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Comparative analysis report

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Disclaimer: On behalf of UNIBO, the present deliverable has been drafted by Giulia Lasagni and Michele Caianiello. This deliverable has been included, with a few revisions, in the final volume of the Project (*Effective Protection of the Rights of the Accused in the EU Directives. A Computable Approach to Criminal Procedure Law,* ed. by G Contissa, G Lasagni, M Caianiello and G Sartor*)*, as Chapter 13. Internal references (eg in footnotes) should therefore be referred to such volume. Although the analysis covers all the 11 Member States included in the research project, a more in-depth analysis could not be carried out with regard to Romania and Sweden, where unexpected commitments of the national rapporteur slowed down the national analysis process; nonetheless, the main findings also concerning such countries are included in the present deliverable and national legal analysis deliverables have been regularly updated on the Portal.

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4 Introduction (13.1)

The objective of this Chapter is to give a concise report on some of the most relevant trends emerging from a comparative analysis on national legal frameworks concerning the procedural safeguards of the suspected or accused in criminal proceedings. In particular, the analysis focuses on those rights included in the six Directives issued in the aftermath of the Stockholm Programme,1 and encompasses eleven Member States, namely Bulgaria, Croatia, France, Germany, Italy, Poland, Portugal, Romania, Spain, Sweden and the Netherlands (hereinafter generally referred as 'Member States').

Such legal systems had been examined in the course of the research under a twofold perspective.

The first methodology is a transversal legal comparative approach. Due to the limited remit of this contribution, the analysis did not aim at listing all incongruencies among Member States in the implementation of the six procedural Directives;2 on the contrary, it rather focused on identifying different normative approaches that seem to generate or incentivize divergent solutions in the level of protection for defence rights throughout the EU. In this perspective, the comparison seems to point out how it is more difficult than it appears at first glance to find a normative approach able to ensure by default a high level of compliance at the national level (§13.2).

The second perspective adopted in the research originates from an innovative multi-disciplinary approach, that combined legal and computer science expertise. Through the elaboration of "harmonization indexes" and "heat maps" based on Artificial Intelligence (ai) technology, this analysis highlighted similarities and lacunas in the recognition of defence rights across domestic systems, thanks to a semantic and textual examination of legal texts. This method, therefore, allowed to cross-check the results of traditional legal analysis, trying at bypassing, by way of

1 Directive 2010/64/EU of 20 October 2010; Directive 2012/13/EU of 22 May 2012; Directive 2013/48/EU of 22 October 2013; Directive (EU) 2016/343 of 9 March 2016; Directive (EU) 2016/800 of 11 May 2016; Directive (EU) 2016/1919 of 26 October 2016.

2 Largely analysed in legal doctrines and at the same EU level, see for all, the precious activity carried out in this field by the European Judicial Network.

automated assessments, some problematic features typical of comparative studies, such as linguistic discrepancies and ontological divergencies (§ 13.3).

The results of this combined effort, as it will emerge, highlight several critical profiles that, on one side, show the difficulties in reaching effective harmonization in the field, and, on the other, may help tracing a potential way forward towards a higher level of safeguard for defence rights throughout the EU.

Pointing the finger against gaps and lacunas, however, should not let us forget how much has actually been accomplished in the last few years. This is even more so, considering that the harmonization had been carried out via legal acts, like directives, which as such do not have a generalized direct effect on national law and which, in the specific matter, are almost unanimously criticized for having lost much of their mandating strength during the negotiations that preceded their approval.3

Just to mention some of the major achievements, reference could go to the extension of the right to a lawyer also during police questioning;4 the strengthening of client-attorney confidentiality; the establishment of communication rights with consular authorities;5 the focus on juvenile specific needs as defendants; the adoption of a more systemic perspective on the right to interpretation and translation;6 or the recognition of the right to information since the early phases of the proceedings.

3 See, for all, Silvia Allegrezza, 'Toward a European Constitutional Framework for Defence Rights' in Silvia Allegrezza and Valentina Covolo (eds), Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies (Wolters Kluver/cedam 2018) 3 ff; Andrè Klip, European Criminal Law (4th edn, Intersentia 2021) 299 ff.

4 For instance, in Germany (cf. Anna H. Albrecht and Anne Schneider, 'German National Report', 32) and in Croatia (cf. Zlata Đurđević, Elizabeta Ivicevic Karas, Marin Bonacic, and Zoran Buric, 'Croatian National Report', 36). On the contrary, the rule still remains unapplied in Portugal, on the basis that "in any event […] statements [before the police] may virtually never serve as evidence later in trial", cf. Miguel João Costa and Pedro Caeiro, 'Portuguese National Report', 35.

5 Although only in some States the accused who benefits from multiple nationalities is explicitly granted the right to choose which consular authorities to communicate with, as requested by Art 7(1), Directive 2013/48. This is the case of Bulgaria (cf. Miroslava Manolova, 'Bulgarian National Report', 44), Portugal (Costa and Caeiro (n 4) 39); Spain (Ana-María Neira-Pena, 'Spanish National Report', 39). Critical under the perspective of the confidentiality of client-attorney relationships is also Romania (cf. Daniel Nitu, § 8.13).

6 For instance, in most examined Member States (all, but in Spain – cf. Neira-Pena (n 5) 14 – and Portugal – cf. Costa and Caeiro (n 4) 16), the transposition of the Directive brought to the creation of official registers for interpreters and translators. See however, below (n 75).

Indirectly, the implementation of the Directives also brought to a partial harmonization of investigative measures, for instance by pushing for the establishment of identity parades, confrontations, and reconstructions of the crime scenes in many States where such measures had not before any legal basis or practice.7

Lastly, even aspects that do not find yet a satisfactory regulation in most countries, such as the audio video recording of interviews of the suspected or accused, or the need to attach effective legal consequences to violations of the presumption of innocence in its notion as rule of treatment, or the urgency to find a satisfactory regulation of the intertwine between procedural safeguards and privacy violations,8 started to be transnationally considered as problematic profiles that require to be addressed, precisely thanks to such EU legislative acts.

All this, though at times unsatisfactory in terms of foreseeability of the applicable procedural norm, contributes to the slow creation of a common culture on the defence needs and standards of protection among Member States.

The comparative analysis indeed shows how, besides for legislative technical limitations and transposition inaccuracies or lacunas, it is the fragmentation of Member States' legal culture the main factor that, in the end, substantially impairs an effective recognition of defence rights throughout the EU. With its innovative approach, the present study tries at contributing to fill this gap, increasing the level of mutual knowledge and understanding for legal operators.

7 As it is the case of the Netherlands with regard to confrontation (cf. Jannemieke Ouwerkerk, Kelly Pitcher and Adriano Martufi, 'Dutch National Report', 64); Germany, at least explicitly, with regard to reconstruction of the crime scene (cf. Albrecht and Schneider (n 4) 32).

8 As requested, respectively, for juvenile defendants, in only partially mandatory terms, by Art 9, Directive 2016/800 and for the presumption of innocence, by the combined reading of Arts 4(2) and 10, Directive 2016/343. For the intertwine between procedural safeguards and privacy, see below Mariavittoria Catanzariti, Chapter 14, § 14.1 ff.

5 Common Trends and Lacunas in the Protection of Procedural Safeguards (13.2)

This comparative analysis cannot but start from the observation that, in the examined Member States, most Directives had been implemented only indirectly, that is, by identifying and sometimes re-interpreting national provisions that pre-existed their entry into force.

Only in few cases, however, the misalignment between EU and national standards is blatant also at a formal glance – the most evident example certainly being Portugal, where, out of six Directives, only one found some form of explicit transposition.9

Most frequently, substance hides in nuances. In this sense, the analysis moved beyond the official assessments of national governments, that tend to overestimate, purposefully or by way of tradition, the adequacy of indirect implementation techniques against explicit transposition.10

This phenomenon forces legal operators, both practitioner and scholar, to extend the inquiry also over the ontological dimension of concepts, as illustrated in national regulation and developed by national courts. Exemplificative, in this sense, is the definition of "suspect". Against the use of a single term across jurisdictions, for instance, in Poland the notion has such a narrow scope that it substantially deprives of its meaning most of the transposing regulation, despite for a level of formal compliance that, on paper, appears comparable with that of other States.11 The impact of such discrepancies and alike becomes disruptive in transnational proceedings, but of course significantly affects also domestic jurisdictions, where the innovative reach of the Directives struggles to find fertile soil.

9 That is, Directive 2016/800, see above Miguel João Costa and Pedro Caeiro, Chapter 10, § 10.3.

10 Especially if compared to the same assessment often made by legal doctrine and the same Commission.

11 See below, § 13.2.1. A partially similar reflection could be extended, again with regard the same country, about the definition of juvenile defendant: In Poland, indeed, persons who are 17- to 18-year-olds do not enjoy the protection of the Directive (cf. above, Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska and Dominika Czerniak, Chapter 9, § 9.2).

This analysis identified at least four main situations, partially even contradictory with each other, that contribute to slowing down harmonization or impeding it from becoming effective.

In some cases, the phenomenon seems to derive from the vagueness or ambiguity of the Directives' provisions. In others, from lacunas in the EU legislation related to profiles that the Directives aim at harmonizing, but that are substantially left to national discretion as far as their regulation is concerned. However, the significant divergence among national regimes may be also observed with regard to norms established in detail by the Directives. Lastly, a notable role seems also to derive from a general underestimation of the concrete contexts and structures required to make certain procedural safeguards operational.

6 Vagueness or Ambiguity within the Directives: The Right to an Effective Remedy (13.2.1)

A major ground to identify the misalignment of procedural safeguards throughout the EU certainly relies on the vagueness or ambiguity of certain rights contained in the different Directives. One of the most obvious examples in this regard may be found in the definition of "effective remedy". Explicitly present in all Directives,12 but in Directive 2010/64,13 this right clearly appears as one of the most crucial and, at the same time, least defined aspects of the notion of due process that the Stockholm Programme aimed at ensuring.14 Several issues can be identified as causes of this situation.

12 Art 8(2), Directive 2012/13; Art 12, Directive 2013/48; Art 10, Directive 2016/343; Art 8, Directive 2016/1919; Art 19, Directive 2016/800.

13 Where it however emerges from the combined reading of Recital (24): "should ensure control can be exercised"; Recital (25): "should have the right to challenge"; and Recital (27): "taking appropriate steps to ensure those rights are guaranteed"; as well as by Art 2(5) and Art 3(5) "shall ensure […] the possibility to complain that the quality of the interpretation/translation is not sufficient".

14 Also defined as the Convention's "darkest" provision. See Judges Matscher and Pinheiro Farinha in Malone v United Kingdom App No 8691/79 (echr, 2 August 1984).

Firstly, the Directives do not outline what a remedy is or should be. For instance, it remains unclear whether it should be limited to a right to appeal, or whether other mechanisms, such as exclusionary rules, should be encompassed too.15

Secondly, the Directives do not define what a remedy should include to be considered "effective". Unfortunately, the question does not find a much clearer answer in the jurisprudence of the European Courts.16 The issue becomes even trickier once read in combination with those provisions requiring rights to be granted "without delay" 17 or, even more ambiguously, "without undue

15 On which see, for all, Sabine Gless and Thomas Richter (eds), Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules (Springer Open, Cham 2019) and John A.E. Vervaele, 'Lawful and Fair Use of Evidence from a European Human Rights Perspective' in Fabio Giuffrida and Katalin Ligeti (eds), Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings (University of Luxembourg, June 2019) 56 ff. Concerning the right to effective remedy with specific regard to Directive 2013/48, cf. also Anneli Soo, 'Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel' (2017) 25 European Journal of Crime, Criminal Law and Criminal Justice 1, 31 ff.

16 In the case-law of the Strasbourg Court, a remedy can be regarded as effective only if available both on the books and in action, that is, only if it can prevent an alleged infringement from persisting or an at least provide an adequate response for past infringements (cf. Kudła v Poland App No 30210/96 (echr, 26 December 2000) §§ 157–58). Thus, it is not sufficient for a remedy to be established in national law: Its effectiveness should be concretely assessed, as by considering the time it takes for the corrective action to be taken or the applicant's effective ability to activate the remedy in light of the specific circumstances of the case (even though the ECtHR has controversially affirmed that the lack of a suspensive effect does not necessarily undermine the effectiveness of a remedy, in Umoru v Italy App no 37442/19 (echr, 8 June 2020) §43). According to the ECtHR, it is not strictly necessary for the appeal to be lodged with a judicial authority; however, the empowered authority shall comply with the independence and impartiality requirements set forth in Art 6(1) echr. On this point, a difference may be observed between Art 13 echr and its analogue in Union law. Indeed, Article 47(1) cfr expressly requires that any violation of the fundamental rights enshrined in the Charter itself be effectively challengeable before a court. Most importantly, in the criminal matter, both European courts require that decisions imposing a punitive measure shall be granted a full judicial review. Thus, it is necessary to identify at least one authority with the power to rule both on questions of fact and of law (Umlauft v Austria App No 15527/89 (echr, 23 October 1995) § 37; Oztürk v Germany App No 8544/79 (echr, 21 February 1984) § 56; Menarini Diagnostics S. R. L. v Italy App No 43509/08 (echr,, 27 September 2011) §§ 59-63-67; Schmautzer v Austria App No 15523/89 (echr, 23 October 1995) § 36; Gradinger v Austria App No 15963/90 (echr, 23 October 1995) § 44); on the EU law side, cf. e.g. Case C-222/84 Marguerite Johnston v Chief Constable (cjeu, 15 May 1986); Case C-222/86 Union nationale v Georges Heylens and O, (cjeu, 15 October 1987); Case C-97/91 Oleificio Borelli SpA v Commission (cjeu, 3 December 1992). See also, Zlata Đurđević, 'Judicial Control in the Pre-trial Criminal Procedure Conducted by the European Public Prosecutor's Office' in Katalin Ligeti (ed), Towards a Prosecutor for the European Union, Vol i (Hart Publishing 2013).

17 Cf. Recital (18) and Art 2, Directive 2010/64.

delay".18 In this sense, it can be inquired whether a remedy, in order to be effective, should necessarily be granted just after the act against which a complaint is lodged has been performed or whether broader timing can also be tolerated.19

Indeed, if effective remedy should be understood as the possibility to challenge – at a certain point – the potential violation of a right, most Member States could be considered as compliant with EU requirements just relying on the regimes already into force before the advent of the Directives.

In this perspective, only a few profiles appear as immediately problematic.

Among them, the basically complete lack of protection for suspects who are not already officially presented with charges (osoba podejrzana), in Poland, which can suffer important restrictions of their rights without any substantial form of protection; and, to a lower extent, of suspects in the inquiry phase in France.20

18 Cf. Art 13, Directive 2012/13; Recitals (19-30-35-36-46) and Arts 3, 5, 6, 7, 10 Directive 2013/48; Recital (27) and Arts 6, 8, 10, Directive 2016/800; Recitals (19, 24) and Arts 4, 6 Directive 2016/1919.

19 Cf. on the issue Valentina Covolo, 'Ensuring the Effectiveness of Defence Rights: Remedial Obligations under the ABC Directives' in Silvia Allegrezza and Valentina Covolo (n 3) 92–93, to whom the second hypothesis seems preferrable: "While the preamble of Directive 2013/48/EU explicitly states that 'the temporary derogation can be assessed by a court, at least during the trial stage', according to Directive 2012/13/EU the right to challenge a decision denying access to documents 'does not entail the obligation for the Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure may be challenged'. From this perspective, national law complies with the ABC Directives so far as decisions delaying legal assistance, or refusing access to certain materials, are adopted by a non-judicial authority but subsequently scrutinized by the court competent for reviewing the merits of the accusation. Hence, a Member State may grant sufficient judicial protection through the review undertaken by a judge at the trial stage of criminal proceedings on the admissibility and use of evidence collected in breach of defence rights […] It thus follows that depending on the structure of the national criminal justice system and the judicial remedies available to the defendant, the effectiveness of the judicial protection afforded may vary from one Member State to another".

20 "Polish law provides for a formal procedure by which the person is preliminarily charged with a crime (Art 313 k.p.k.). This takes place by issuing a formal charging decision against her, promulgating it, which is followed by mandatory interrogation, unless the person has fled. In theory, the investigative authorities are obliged to bring charges as soon as they have sufficient data indicating the crime was committed by a specific person. Delaying formal charging is impermissible. Only if the charges are formally presented does the individual gain the status of podejrzany and becomes a party to the proceedings with a possibility of fully exercising defence rights […] As a consequence, Polish law makes a very strict distinction between the status of podejrzany and osoba podejrzana […] The latter term has no legal definition, although it is understood as referring to a person who is in fact suspected of committing a crime, but who has not yet been initially charged with an offence" – cf. Kremens and o (n 11) § 9.3.1 – but might, for instance, has already been

Equally critical appears the absence of specific rules regarding potential violations of the presumption of innocence meant as a rule of treatment, especially concerning the presentation of the accused to the public. In most Member States, indeed, these breaches do not find any remedy within the realm of criminal proceedings; the only legal consequences usually taking the form of potential disciplinary sanctions, or civil requests for reparation. Such legal actions, however, both for their theoretical design and their concrete application, are widely considered to be fairly ineffective. In Romania, the level of compliance in this regard has been considered so low to justify the opening of an infringement procedure by the Commission.21

Moreover, remedies that are available in national laws significantly vary from country to country: requirements to trigger appeal tools, for instance, as well as the powers of the courts in charge to examine them.22

The situation is also quite fragmented with regard to exclusionary rules. Firstly, not all States provide for them with regard to the rights recognized in the six Directives.23 Even where such rules are established, approaches towards them vary: in some countries they are implicitly derived from a balancing of constitutional values (France, Germany), 24 while in others they are provided for straightforwardly by the legislative provision in relation to specific breaches (Croatia, Portugal), or in rather broad terms, i.e. for the general violation of procedural safeguards (Bulgaria, Spain).25

subjected to investigative acts, like searches or seizure, without enjoying any procedural safeguards. For France, cf. Eleonora Cervellera and Raphaële Parizot, Chapter 6, § 6.3.4.

21 This is clearly the case in Bulgaria (see above, Manolova, Chapter 4, § 4.3.1); Germany (Albrecht and Schneider (n 4) 65); Croatia (cf. Đurđević and o (n 4) 81); Laura Bartoli, Marianna Biral, Cosimo Emanuele Gatto, Giulia Lasagni, Vanessa Maraldi, Irene Milazzo, Isadora Neroni Rezende, Antonio Pugliese and Alessandra Santangelo, 'Italian National Report', § 6.4.1.; as well as in Romania (cf. Daniel Nitu, § 11.1.3).

22 For an overview on the different remedies across Europe, see Silvia Allegrezza (ed), Criminal Appeals in Europe: A Comparative Study (forthcoming publication); raising the issue on a cross-border dimension Vania Costa Ramos, Michiel Luchtman and Geanina Munteanu, 'Improving Defence Rights Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings' (2020) 3 Eucrim 230 ff.

23 Though they might provide them for other violations, as it is in the case of Germany.

24 Cf. Albrecht and Schneider (n 4) 8; and above, Cervellera and Parizot (n 20) § 6.3.3.

25 Cf. Đurđević and o (n 4) 8 ff; Costa and Caeiro (n 4), 13 ff; Manolova (n 5) 47–48; Neira-Pena (n 5) 41.

Some countries present a hybrid form (Poland and, to some extent, Italy)26 while in other systems the possibility to apply exclusionary rules, per se existing as a remedy, is totally left to the discretion of the court, in a case-by-case assessment about the concrete impact of the breach (the Netherlands).27

The picture gets however sensibly more critical if the "effectiveness" of the remedy is read in light of the need for a timely response, as from this angle only few cases could be considered to match the requirements of the Directives.

This is, for example, the possibility to trigger a judicial review before the investigating judge in case of limits to the right of access to file in the Netherlands,28 or the wider possibility in Bulgaria to appeal decrees of investigative bodies directly before the prosecutor (or, if the decree is issued by the prosecutor, before her hierarchical superior).29

Against this general background, what could be overall observed is that remedies, although pivotal for the successful application of the rights enshrined in the Directives, passed almost unchanged through the implementation of the Stockholm programme.30

26 For Poland, cf. Marcin Wolny and Małgorzata Szuleka, 'Right to defence v. evidence procedures. Admissibility of evidence in the light of EU law and national legal standards. Country report: Poland' (2021) Helsińska Fundacja Praw Człowieka < https://www.hfhr.pl/27220-2/> 19 ff.; for Italy, cf. Bartoli and o (n 21), e.g. § 4.5.1.

27 Cf. above, Adriano Martufi, Kelly Pitcher and Jannemieke Ouwerkerk, Chapter 12, § 12.2.

28 Ouwerkerk and o (n 7) 50.

29 Art 200 of the Bulgarian Criminal Procedure Code, on which cf. Manolova (n 5) 46 ff, raising issues about effectiveness of such remedy.

30 Interestingly enough, perhaps because of its common placement outside of criminal procedure codes, a tendency towards relatively specialized remedies can be found more easily with regard to the legal aid regimes, although their effectiveness or timing is often put in question, see, eg., Albrecht and Schneider (n 4) 60, highlighting the lack of direct impact of potential violations on the admissibility of evidence.

7 Specific Rights, Undefined Parameters: Access to File, Trial in Absentia, Role of the Lawyer (13.2.2)

Sometimes, the lack of a fully harmonizing effect may be traced back not to the vagueness of the right in itself, but rather to the absence of a common approach in defining the parameters that constitute such safeguard.

This is for instance the case of the grounds allowing restrictions to the right of access to file. The reference to "prejudice to ongoing investigation or seriously harm the national security of the Member State" included in Art 7(4), Directive 2012/13, is indeed so broad to seriously risk inverting the relation between rule and exception in favour of the latter.31 This causes a broad array of solutions at the national level, where legislation range from systems in which access to files is always fully granted (Bulgaria),32 to models in which full access may be requested only after one year from the start of the inquiry (France),33 passing through most other models, in which the matter is de facto left to the discretion of the investigating authorities, with limited possibilities for the defendant to challenge such decision until an advanced stage of the proceeding.

Similarly, the possibility to carry out a trial in absentia where the suspected or accused, "having been informed of the trial", is represented by a lawyer (Art 8(2), Directive 2016/343), leaves rather undefined the tangible level of awareness that the authorities should grant to the defendant to be sure she has knowledge of the schedule of the hearing. This becomes especially problematic where the lawyer is appointed by the court. Also in this sense solutions are thus doomed to be highly varying.

They range from cases in which formal notification is considered enough to comply with the Directive (Poland, the Netherlands),34 to countries where instead a specific attention is put on the

31 Regardless of the invitation to interpret such exceptions "strictly" contained in Recital (32), Directive 2012/13. In Romania, for instance, no clear criteria exist to limit the prosecutorial discretion in limiting access to file during the investigation phase, cf. Nitu (n 21), § 7.1.3.iden

32 Cf. Manolova (n 5) 29.

33 Cf. Eleonora Cervellera and Raphaële Parizot, 'French National Report', 22.

34 Cf. Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska and Dominika Czerniak, 'Polish National Report', 82; Ouwerkerk and o (n 7) 123.

substantial awareness of the hearing schedule (Spain and, arguably, Italy),35 to countries in which the issue is partially underestimated or otherwise given for granted, as presence at trial is mostly mandatory (Croatia, France, Germany, Portugal),36 or may be made so (Bulgaria).37

This inhomogeneous picture becomes particularly problematic in light of Directive 2016/343 but has also a direct impact on transnational proceedings. Conditions of trial in absentia indeed represent a rather common ground for refusing the execution of a European Arrest Warrant.38 To make a matter worse, the eaw Framework Decision on the subject is arguably not entirely overlapping with those of the Directive. 39 The lack of clear European parameters in this regard, therefore, incentivises national authorities to rely rather on domestic standards, which do not necessarily ensure the best level of protection to the rights of the accused.

Another major right which highly suffers from the lack of precise definition of its constituting elements in the Directives is access to a lawyer, and in particular the distinction among the right for

35 Cf. Neira-Pena (n 5) 61 and for Italy, Bartoli and o (n 21), §§ 6.6.2 – 6.6.4, at least in the more recent interpretation of the Supreme Court, Sez. un., no 23948 of 17 August 2020.

36 Đurđević and o (n 4) 88–89; Cervellera and Parizot (n 33) 70 ff; Albrecht and Schneider (n 4) 65 ff; Costa and Caeiro (n 9) § 10.4.3.2. Even in those countries, however, the existence of exceptions may put at risk the very core of the right, see the case of Croatia, where if "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 trailed in absence and if he has already given his statement regarding the charge in the presence of the defence counsel (Article 404(3) cpa)" (cf. Đurđević and o (n 4) 88).

37 Only with regard to serious crimes or if otherwise ordered by the court, cf. Manolova (n 5) 84.

38 Cf. Art 4a, Council Framework Decision 2002/584/jha of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/jha of 26 February 2009.

39 Cf., e.g., Hannah Brodersen, Vincent Glerum and André Klip, Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person <https://www.inabsentieaw.eu/wp-content/uploads/2020/02/InAbsentiEAW-Research-Report-1.pdf> 54–56.

the lawyer to "be present", to "attend" and to "participate effectively" to certain investigative acts.40

No clear definition of such terms is provided for in Directive 2013/48, but for a hint in Recital (25), where, referring to the last expression, it is recommended that "lawyer may, inter alia, in accordance with [national law procedures], ask questions, request clarification and make statements".41 The ambiguity of the wordings, and the non-binding value of the few interpretative reported criteria, leave several profiles subject to different regulations across the EU and, reportedly, offer some back-up to those systems which traditionally see the role of the defence lawyer as a rather passive one.

In the Netherlands, for instance, where the right to assistance during police questioning was introduced only in 2015 after Salduz, the possibility for the lawyer to participate can be excluded if considered "disruptive" by police.42 In Germany, where the same right was recognized only thanks to the transposition of the Directive, lawyers can intervene, but only after the interrogation and not during it.43 In France, the intervention of the lawyer is also in principle admitted at the end of the interview, but her questions may be objected by the police, and the only remedy against such an opposition is the possibility to demand including comments in the recordings of questioning.44

Other systems show a broader approach. In Croatia, for instance (where questioning of the defendant is also always audio-recorded) the accused, having given her statement, may be requested for clarification by the police: in this phase, the lawyer cannot consult with the accused, but can suggest her not to answer to one or more questions. After the conclusion of this first part,

40 Cf. Art 3(3)(b) and (c), Directive 2013/48, on which see Teresa Armenta Deu and Lisa Urban, 'The Right of Access to a Lawyer under Directive 2013/48/EU' in Allegrezza and Covolo (n 3) 74 ff.

41 On which see, e.g., Anna Ogorodava and Taru Spronken, 'Legal Advice in Police Custody: From Europe to a Local Police Station' (2014) Erasmus Law Review 195; Jacqueline Hodgson and Edward Cape 'The Right to Access to a Lawyer at Police Stations. Making the European Union Directive Work in Practice' (2014) New Journal of European Criminal Law 467 ff; Lorena Bachmaier Winter and Stephen C. Thaman, 'A Comparative View of the Right to Counsel and the Protection of Attorney-Client Communications' in Lorena Bachmaier Winter, Stephen C. Thaman and Veronica Lynn (eds), The Right to Counsel and the Protection of Attorney-Client Privilege in Criminal Proceedings. A Comparative View (Springer 2020), 20.

42 Cf. Salduz v. Turkey App no 36391/02 (echr, 27 November 2008), cf. Martufi and o (n 27) § 12.2).

43 Cf. Albrecht and Schneider (n 4) 32.

44 Cf. Cervellera and Parizot (n 33) 32.

questions can then be posed directly by the lawyer.45 Greater margins of intervention are also recognized in Bulgaria, Italy, Spain and Poland, where lawyers may make requests, comments and raise objections also during the questioning.46

Practical circumstances not considered by the Directives can also significantly hamper the possibility for the lawyer to exercise an "effective participation". Exemplificative in this case is, for all, the timeframe (of ca 30 min) that several States introduced to limit the communication between the counsel and the accused before questioning (Croatia, France, the Netherlands).47

8 When Details Do Not Necessarily Make It Easier: A Scattered Supranational Picture (13.2.3)

In some cases, the reason behind this misalignment is clearly attributable to a general political programme, that in all sectors of law, including criminal justice, tends to reduce or rebut the impact of the EU over national law. Blatant, in this sense, is the case of Poland, where some fundamental rights have never been transposed in accordance to the Directives, and some, though initially implemented, have undergone a process of progressive limitation. Significant are for instance the clear limitations of the right of access to a lawyer, that, contrary to Art 3(2), Directive 2013/48, do not generally allow the accused to confer with the lawyer before questioning; of the right to be present at trial, in a system where the defendant may be prohibited to attend trial hearings even when willing to do so, and regardless of potential public order reasons; of the right of access to file, first correctly implemented and then significantly restricted in 2016.48

In other situations, however, reasons for non-compliance with the EU acquis seems harder to grasp and rather scattered if observed through transnational lenses.

45 Cf. Art 276(4) and 208.a(7) of the Croatian Criminal Procedure Code, cf. Đurđević and o (n 4) 38.

46 Cf. Manolova (n 5) 37; Kremens and o (n 34), 42 ff; Bartoli and o (n 21) § 5.4; Neira-Pena (n 5) 35. In Portugal, on the other side, no right to a lawyer is recognized before police questioning, cf. Costa and Caeiro (n 4) 35.

47 Đurđević and o (n 4) 59; Cervellera and Parizot (n 33) 35; Ouwerkerk and o (n 7) 79.

48 Kremens and o (n 34) 4 ff.

This is the case of Directive 2016/800, whose provisions are actually quite detailed and relatively rule-based. Despite that, the Directive still does not find application in Member States where the pre-existent discipline of juvenile criminal proceedings only in small part reflects the rights enshrined in the EU standards (Spain)49 or is largely diverging, either due to complete lack of transposition (Bulgaria)50 or because of a substantial inadequacy of safeguards for vulnerable accused, starting from the very setting of the age threshold (Poland).51

Also some limitations to the right of access to a lawyer appear difficultly explainable in a systematic perspective. For instance, in Portugal the transposition of Directive 2013/48 was not deemed necessary; however, the right is not extended to police questioning, confrontations, identity parades of reconstructions of the crime scene, which are without margin of doubt clearly listed in its scope.52 According to Art 8(1)(c), moreover, derogation to the rights of the Directive cannot be "based exclusively on the type and seriousness of the alleged offence". Nonetheless, exceptions grounded on the severity of some crimes, especially terrorism or organized crime, do represent the basis for a derogatory regulation in several countries, such as in Spain (incommunicado regime),53 and Portugal,54 (where the presence of a lawyer is always ensured, though appointing a person different from that chosen by the accused), or Italy55 (where the derogation is broader, as it encompasses a real postponing of accessing to the lawyer as such).

The absence of uniform transposition of facsimiles, such as the indicative model Letter of Rights attached to Directive 2012/13, also emerges as significant in this regard. The model, though not

49 Cf. above, Neira-Pena, Chapter 11, § 11.3.1.2.

50 Where a proposal to transpose the Directive is pending since 2020, though with no outcome so far, cf. Manolova (n 21) § 4.2.

51 Kremens and o (n 11) § 9.3.1.

52 Art 3(3), Directive 2013/48; cf. Costa and Caeiro (n 4) 34 ff.

53 Cf. Neira-Pena (n 49) § 11.3.2.

54 Cf. Costa and Caeiro (n 4) 40 ff.

55 Cf. Bartoli and o (n 21) § 5.6.

strictly binding in its form,56 was indeed provided for with a complete list of the rights to be included and a translation in all EU languages.

Despite this easing, in several countries the adopted "model Letters" differ, in the sense that one or more of the mandatory information rights are missing, or substantial limitations may anyway be observed. In Poland, for instance, no warning is given about the right to free legal aid and access to file;57 in Croatia, information is lacking on remedies and again on legal aid.58 In France, the letter is used in domestic proceeding, but does not have an eaw equivalent.59 In Bulgaria, it is substituted with a prosecutorial decree, which however does not encompass the rights to medical examination and does not indicate the maximum number of hours or days the suspect or accused may be deprived of liberty before being brought before a judicial authority.60 Portugal, again, did not provide any explicit transposition for the Directive, and does not, therefore, make use of the Letter or of any national surrogate.61 Against this background, the situation in Italy and in the Netherlands appears more linear, as in both countries Letters of Rights have been created, by following more closely the wording of the Directive.62

In Germany, the model Letter was partially amended, substituting the right to be informed of the accusation with the more safeguarding direct communication on charges. This, however, was not extended to the first interrogation before police; a caveat which seems to go quite against the spirit that animated the whole EU legislation on information rights. A loophole to the protection of this right during police questioning may be observed also in Italy, where information about the rights

56 Cf. Directive 2012/13, Annex 1: "The sole purpose of this model is to assist national authorities in drawing up their Letter of Rights at national level. Member States are not bound to use this model. When preparing their Letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information".

57 Kremens and o (n 34) § 31.

58 Đurđević and o (n 4) 29.

59 Cervellera and Parizot (n 33) 22 ff.

60 In case of detention not disciplined by the criminal procedure code, a document similar to the Letter of Rights is issued to the detainee, but it does not contain all the rights lsited in the Directive, cf. Manolova (n 5) 30–31.

61 And where information of rights is limited to a narrower list of rights, cf. Costa and Caeiro (n 4) 19, 25.

62 Alessandra Santangelo, Isadora Neroni Rezende and Marianna Biral, Chapter 8, § 8.2; Ouwerkerk and o (n 7) 47, though in the latter case according to a model different from that of the Directive.

listed in Directive 2012/13 is provided to the accused in cases of questioning before the prosecutor, or before the police when the latter is delegated by the prosecutor, but only partially in case of questioning before the police that acts on its own initiative.63

In Spain, the transposition of the list of information rights is relatively complete. Spain is also the only country that seems to have incorporated the effort towards the "comprehensibility" requested by Art 4 of the Directive, as it explicitly requires to deliver the information rights in an "accessible language, adapted to the age, degree of maturity, disability and any other personal circumstance".64

However, the Spanish system is clearly deficient against one of the most crucial information rights, that is the obligation to inform the accused of the "nature and legal classification of the criminal offence, as well as the nature of participation", as well as of "any relevant changes in the object of the investigation and of the alleged facts".65 In Spanish law, these elements are indeed substituted with the milder reference to a general description of the facts attributed to the accused, and information of subsequent changes will only "be provided with sufficient detail to allow the effective exercise of the right of the defence" – of course, according to the determination of the investigators.66

Derogations concerning the right to be informed of the accused, even in clear violation of the Directive, may be found also in other legal orders. In Germany, as anticipated, where no information about legal qualification is given in case the person is interviewed by police, such information is replaced by a "rough description of the accusation";67 in Croatia, the right to information does not extend also to subsequent "changes".68 On the other side, Bulgaria, Italy, France, Portugal and Poland appear more in line with the Directive under this profile, though sometimes only thanks to

63 Cf. for Germany: Albrecht and Schneider (n 4) 22–24; and for Italy: Bartoli and o (n 21) § 4.2.1.1.

64 Cf. Neira-Pena (n 5) 28. A proposal is this sense was also raised by the Polish Ombudsman in 2019 with regard to juvenile defendants, but without success, cf. Kremens and o (n 34) § 52.

65 Art 6(3) and (4), Directive 2012/13.

66 Cf. Neira-Pena (n 5) 29.

67 Cf. Albrecht and Schneider (n 4) 24–28.

68 Cf. Đurđević and o (n 4) 31.

substantial interventions of the case-law, that subsequently brought the necessary statutory amendments.69

9 Underestimating Practical Contexts and Structures: Training, Costs, and Qualitative Assessments (13.2.4)

Lastly, detrimental effects for a coherent application of procedural safeguards throughout the EU may also be observed with regard to some practical or structural profiles that, although mentioned in the Directives, do not find any specific discipline at the supranational level. They remain, therefore, openly left to national discretion in their concrete implementation.

The first reference, in this sense, are training obligations, established in all Directives but for 2013/48 and 2016/343.

These pieces of EU legislation, indeed, clearly affirm the need to establish training programmes for all different actors involved of criminal proceedings (judges, prosecutors, law enforcement, defence counsels). Nonetheless, they do not spare wording on how such programmes should be structured, or financed, in order to ensure an acceptable quality threshold. In practice, this brought to a situation in which, after the entry into force of the Directives, nothing, or very little, has changed at domestic level concerning remedies.

Currently, the field where these obligations seem to be taken less seriously is Directive 2012/13, for which some training is reported only in Sweden and France (in the latter, just for magistrates).70 It follows Directive 2016/1919, where programmes are established, in very different forms, only in Italy, Poland and the Netherlands.71 Very fragmented is the situation concerning Directive 2010/64: in this context, sometimes no training programme is provided at all (Italy, Poland, Spain); sometimes

69 As in the case of Italy, thanks to Drassich v Italy App. no. 25575/04 (echr, 11 December 2007), cf. Alessandra Santangelo and o (n 63) § 8.2. For the other mentioned countries, cf. Costa and Caeiro (n 4) 27; Kremens and o (n 34) 34; and Cervellera and Parizot (n 33) 21.

70 Cervellera and Parizot (n 33) 24; Maria Bergström, 22.

71 Cf. Ouwerkerk and o (n 7) 108; Kremens and o (n 34) 73; Santangelo and o (n 63) § 3.3.1.

it is foreseen only for magistrates, though in quite a superficial way (France);72 in other cases it exists, but is limited to interpreters (Portugal, Croatia, the Netherlands).73 Better is the situation in juvenile justice, where the need for specific training is generally more recognized, though still far from being unanimous: in some cases, specific programmes are not established yet (Portugal, the Netherlands); or are limited to court-appointed lawyers (Croatia, Italy).74

For Directive 2010/64 and Directive 2016/1919, such criticalities then naturally merge with the problematic lack of provisions for a dedicated budget, at the national or EU level, to support the costs deriving from interpretation and translation, as well as from legal aid services. In some countries the implementation of Directive 2010/64 was explicitly subjected to the obligation not to increase costs for the state (Spain). 75 The underestimation of such structural and financial requirements has been unsurprisingly identified as a significant element undermining the effective implementation of these two Directives.

Moreover, to a certain extent, this situation also plays as a counterbalancing factor against the broader scope of application of the right of access to a lawyer pursued by Directive 2013/48:76 Indeed, if cases of assistance are expanded, but nothing is done to financially support legal aid budget, the effectiveness of such right cannot but be drastically reduced for a large part of the population.

72 I.e. half a day programme, cf. Cervellera and Parizot (n 33) 15.

73 And in the Netherlands only to registered interpreters, cf. Ouwerkerk and o (n 7) 38.

74 Cf. Đurđević and o (n 4) 72; Santangelo and o (n 63) § 3.3.1.

75 Cf. Neira-Pena (n 5) 18. Regarding Directive 2010/64, the underestimation of structural profiles touches also upon the organization itself of the interpretation services. Indeed, in most examined Member States (all, but in Spain – cf. Neira-Pena (n 5) 14 – and Portugal – cf. Costa and Caeiro (n 4) 16), the transposition of the Directive brought to the creation of official registers for interpreters and translators. Nonetheless, the concrete ways in which such a measure brought to an effective improvement on the quality of this form of assistance remains highly diverging. In Croatia, interpreters and translators are part of courts' permanent staff and are registered in lists kept in county courts (Đurđević and o (n 4) 18–21). In France, the list is centralized before the Court of Cassation (Cervellera and Parizot (n 33) 14). In some cases, besides for linguistic skills, further competence is required: in Croatia, general and legal knowledge is necessary (Đurđević and o (n 4) 18–21); in the Netherlands, the register is organized in different sections in which interpreters are classified according to their sectorial expertise (eg. criminal law, civil law cases), cf. Ouwerkerk and o (n 7) 38.

76 Cf. Ouwerkerk and o (n 7) 102 ff.

A similar consideration also partially explains the widespread trend to consider the right to interpretation and translation as alternative options, rather than two autonomous safeguards, both necessary to the defendant who does not understand the language of the proceedings.77

Such an approach may be observed in some Member States, where the possibility to provide an oral instead of written translation is drafted in terms so broad as to make it the rule.78 In Germany, despite the cjeu landmark decision Covaci, the right to translation is always performed orally if the accused is assisted by a lawyer;79 a similar conclusion finds application also in France, where a combination of interpreter and lawyer assistance is clearly preferred to the need of providing written translation. 80 This restrictive interpretation does not however find application in all Member States: in Bulgaria, Croatia, and Italy, for instance, oral translation is allowed only in exceptional circumstances.81

Peculiar, is again the case of Portugal, where oral translation remains an exception; however, in that system the recognition of the right to translation does not follow the criteria established by the Directive (essential/non-essential document), and it is rather based on a "necessity/unnecessity" assessment, which adds vagueness to the already limited foreseeability of the precise scope of this right.82

Dealing with underestimation of structural mechanisms, also the lack of rules and guidelines referring to how certain "assessments" should be carried out within criminal proceedings should be mentioned. The reference here goes to the evaluation of the capacity of the suspect or accused to "speak and understand the language of the criminal proceedings", to ascertain the need for interpretation and translation.

77 Ibid 40–41; James Brannan, 'Identifying written translation in criminal proceedings as a separate right: scope and supervision under European law' (2017) 27 Journal of Specialised Translation 43.

78 Contrary to what established by Art 3(7), Directive 2010/64, for which such cases should remain exceptions.

79 Cf. Albrecht and Schneider, Chapter 7, § 7.4.

80 Cf. Cervellera and Parizot (n 33) 14 ff.

81 Cf. Manolova (n 5) 13; Đurđević and o (n 4) 19; Bartoli and o (n 21), § 3.4.

82 Though according to the requests made by the defendant, cf. Costa and Caeiro (n 4), 16.

Despite the statement that "Member States shall ensure that a procedure or mechanism is in place", and that the latter should require "that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned" the existence of such needs,83 the provision indeed remained a little more than a recommendation.

Therefore, it is not surprising to observe a whole variety of practices at the national level, that differ under all relevant profiles, starting from the definition of which authority is in charge for the assessment. In some States, the power is conferred to police officers, with a possibility to appeal their decision to the prosecutor or the judge, depending on the phase of the proceeding (the Netherlands);84 in others, the decision is made by judicial authorities (Germany, Italy);85 in most cases, however, the matter is not clearly regulated and rather decided on a case-by-case basis (Poland, Portugal, Croatia, Spain, Bulgaria).

Moreover, none of the examined Member States has established a formal test to ascertain the linguistic skills of the accused. The procedure usually remains highly informal, which makes its results often quite difficult to challenge for the defendant. In Spain, in particular, it is explicitly affirmed that the burden of proof over the lack of sufficient linguistic understanding shall be borne by the accused.86

Against this background, the Dutch and Croatian systems appear more safeguarding. In the Netherlands, it is prescribed that the accused shall not only "understand", but also "master" the language not to trigger the need for interpretation and translation.87 In Croatia, though missing any formalization, the domestic jurisprudence considers it sufficient to ask the defendant about her skills, without attaching any presumptive value to parameters such as being resident or a worker in the country. In case of doubt, the person shall be recognized the right to interpretation.88

83 Cf. Art 2(4) and Recital (21), Directive 2010/64.

84 Cf. Ouwerkerk and o (n 7) 26 ff.

85 Cf. Albrecht and Schneider (n 4) 15; Bartoli and o (n 21), § 3.2.

86 Cf. Neira-Pena (n 5) 24.

87 Cf. Ouwerkerk and o (n 7) 26.

88 Cf. Đurđević and o (n 4) 22.

10 Beyond Legislative Texts: The Role of Judicial Interpretation (13.3)

Undoubtedly, the substantial level of protection of procedural rights shall be measured also in light of the case law, that has a direct impact on the matter, especially in its domestic dimension. The examined case law included decisions making reference to the Directives explicitly, and such that simply referred to the rights – often already provided for at the national level – that the Directives insisted onto.89

In this regard, a first observation is, that despite a legislative apparatus composed of six Directives, in all Member States national courts are reportedly tending not to make explicit reference to EU legislation, and mainly refer to domestic frameworks or, at most, to the jurisprudence of the Court in Strasbourg.

On one side, this phenomenon was to be expected due to historical reasons; being the Directives relatively more recent compared to the Convention, and the case law of the cjeu on the criminal matter still rather limited. Not always, however, the ECtHR case law provides for the highest standards of protection at the European level. In these situations, "overreliance" on the Conventional system may bring to the unintended consequence of "neutralizing" the innovative capacity of the Directives. A greater level of reference to the EU legislation, therefore, could have been expected at least with regard to those rights that find in this context a higher protection, for instance the privilege against self-incrimination in criminal proceedings, or the right to interpretation and translation.90 Against these profiles, the sensitiveness of national courts, and especially of courts of last resort, seems still quite below its potential.

89 To this end, it shall be clarified that, in order to adopt a more rational approach, the present research took into account national judicial decisions referring to the procedural safeguards recognized by the six Directives issued only after the expiration of the transposition deadlines of each Directive they referred to. Only where such case law was too scares, the research was extended to previous jurisprudence.

90 For instance, the right to silence within criminal proceedings, as the wording of Art 7, Directive 2016/343 provides for a higher level of protection than that of the ECtHR case law, e.g. in Ibrahim and o. v UK App Nos 50541/08, 50571/08, 50573/08 and 40351/09 (echr, 30 March 2016), especially concerning the prohibition to use the choice to remain silent against the defendant. A similar trend may be noticed to a certain extent also with regard to the already mentioned distinction between the right to interpretation and translation. As noticed by Ouwerkerk and o (n 7) 41: "the Strasbourg court has extracted this right from Article 6(3)e, which merely provides for the right to obtain the assistance of an

The increasing number of preliminary requests filed by first instance judges in criminal matters in the last few years, gives hope for a slow change of perspective. To date, however, the effort is certainly not equally distributed among Member States, and often does not reach its purpose due to the divergent number of interventions of distinct highest courts. Examining the relevant case law of the cjeu, it can be noticed how requests tend to originate from a relatively close group of Member States (Italy, Bulgaria, Germany, Poland, Spain and, to a lower extent, Romania), while others appear so far mostly absent from the circuit (Croatia, France, Portugal, the Netherlands, Sweden).91

The jurisprudence of the Court in Luxembourg, however, is far from being overreaching when it comes to the criminal matter, and to procedural safeguards of the defendant in particular. In this sense, it seems worth to briefly recall the areas that have already emerged as more critical even in this transitional phase of the harmonization process. At the moment, still relatively few final decisions of the Court have been issued, and not with regard to all six Directives. Yet, the situation is hopefully destined to change in the near future.

11 The Case-Law of the Court of Justice and National Approaches: Overview (13.3.1)

Only some of the rights recognized in the Directives have been so far brought before the attention of the Court, and even less have already been the target of final decisions. Regardless, the preliminary request ratio has notably increased in the last couple of years, and the picture could therefore quickly become much broader than the current one.

At the time of writing, however, with regard to Directive 2010/64, the Court has mainly focused on clarifying (or trying to clarify) the notion of “essential documents” for which a translation is required, and on whether substantial terms to appeal a decision should run from the moment of formal

interpreter in court. What is more the ECtHR has often admitted that, as the text of the relevant provisions in the echr refer to an ‘interpreter’, not a ‘translator’, oral linguistic assistance may satisfy the requirements of the Convention, see Husain v Italy App no 18913/03 (echr, 24 February 2005)”.

91 See the case law referred to in § 13.3.1. For Sweden, cf. Maria Bergström, §4.2 ff.

notification or of rather from the actual communication of the act in a language that the persons understand.92

Decisions on Directive 2012/13 also appear so far relatively narrow in scope and mostly concerned the right to information (how or where to notify the accused of her rights, and especially the information about the accusation, particularly critical in case of simplified proceedings, like penal decrees).93 Critical and relevant issues, however, already emerged also with regard to transnational cooperation, in particular about the application of information rights within eaw proceedings.94 The right of access to file, on the other side, has been raised only to a lesser extent.95

Issues concerning the scope of application of the rights emerged also with regard to Directive 2013/48,96 together with significant questions concerning potential limitations for the accused to choose a lawyer of her own choice,97 or the boundaries of temporary derogation to the right to a lawyer.98

Much broader, in terms of evolving themes, are the decisions issued or pending about Directive 2016/343, starting from the very scope of the presumption of innocence as such,99 and of the

92 Case C-216/14 Criminal proceedings against Gavril Covaci (cjeu, 15 October 2015); Case C-278/16 Criminal proceedings against Franck Sleutjes (cjeu, 12 October 2017); Case C-338/20 DP (Prokuratura Rejonowa Łódź-Bałuty) (cjeu, 6 October 2021).

93 Case C-612/15 Criminal proceedings against Nikolay Kolev and Others (cjeu, 5 June 2018); Case C-646/17 Criminal proceedings against Gianluca Moro (cjeu, 13 June 2019); Covaci (n 92); Joined Cases C-124/16, C-188/16 and C-213/16 Criminal proceedings against Ianos Tranca and Others (cjeu, 22 March 2017); Case C-615/18 UY v Staatsanwaltschaft Offenburg (cjeu, 14 May 2020); Case C-467/18 Criminal proceedings against EP (cjeu, 19 September 2019). See also the pending cases C-769/19 Spetsializirana prokuratura and Case C-282/20 zx (both preliminary references from Bulgaria).

94 Case C-649/19 Criminal proceedings against ir (cjeu, 28 January 2021).

95 Kolev and Others (n 93).

96 ep (n 93); Case C-659/18 Criminal proceedings against vw (cjeu, 12 March 2020).

97 Kolev and Others (n 93).

98 Criminal proceedings against vw (n 96).

99 Case C-439/16 ppu Criminal proceedings against Emil Milev (I), (cjeu, 27 October 2016); Case C-310/18 ppu Criminal proceedings against Emil Milev (ii), (cjeu, 19 September 2018); ep (n 93).

privilege against self-incrimination in particular.100 Specific questions have then been proposed with regard to the presumption as a rule of treatment,101 or to the standards related to the burden of proof. Still limited, on the contrary, is instead the jurisprudence on the right to be present at trial.102

The same goes for Directive 2016/800, which so far has come to the attention of the Court only in relation to the execution of a European Arrest Warrant.103 No case law, finally, is reported yet with regard to Directive 2016/1919.

The right to an effective remedy, transversal to most Directives, has been so far touched by cjeu decisions only to a limited extent, in a case concerning the right to a lawyer and to information.104

Against this significant, but overall limited case law, it may be observed that approaches of national courts are quite diverging throughout the EU and also within the same Member States, depending on which procedural safeguard they refer to.

Naturally, this can be explained at least partially with the persistence of some structural differences among legal orders, which heavily influence the interpretation and concrete application of the same rule (even where semantically identical) across jurisdictions.

Fundamental systemic divergences include, for instance, the degree of relevance given to evidence collected in preliminary investigation at trial, or the more proactive or passive role conferred to the defence lawyer, or the legislative tendency to conceive procedural safeguards more as provisions limiting public authorities' prerogatives, than conferring rights to the privates involved.105

100 Case C-481/19 DB v Commissione Nazionale per le Società e la Borsa (Consob) (cjeu, 2 February 2021).

101 Case C-8/19 ppu Criminal proceedings against rh (cjeu, 12 February 2019); Case C-377/18 Criminal proceedings against AH and Others (cjeu, 5 September 2019).

102 On the standard of proof, see rh (n 101); Case C-653/19 ppu Criminal proceedings against Spetsializirana prokuratura (cjeu, 28 November 2019); on the right to be present at trial, cf. Case C-688/18 Criminal proceedings against tx and uw (cjeu, 13 February 2020).

103 Case C-367/16 Dawid Piotrowski (cjeu, 23 January 2018).

104 Directive 2013/48 and 2012/13, cf. ep (n 93).

105 Cf. e.g., in the Netherlands, Ouwerkerk and o (n 7) 129.

Structural differences, however, seem to emerge also beyond traditional discrepancies attributed to the influence of inquisitorial or accusatorial models. For example, the scope of the right to a lawyer at the national level seems to depend to a significant extent also on the choice, made by the legal system, to have or not have a complete overlapping between mandatory defence and free legal aid. Indeed, in some countries (all but Italy and Spain) the necessary presence of the lawyer also implies that costs are paid by the State,106 which has relevant implications on the sustainability of the right in practical terms.

Given such a complex structural scenario, some national courts, especially those of last resort, reportedly tend to promote a minimalist approach towards EU law, that limits its effects in favour of national standards. This may reportedly be observed even where the former entails a higher level of protection for its citizens, and even where the national legal bases would actually allow for a broader interpretation of the rights at stake. Examples in this sense maybe found in the Netherlands, where a narrow interpretation of the "participation" of the lawyer during questioning is developed;107 in Bulgaria and Spain, concerning the interpretation of "essential documents", or again in Bulgaria about the scope of the right to be present at trial for juvenile defendants.108 In some cases (France,109 Portugal),110 the position of higher courts is even reportedly that of an explicit and net rejection of EU standards, showed by a constant refusal to make reference to the cjeu regardless the requests coming from first instance judges.

On the other hand, national courts are also increasingly playing an essential role in pushing towards harmonization beyond the limits of the Directives' texts or of their official transpositions.

This occurred, for instance, in Italy, Bulgaria and the Netherlands with regard to the extension of certain procedural rights also to the so-called punitive administrative matter;111 in Poland, where the jurisprudence, at least to a certain extent, tries to limit the severe lacunas for instance with

106 Given the possibility, in some States, to recover costs from the accused if she gets convicted, e.g. in Germany.

107 Cf. Ouwerkerk and o (n 7) 62 ff.

108 Cf. Neira-Pena (n 5) 15 ff; Manolova (n 5) 17, 62.

109 Cf. Cervellera and Parizot (n 33) e.g. 26–27.

110 Cf. Costa and Caeiro (n 9) §10.4.

111 Right to silence in Italy (cf. Santangelo and o (n 63) § 8.3), right to interpretation and translation in the Netherlands and in Bulgaria (Ouwerkerk and o (n 7) 39 ff; Manolova (n 5) 13).

regard to the right to assistance by a lawyer;112 again in Bulgaria and in Spain, where the case law strengthened the burden of proof rules in light of the presumption of innocence.113 Particularly significant is the Spanish case, where the Constitutional court recognized some Directives' provisions a direct effect, anticipating their safeguarding value before the transposition into national law.114

12 Hints from Automated Analysis (13.3.2)

Against this background, the research adopted also a different perspective to analyse the state of play of procedural safeguards in the EU through the lenses of harmonization.

This innovative point of view grows upon a semantic analysis and annotation of the legal provisions contained in the six Directives. The methodology, developed by computer scientists in cooperation with legal experts, takes its cues from the "translation" of legal text into a numerical text representation, following a computational approach that exploits Natural Language Processing (nlp) techniques, which is an application of ai technologies. According to this methodology, text excerpts, such as legal provisions, have been transformed into a vector, by which words are represented by numbers. The main aim of such semantic analysis was the tracking of significant frequency of occurrences from mere counts or redundancies.115

The result of such analysis allowed the development of a "harmonization index", that enables to compare the level of harmonization among Member States in an automatic way. This task is usually based on single assessments made by national legal experts (as in traditional legal comparative analysis). In the present analysis, also an automated perspective was added, thanks to an examination of the scores directly emerging from the legal texts at the different levels (national/European).

112 Kremens and o (n 11) § 9.3.1.

113 Neira-Pena (n 5) 65; Manolova (n 5) 82.

114 Cf. Neira-Pena (n 5) 32. A more limited attempt in this sense could be seen also in Portugal, with regard to Directive 2010/64, cf. Costa and Caeiro (n 4) 18.

115 For further illustrations on the methods and result of this research see below, Luigi Di Caro, Llio Humphreys, Emilio Sulis and Rohan Nanda, Chapter 16, § 16.5 ff.

In other words, the semantic automated analysis provided a significant alternative examination of the level of harmonization of procedural safeguards throughout the EU, that allows to countercheck whether the conclusions derived from a human-based and traditional legal analysis find adequate match in the legislative texts. This also allows, on a further level, to inquiry on whether implementation into national legislation resulted in modifications of the notions contained in the supranational texts.

Thus, this method became especially relevant in the given playfield, where the level of explicit definitions of terms is generally quite low, the linguistic divergences between Member States is high and judicial interpretation is also rather divergent.

On a basic level, the analysis pointed out how some of the differences in the application of the procedural safeguards may derive from different linguistic versions of the six Directives.116

116 "For instance, the English version of Article 2(1) of Directive 2010/64 states that "[m]ember States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings." The Italian version of the same states: "Gli Stati membri assicurano che gli indagati o gli imputati che non parlano o non comprendono la lingua del procedimento penale in questione siano assistiti senza indugio da un interprete nei procedimenti penali dinanzi alle autorità inquirenti e giudiziarie, inclusi gli interrogatori di polizia, e in tutte le udienze, comprese le necessarie udienze preliminari." There is a structural difference in the way the concepts are related to one another. In the English version, the concept "criminal proceedings before investigative and judicial authorities" has three examples, namely "police questioning", "all court hearings" and "any necessary interim hearings." However, in the Italian version, the third concept is an example of the second concept. The French and German versions follow the conceptual structure of the English version. Conversely, linguistic comparison can also help resolve uncertainties and ambiguities. For instance, according to Recital 28 Directive 2010/64, "[w]hen using videoconferencing for the purpose of remote interpretation, the competent authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals)." It seems strange that "information" should be an example of a "tool". However, in light of the comparison between linguistic versions, it is clear that this is the intended meaning. For instance, the Italian version of the recital is: "Quando si utilizza la videoconferenza per l'interpretazione a distanza, le autorità competenti dovrebbero poter utilizzare gli strumenti sviluppati nel contesto della giustizia elettronica europea (ad esempio informazioni sui tribunali che dispongono di materiale o di manuali per la videoconferenza)". Linguistic comparison also clarified that Recital 28 provides only one instance of tools, "information on courts with videoconferencing equipment or manuals", rather than two examples, "information on courts with videoconferencing equipment" and "manuals" – an alternative reading that is only possible in the English version", cf. Emilio Sulis, Davide Audrito, Luigi Di Caro and Llio Humphreys, CrossJustice Project, Deliverable 3.2, 'Rule ontology, user's guide' <https://site.unibo.it/cross-justice/en> § 9.2.

More in-depth analysis can be derived from this approach.

It was possible, for instance, to rank the level of transposition, highlighting implementation lacunas in a systemic way, taking into account not just explicit transposition, but also rules already present in the legal framework even before the advent of the EU legislative package. Namely, the analysis showed that the Directive that by far presents more non-transposed provisions is Directive 2016/800 (182 lacunas), followed at a large distance by Directive 2013/48 (69), Directive 2016/1919 (56); Directive 2012/13 and 2016/343 (respectively: 49 and 41), and finally by Directive 2010/64 (only 32 lacunas).117

Such data may be interesting from several perspectives. For instance, they seem to clearly exclude a direct link between the level, or quality of the transposition and the amount of time elapsed since each piece of EU legislation became binding.

On a different viewpoint, it shall be considered that lacunas may have a different impact depending on which of norms they refer to. Accordingly, bare high numbers do not per se entail a level of infringement necessarily more severe than a lower one. Also, as already argued, Directives differ in terms of their structure, some being more prescriptive than others, and therefore containing more provisions that might be "forgotten" in the transposition.

From this consideration, one might suppose that more "rule-based" Directives are more likely to have implementation loopholes, while Directives with a vaguer, or more "principle-based" nature might be less subject to this phenomenon. This explanation, however, does not result satisfactory in all cases. For instance, while it could fit for Directive 2016/800, it does not make sense if referred to Directive 2016/1919. The latter Directive, indeed, presents a relatively high level of transposition lacunas, while showing a nature more "principle than rule-based".

Therefore, it can be observed how the normative legislative technique seems to produce dissimilar effects on the of level implementation, which do not necessarily follow easily predictable explanatory paths and depend to different extents on the specific profile touched upon the EU legislation.

117 Data extrapolated from Emilio Sulis, Llio Humphreys, Davide Audrito and Luigi Di Caro, CrossJustice Project, Deliverable 3.5, 'Report on semantic analysis and annotation of legal data', Table 2.

"Harmonization indexes" and "heat maps" can also be interestingly used to reflect upon the method chosen at the national level to implement each Directives.

Ranking the latter according to the level of explicit transposition, and thus on the direct impact they brought into national systems, Directives 2016/800 and 2013/48 emerge again on top (respectively, with 236 and 181 explicit transpositions), this time followed by Directive 2012/13 (162), Directive 2010/64 (124), Directive 2016/1919 (52) and finally Directive 2016/343 (only 10 cases of explicit transposition).118

The misalignment between the two proposed dataset confirms therefore, from a different perspective, that a major role in assessing the status of procedural safeguards in the EU relies in the notion and interpretation of pre-existing norms, rather than on the explicit introduction of new provisions.

It is at this point that the semantic analysis, which will be further illustrated in the volume, brings its most relevant contribution, allowing – on the basis of the text analysis – to draw "heatmaps", that describe for each article of the Directives the level of similarities between pairs of Member States.119

To this end, nlp techniques may thus provide a significant contribution in identifying systems which, in relation to certain provision, present a higher level of affinity.

This might have significant impact, for instance, in transnational proceedings including eaw or eio, which already involve usually only two Member States at the time.

118 Ibid.

119 See Di Caro and o (n 115) § 16.7, pointing out that "for instance, the following 'heat map' about "Art_5" of Directive 2016/1919 clearly describes how three pairs of States (Italy and Germany, Germany and Spain, Poland and Germany) have more similar text (light color) than other States. On the contrary, Italy's and Poland's cases seem very different".

13 The (Ir?) Relevance of the Type of Legal Bases at the EU Level (13.4)

The picture that emerges from the analysis carried out shows that the path of harmonisation in the field of criminal justice is rather complicated. It is particularly so in the field of criminal procedure, and specifically in the extremely sensitive area of respect for the rights of the accused.

In the light of these considerations, it would seem natural to conclude that, theoretically, the most suitable instrument, and perhaps the only one, to obtain satisfactory results in this sector is a regulation.

Thanks to such legislative tools, the EU could achieve vertical unification without having to wait for all the Member States to correctly transpose the provisions adopted at Union level.

Obviously, this route is not per se feasible, as is often the case with purely theoretical hypotheses developed by scholars.

On the one hand, it is the Treaty that precludes this option. Indeed, Art 82(2) tfeu allows the EU legislator only to adopt directives, and not regulations, on the rights of the accused. Moreover, as well known, in Art 82(2), the purpose that justifies recourse to EU legislation is promoting better functioning of judicial cooperation and the principle of mutual recognition. In other words, the European legislator may adopt directives on the defendant's safeguards only when they are instrumental in producing added value in judicial cooperation, by harmonising certain aspects of the criminal justice systems so as to increase mutual trust among Member States. Regulations could therefore be considered incompatible with the principle of subsidiarity.

On the other hand, even besides for such limitations, perhaps the use of regulations in this area would not be anyway able to produce definitive effects in terms of system unification. As we have seen, most of the inequalities among Member States are not related to what is written in the law, i.e. they are not due to the legislative wording in the strict sense. Rather, they are caused by different basic legal cultures, which produce different interpretations and applications even against legal texts formally expressed in homogeneous ways.

14 Which Effective Protection? (13.5)

It is therefore necessary to work with the tools that are available on the ground: Directives, the final version of which is evidently non-linear and characterized by some gaps in the definition of concepts.

This is due to a large extent to the strong jealousy120 that Member States show when it comes to ceding part of their sovereignty to standardise criminal procedure systems. The fact, politically speaking, is easily understandable. Criminal procedure is one of the most obvious forms – naturally not the only one – of state sovereignty, since it is only through it that the power to punish individuals in a community is regulated. Precisely because it touches on the relationship between the sovereign power and the citizen, criminal procedure is also strongly linked to constitutional law (so much so that some scholars have described it as a form of 'applied constitutional law').121 It is therefore inevitable that each State tends to act as a protective guardian of the way in which it administers the rules that are laid down in this very sensitive area.

We must therefore accept that, in the area of defendants' rights, the harmonisation process will proceed slowly, in a partial way, and through a set of interventions that will be able to produce effective results only in the long run (and thanks to adequate training of stakeholders).

In particular, there are three ways in which harmonisation is taking shape.

The first is vertical (top-down model) and is achieved thanks to the binding value of EU legislation (the directives adopted) and the judgments of the Court of Justice. Both these instruments, although of great importance, have limitations. Specifically, as illustrated also above, some regulatory provisions lack precision (and therefore leave too much freedom to the Member States).122 cjeu decisions, in turn, are still scarce in number123 and do not always intervene in key areas in the

120 Cf. above, Michele Caianiello, Chapter 1, § 1.2.

121 Daniele Negri, 'Diritto costituzionale applicato: destinazione e destino del processo penale' (2019) 2 Processo penale e giustizia 553. The author referred to (and examined) the definition adopted originally by Walter Sax, 'Grundsätze der Strafrechtspflege' in Karl August Bettermann, Hans Carl Nipperdey, Ulrich Scheuner (eds), Die Grundrechte, iii-2, (Duncker & Humblot 1959) 966–967.

122 See above, § 13.2.

123 See above, § 13.3.1.

matter (because they are left to the impetus of the national courts, which make, or refuse to make, requests of preliminary references).

The second method follows the opposite direction, proceeding from the lowest level (the State), to the supranational one (therefore in a bottom-up movement). It is constituted by preliminary rulings made by national courts, whose intrinsic structure does not ensure a homogeneous coverage of all the critical issues that would be potentially relevant in the interpretation of the Directives. Moreover, a limitation to this method also derives from the narrow number of Member States whose judges currently decide to make a reference to the Court of Justice.124 In short, this is a structurally non-homogeneous and incomplete mode of operation, both ratione materiae (not all potentially relevant matters are involved) and, so to speak, ratione personae (not all "persons" – the judges of the Member States – operate with the same diligence).

The third way in which harmonisation takes place is horizontal, and operates through judicial cooperation among Member States. Limits to mutual recognition of judicial decisions, and thus to cooperation, act as threats for those systems whose standards of protection are not compliant with EU directives and principles. This is a way of implementing harmonisation which certainly has some practical limitations (it is entirely left to the initiative of the individual national courts and lawyers), but which may be effective in some cases, at least where non-cooperation imposes too high a cost on the non-compliant State, either economically or, more frequently, politically.

All the three methods identified require considerable effort on the part of the legal operators.

Firstly, besides for the echr, justices and defence counsels need to be familiar also with the relevant EU law and jurisprudence, in order to understand which aspects require clarification (and which can be relied on/can find a solution in established case law).

This task is however problematic, given the multifarious nature of such supranational system. EU law is integrated in national systems, as well as strongly intertwined with the normative corpus of the echr (which, in turn, is in continuous dialogue with national systems). Furthermore, in both the EU and the echr systems, case law is a fundamental source, and probably the most important. This in turn implies that interpreters have to be familiar with two quite different methodological approaches (interpretation and application of statutory sources and capacity to find the rationes

124 See above, § 13.3.

principii of the judicial decisions) to which their legal tradition is still not always ready providing adequate training.

Secondly, professionals dealing with this branch of law need to have a minimum level of knowledge of the other Member States legal systems.

Within such basic knowledge one must include the main principles of the criminal matter, the essential scheme on how national criminal proceedings is regulated, and some understanding on how in practice works the interaction among police, prosecutors, defence counsels and judges. Eventually, some familiarity with how legal reasoning is expressed by national court may help in understanding strengths and weaknesses of a given criminal justice system.

Only this way one can adequately appreciate the magnitude of potential lacunas in procedural safeguards and whether to refer a case before the cjeu for a preliminary ruling, and on which points: Indeed, as shown by the analysis of single national systems,125 despite national Governments' claims of having complied with the requirements of a Directive, in practice things often work out rather differently.

For the reasons already expressed above, against this background ai systems may be of significant help, as they allow an integrated analysis of the different levels in a relatively quick and effective manner.126

Of course, their impact heavily depends on the quality of the data that is fed into the system.127 As long as they are accurate and constitute the result of research conducted with a high level of professionalism and precision, ai systems can however provide a significant added value in the speed and accuracy of learning a different legal orders.

It is therefore conceivable that, by continuing along this path, the complex process of harmonising State criminal procedures, in particular with regard to the rights of the defence, could be speeded

125 Cf. above, Part ii of the volume.

126 Cf. above, Caianiello (n 120) §§ 1.4 and 1.8.

127 See Giuseppe Contissa and Giulia Lasagni, 'When it is (also) Algorithms and AI that decide on Criminal Matters: In Search of an Effective Remedy' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 295; Michele Caianiello, 'Dangerous Liaisons. Potentialities and risks deriving from the interaction between Artificial Intelligence and preventive justice' (2021) 29 European Journal of Crime, Criminal Law and Criminal Justice 21.

up and could lead to the integration of national systems, which has been the ultimate objective of the EU since the inception of the Area of Freedom, Security and Justice.