality applying the principle of proportionality in line with the article 10(3) of the CPA.

11.2.1. Is the detention justified by conducting other criminal proceedings against the same defendant violating the presumption of innocence?

Legal remedies submitted by the same accused against the ruling on extension of detention have resulted with three court decisions: the Supreme Court decision (VSRH II Kž 4/2021-4 of 13 January 2021), the High Criminal Court decision (II Kž-97/2021-5 of 7 April 2021) and the Constitutional Court of the Republic of Croatia (U-III-4298/2020 of 20 October 2020). The accused has in two appeals invoked the violation of the presumption of innocence as guaranteed by the Directive 2016/343 and in the Constitutional complaint the violation of the presumption of innocence as right protected by the Constitution and the European Convention of Human Rights.

Although it does not refer to the Directive the Constitutional Court decision gives the sound reasoning that reverses the previous case law of the Supreme Court of the Republic of Croatia and that was referred to in both rulings of the regular high criminal courts.

The Constitutional Court notes that the danger of reoffending as ground for detention beside on the circumstances of the commission of the serious criminal offense charged with (the murder), was also based on the fact that another criminal proceeding is being conducted against the applicant for existence of reasonable suspicion of committing the criminal offense of endangering life and property by generally dangerous act or means and committed precisely to the detriment of the same victim as in the criminal proceedings in question. The competent courts assessed that these facts indicate

persistence and represent precisely those particular circumstances which indicate the existence of a danger that the applicant at liberty might commit the same or graver criminal offence.

In relation to the applicant's allegations that justifying the danger of reoffending on the fact that he has been prosecuted in other criminal proceedings cannot be a reason for on because it is thereby violating the presumption of innocence, the Constitutional Court reiterated that in deciding on the ordering / extension of pre-trial detention such circumstances may be taken into account, not as proof of conviction, but as proof that it has been established in other proceedings as well the existence of a reasonable suspicion that that person has committed criminal offenses. Opposite position would lead to unacceptable consequences that the danger of reoffending could not be based on all those parts of the factual substrate of a case about which (parallel) criminal proceedings are still being conducted (only due to the fact that it has been conducted), which may call into question that ground for detention basis. In addition, the fact that the applicant in the second case was found suspicious that he committed another crime reinforces the justification of the prognosis on the existence of the danger or reoffending (§ 9.1.).

The decision of the Constitutional Court is correct and in line with the Directive 2016/343.

Concluding remarks

From the analysis presented here, it can be concluded that Croatian law has been, even before the procedural rights of suspects and accused persons have been formulated in directives, to some degree compliant with their provisions. If a certain aspect of Croatian criminal procedure that demonstrated significant divergences from European standards had to be identified, it would be the part of the proceedings which is dominated by police work in relation to criminal procedure. These structural deficiencies have finally been rectified in the process of implementation of directives. Of course, this general conclusion does not affect many findings in this study where certain degrees of non-compliance with EU standards have been identified in relation to provisions of all directives included in the research. This study has also shown that in relation to most provisions that require implementation, the adoption of legislative amendments step might be the least problematic one. From the perspective of the implementation, necessary system modifications and adaptations, as well as those that relate to in practice well established attitudes and modes of operation, represent a much bigger challenge in the implementation process.