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National Report for Romania

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Disclaimer: On behalf of the **EUI**, the present deliverable has been drafted by **DANIEL NIŢU,** Ph.D., Associate Professor, Faculty of Law, Babeş-Bolyai University in Cluj-Napoca Romania. **For the purposes of this report, national case law has been included only if issued after the approval of the procedural Directive it refers to**.

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4 Main findings

Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings was incorporated in the body of the 2014 Code of Criminal Procedure (CCP). In the field of the European arrest warrant, Law no. 302/2004 on international judicial cooperation in criminal matters represented a *de facto* (indirect) implementation of parts of the Directive. Regarding interpretation and translation services, only in 2016 was the special legislation in this field amended in order to explicitly transpose the correspondent provisions from the Directive. Although the national authorities consider the Directive fully transposed (in 2016, we add), there are still provisions from the Directive which are not even now implemented by national law.

Directive 2012/13/EU: Right to information in criminal proceedings were explicitly transposed by the 2014 CCP. In addition, in 2016 the rest of the provisions were explicitly transposed. According to official information, the Directive was fully transposed only in 2017, after the enactment of an Order in 2017 which provided for the model letter of rights. From the case-law perspective, attention is drawn in particular to recent Constitutional Court decisions.

Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed was eventually transposed into domestic legislation by Law no. 236/2017 amending Law no. 302/2004 - this is the case for the European arrest warrant, as the other aspects regulated by the Directive were transposed implicitly by pre-existing legislation. Although most of the requirements imposed by the directive are now met by Romanian legislation, there are cases where the national legislation failed (e.g., in relation to confidentiality of discussions between the suspect or accused persons and their lawyer prior to any questioning, which is explicitly provided for by the CCP only when deprivation of liberty is involved).

The 2014 CCP already provided a distinct status for children who are suspects or accused persons in criminal proceedings, so most parts of the Directive (EU) 2016/800: Procedural safeguards for juvenile accused persons were covered by national legislation, pre-existing the directive. Still, several requirements were not fulfilled – therefore, the CCP was amended in December 2020, when Law no. 284/2020 entered into force with the explicit objective of transposing the Directive. Despite the serious delay regarding the transposition, there are still several aspects which prevent us from concluding that the national legislation is fully compliant (the definition of child provided by Law no. 272/2004 seems not to be applicable in criminal cases, the letter of rights provided by the already mentioned 2017 Order was not amended, there is no possibility to derogate from the individual assessment even when it would be on the child's best interests, etc.).

Directive (EU) 2016/1919 on legal aid: until very recent, there were no official records regarding the transposition process of the; probably the legislator was confident that most provisions from the Directive were already incorporated in the 2014 CCP, which considers that access to a lawyer is a fundamental principle. However, several provisions from the Directive have no correspondence in pre-existing legislation (e.g., the definition of legal aid is regulated only in civil matters and explicitly precluded from application in criminal matters). In March 2021, Law no. 51/2021 amended Law no. 302/2004 and explicitly transposed Article 5 from the Directive.

Directive (EU) 2016/343: the transposition of this Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial is still ongoing. Several projects of law aiming at transposing the Directive and amending the CCP were adopted by the Parliament, but were subsequently quashed by the Constitutional Court, before entering into force. In late 2020, Law no. 228/2020 intervened and explicitly transposed Article 8.4. At current time, there is no provision in national law dealing or sanctioning any public references to guilt; in addition, although there are several provisions dealing with the use of physical restraint, none of them "cover" the requirements from Article 5.1. As well, from the perspective of Article 5.2, the national legislation leaves at the discretion of the judicial organs the decision on maintaining handcuffs, thus contradicting the requirements of the Directive.

5 Introduction

5.1 General remarks

After the fall of the Communist regime in December 1989, the legislator tried to adapt both criminal law and criminal procedure law to European standards, especially in the field of sentencing (e.g., the abolishment of death penalty1, of seizure of entire properties2, etc.) and the right to a fair trial. Over the years, this legal reform has been greatly influenced, at least regarding the criminal procedure, by the ECHR case law against Romania.

During the process of reform, the challenges met by both the legislator and the courts were quite serious. Given that the law and the administration of justice have been regarded as instruments through which the Communist regime was set up and consolidated, the legal reform had to overcome both the law and the professional culture of criminal justice actors (judges, prosecutor and lawyers as well needed to shift, from the old communist / soviet mentalities, to the new European alike).

The 2014 CCP was adopted by Law no. 135/20103, as amended by Law no. 255/20134, and which entered into force on 1 February 2014. In the Explanatory Statement of the Code, the drafters pointed out that the continental paradigm is preserved while including a few adversarial rules adapted to Romanian legal culture5. For the drafting of the adversarial rules the main source of inspiration was the Model Code of Criminal Procedure for post-conflict criminal justice6. Other important rules were also inspired from this source7.

[1] See Decree no. 6/1990, published in M. Of. no. 4 from 8 January 1990, which repealed the death penalty from Romanian Criminal Law (Article 54 from 1969 CC) and replace it with life imprisonment.
[2] Article 68 from 1969 CC, repealed by Law no. 140/1996, published in M. Of. no. 289 from 14 November 1996.
[3] Published in M. Of. no. 486 of 15 July 2010.
[4] Published in M. Of. no. 515 of 14 August 2013.
[5] This being said, the 2014 CCP does not imply a broad reform in order to introduce adversarial culture in Romanian criminal procedure.
[6] V O'Connor, C Rausch, HJ Albrecht, G Klemencic (eds), *Model Codes for post-conflict criminal justice* (Washington, United States Institute of Peace Press, 2008).
[7] E.g. the purpose of procedural laws, the classification of protective measures for witnesses taking into account the

Initially, the drafters intended to introduce more items from the adversarial model in an attempt to mark a shift from the Communist past and remove the prosecutorial bias exercised by the judges. During the drafting process, this intention was abandoned. Cultural conservatism, together with new purposes like efficiency and expediency, became the driving force of the new legislation. Thus, only disparate elements from the adversarial system were introduced. These include, inter alia, the preliminary hearing, the taking of the evidence from a witness by a judge during the criminal investigation, the initial questioning of the witnesses by the party that called them to testify during the trial and the reasonable doubt standard. However, the whole structure of criminal proceedings and the dominant mentalities were not subject to change.

5.2 Constitutional and criminal justice system

The first major step was the adoption of the 1991 Constitution (RC), which was seen as an attempt to depart from the old regime legislation and the habits within. In fact, the Romanian Constitution (even after its revision in 2003) contains several detailed provisions regarding the protection of fundamental rights.

The Constitution devotes an entire Title to "Fundamental rights, freedoms and duties" (Title II). Among general provisions, Article 16.2 regulates the equality before the law of all persons; Article 20 underlines the prevalence on domestic law of international treaties on human rights, while Article 21 provides free access to justice. Chapter II, entitled "Fundamental rights and freedoms" contains detailed provisions regarding individual freedom (Article 23), right to defence (Article 24), personal and family privacy (Article 26), inviolability of domicile (Article 27), secrecy of correspondence (Article 28), freedom of conscience and expression (Article 29 and 30), right to petition (Article 51).

All these provisions were repeated and detailed in the CCP and other subsequent legislation (e.g., the so-called execution law legislation)[8]. The Criminal legislation has been updated by constant

witnesses under threat and vulnerable witnesses, the way in which the technical measures of surveillance and investigation were regulated.

[8] The fact that the Constitution itself devotes an entire title to such provisions is not common for most legal systems and it is consequence of the desire to regulate the "first level" of these rights and standards, in order to depart from old communist legislation. Following the model of former 1968 (amended) CCP, the 2014 CCP regulates once more and in

amendments which have tried to align it to the standards at the European level (a major factor behind being the case-law of the ECHR). The '1 February 2014 moment', when the new CCP and new Criminal Code (CC) entered into force represented a turning point for the Romanian legal system. The new desired framework incorporated the recent case law of the Constitutional Court and the ECHR, thus reaching a genuine European level of protection, theoretically correspondent to those of most developed European legal systems.

5.2.1 The Right to a Fair Trial and the Right to Criminal Proceedings within a Reasonable Length of Time

These two rights have been expressed in the Constitution along with its 2003 revision (Article 21.3) and the 2014 CCP regulates them as well[9]. As stipulated by the 2014 CCP, the right to a fair trial is the summing of all procedural rights and it does not have a special definition or meaning[10].

5.2.2 Right to Liberty and Security

The right to liberty and security is a fundamental right under Article 23 of the Constitution and Article 9 of the CCP. As a specific feature of the Romanian law, the Constitution contains a lot of rules on this right, rules which naturally should have appeared only in the CCP: the upper time limit

more detail all these provisions, but such an approach can lead to certain confusion. In addition difficulties may arise from various subsequent amendments of the CCP (e.g., transposing EU Directives), while the Constitution is still in its 2003 version. In order to avoid such confusions, we underline that the hierarchy of the acts is as follows: the Constitution and, afterwards the organic laws (in this case, both the CC and the CCP). The European legislation is considered to have an infra-constitutional status, namely "under" the Constitution, but above the CC and the CCP. Therefore, in case of a non-transposed Directive the direct effect is possible, as the European legislation has primacy in this case. In the particular case where the Constitution itself regulates a particular issue, amendments can be made only after the revision of the Constitution. This is more of a theoretical problem, as the constitutional provisions are quite general, but, for example, a recent debate has focussed on the fact that the upper limit of arrest should be of 48 hours and not 24 hours (like it is provided now). In this later case, a revision of the Constitution will be necessary in order to permit such an amendment to the CCP.

[9] Article 8 CCP ("*Fair trial and reasonable duration of the criminal process*"): "*The judicial authorities are compelled to investigate and to try cases in compliance with the procedural guarantees and rights of the parties and of the other subjects, so as to provide a timely and full finding of the facts that constitute criminal offences, that no innocent person is held criminally liable, and that any person who has committed an offence is punished as under the law, within a reasonable time*".

[10] For an in-depth analysis, see M. Udroiu, *Sinteze de procedură penală. Partea generală*, C.H. Beck Publishing House, Bucharest, 2020, p. 49-54.

for arrest (24 hours); the upper time limit for pre-trial detention (30 days); the special requirement of a written warrant issued by a magistrate in case of pre-trial detention and the right to appeal it to a judge; the special requirement of a written warrant issued by a judge for the continued detention; the right to be informed about the reasons for arrest or detention; the right to mandatory legal assistance; the right to be released where the grounds for detention are no longer valid; the right to be released on bail[11]. The 2014 CCP reaffirmed all the above-mentioned constitutional rules, in a more detailed manner. In addition, it provided that the judge who has the right to issue a pre-trial detention warrant is the judge of rights and liberties (JRL). As well, the Article 9.5 CCP states that any person against whom arrest, detention or house arrest has been ordered unlawfully during the criminal proceedings is entitled to compensation for his/her losses.

5.2.3 Right to Defence

The right to defence is a fundamental right under Article 23 of the Constitution. Detailed rules are contained in the Article 10 CCP. The right to defence is provided not only for the suspect or accused person[12], but also for any other private party (the victim, the civil party and the civilly liable party), including during the pre-trial proceedings[13]. The elements of the right to defence are the following: 1) the right to defend oneself personally or through a counsel; 2) the right to adequate time and facilities for the preparation of the defence; 3) the right of the accused person to be informed promptly and before any interrogation of the alleged facts and their legal characterization; 4) the right of the accused person to be informed of the right to silence before the interrogation.

In order to guarantee this right, the CCP provides two obligations. First, the judicial authorities have the duty to ensure the effective exercise of the right to defence throughout the proceedings (Article 10.5 CCP). Second, the parties and their counsel have the duty to exercise this right in good faith (Article 10.6 CCP). The infringement of the first duty is sanctioned with the nullity of the procedural

[11] This is due to the experience of the Communist regime and its abuses regarding the freedom of people. On the other hand, such an approach makes it difficult to amend to CCP provisions, as a constitutional revision is required. For example, the drafting of the 2014 CCP led to a debate focused on the extension of the upper limit for arrest (24 hours) because the prosecutors have appreciated it as being too short. However, such a solution was rejected because a Constitution's revision was needed and, at that time, there was no political will in bringing such a topic to public debate.
[12] A person under investigation is called either a 'suspect' (*suspect*) or an 'accused person' (*inculpat*), after the commencement of criminal proceedings. The person sent to trial is already an accused person.
[13] See Article 10.5 CCP – for more details, see also, M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 56-62.

act thus performed, as provided by Articles 281 and 282, on express (absolute) and relative nullities[14]. Absolute nullities intervene in cases when essential rules of the fair trial are violated as explicitly provided by Article 281 CCP. In these cases, the simple violation of these rule leads to an irrefragable presumption of nullity of the procedural act thus performed. Article 282 CCP regulates the relative nullities – in this case, the person must demonstrate the *in concreto* harm produced by the (a) procedural act of the authorities. The absence of the counsels when their presence is mandatory (e.g., the interrogation of an accused person held in detention) is a case of absolute nullity. In all other situation a case of relative nullity can be considered, if the harm is demonstrated[15]. The infringement of the second duty constitutes misconduct before the judicial authorities (in which case the court, after finding such misconduct, can impose only a fine of an administrative character).

5.3 Institutional framework

5.3.1 Synthetic overview

In Romania, the ordinary flow of a criminal case is the following: 1) the criminal investigation (urmărirea penală), a stage controlled by the prosecutor and during which the judge of rights and liberties (JRL) intervenes at the prosecutors' request when specific measures have to be ordered; 2) the preliminary hearing (camera preliminară), a stage controlled by the preliminary hearing judge (PHJ); 3) the trial (judecata), a stage controlled by the first instance court; 4) the appeal (apelul), a stage controlled by the appellate court; 5) the extraordinary remedies (căi extraordinare de atac), a stage controlled either by the first instance court, the appellate court or the Supreme Court – the High Court of Cassation and Justice (HCCJ).

[14] Absolute nullities intervene in cases when essential rules of the fair trial are violated as explicitly provided by Article 281 CCP. In these cases, the simple violation of these rule leads to an irrefragable presumption of nullity of the procedural act thus performed. Article 282 CCP regulates the relative nullities – in this case, the person must demonstrate the *in concreto* harm produced by the (a) procedural act of the authorities. The absence of the counsels when their presence is mandatory (e.g., the interrogation of an accused person held in detention) is a case of absolute nullity. In all other situation a case of relative nullity can be considered, if the harm is demonstrated

[15] See also CC, decision no. 554/2017 (published in M. Of. no. 1013 from 21 December 2017) – the Court considered that Article 282.2 CCP, which does not provide the *ex officio* possibility to raise the nullity, is unconstitutional.

Therefore, generally speaking, the national authorities involved in criminal proceedings are: police officers, supervised by the public prosecutor and with the involvement and control of the JRL regarding certain measures (during the criminal investigation phase). After the case is sent to trial, the prosecutor and the PHJ are involved (during the preliminary hearing phase) and later on the trial and the appellate court (during the first instance and the appeal phase)[16].

5.3.2 The Judicial Police. The Special Investigative Bodies

The organisation and functioning of the Romanian Police are regulated by Law no. 218/2002[17]. The police is part of the Ministry of Internal Affairs and is the 'specialised institution of the state that exercises the prerogatives regarding the defence of the rights and liberties of persons, the defence of the private and public property, the prevention and the discovery of crimes, ensuring public order and peace, under the conditions of the law' (Article 1 Law no. 218/2002). The police is organised in accordance with the administrative-territorial division of the country and it has the following structure: the General Inspectorate of the Police, territorial units under the subordination of the General Inspectorate of the Police, the General Police Department of the municipality of Bucharest and the county inspectorates of police, educational institutions for the training and specialisation of police personnel, and other necessary units, established according to the law.

The police officers that are qualified to be criminal investigative bodies of the judicial police are named by the minister of internal affairs with the approval of the general prosecutor of the Prosecutor's Office attached to the HCCJ. In fulfilling his activities as an organ of criminal investigation, the judicial police officer has the territorial competence of the police unit that he belongs to.

The judicial police have general jurisdiction during the investigation stage. Since this jurisdiction is a residual one, where the law does not afford jurisdiction to the prosecutor or to the special investigative bodies, the judicial police will perform the investigation of that criminal offence. When the judicial police is acting as investigative authority, the officers are performing their powers only

[16] For the general presentation of the criminal trial in Romanian procedural law, see *Participants in the criminal trial*, in M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2020, p. 205 et seq.
[17] Republished in the Official Gazette [Monitorul Oficial (M. Of.)] no. 170 from 2 March 2020.

under the prosecutor' direction. Their chiefs within the Ministry of Internal Affairs have no right to interfere with the criminal investigation.

The judicial police have therefore a double subordination: (1) a subordination towards the chiefs within the Ministry of Internal Affairs as for the disciplinary accountability (including where the officers do not obey prosecutor's orders) and all other matters inherent to the relationship employer – employee and (2) a subordination towards the prosecutors as for the criminal investigations.

Regarding special investigative bodies, these are explicitly provided by the CCP and mostly deal with the military realm (e.g., the officers designated by the military units' commanders or by the garrisons' commanders, the officers designated to act when delegated by the military prosecutors).

5.3.3 The Prosecutor's Office

The Romanian Prosecution Service is a state institution called Public Ministry (a translation of the French *Ministère Public*)[18]. It is an independent agency, consisting of all the prosecutor's offices within the country and dealing with the administrative and coordination relationship between these bodies. The activity of all the prosecutor's offices is coordinated by the Prosecutor's Office attached to the HCCJ, which has legal personality and manages the budget of the Public Ministry.

The RC provides that the prosecutors are exercising their powers under the authority of the Minister of Justice (Article 132 RC). Initially, the Minister of Justice had extensive powers[19], but at present, its authority is much more limited. Thus, the Minister of Justice does no longer have the right to give

[18] For a general presentation of the organisation of the Public Prosecutor's Office, see M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 92-93.

[19] The Minister of Justice had the power to direct the prosecutor's activity by giving orders, through the general prosecutor, including the power to order the start of an investigation and the power to exercise control over the activity of all the prosecutors through prosecutors acting as inspectors. Moreover, the prosecutor's career was the responsibility of the Minister of Justice, as he/she had the right to decide over the advancement in their career, upon the general prosecutor's proposal.

instructions relating to the beginning of an investigation and the career of the prosecutors is under the responsibility of the Superior Council of Magistracy[20].

Although the Prosecutor's Office is governed by the principle of hierarchical subordination[21], this is not the case when dealing with the "merits" of the case. To be more precise, the prosecutors are not subject to the hierarchical subordination in two situations:

(1) when, at the end of the investigation, they deliver a decision (Article 64.2 Law no. 304/2004). If the prosecutor dealing with the case decides to drop the charges, a complaint can be made, addressed to the chief prosecutor of the office. If the chief prosecutor upholds

[20] The authority of the Minister of Justice has the following content (Law no. 304/2004, Article 69; Law no. 303/2004, Article 54): (1) the Minister of Justice can control the prosecutors' activity through prosecutors appointed by the General Prosecutor, the Chief Prosecutor of NAD or the ministry of justice. The Minister of Justice can verify only the manner in which prosecutors fulfil their managerial duties and interact with citizens. The measures ordered by the prosecutors during the investigation and the decisions delivered can no longer be subject to this control; (2) the Minister of Justice has the power to give written directions to the General Prosecutor or the Chief Prosecutor of NAD regarding the measures to be ordered for the prevention and fight against criminal offences; (3) the ministry of justice has the right to request the General Prosecutor or the Chief Prosecutor of the NAD information on the prosecutors' activity; (4) the most important positions in the hierarchy of the Public Ministry (the General Prosecutor of the Prosecutor's Office attached to the HCCJ and his/her deputy, the chief prosecutors of the divisions within the Prosecutor's Office attached to the HCCJ and NAD, the Chief Prosecutor of the NAD and his/her deputies) are filled by prosecutors appointed by the President of Romania upon a proposal of the Minister of Justice. The opinion of the Superior Council of Magistracy is only advisory. It is deemed that the involvement of the Minister of Justice in the designation of chief prosecutors may raise suspicions of political influence - According to the European Commission this procedure includes a strong political element which can be a point of controversy in respect to appointments in the senior positions of the prosecution. See Report of the Commission to the European Parliament and the Council on the Progress in Romania under the Co-operation and Verification Mechanism, Brussels, 28.01.2015, COM (2015)35, p. 3.

[21] Which is reflected in the following rules: (1) the chief prosecutor is the one who assigns cases to prosecutors within the office (unlike the random assignment of cases at trial); (2) after the assignment of cases, the chief prosecutor may order investigation to be conducted by another prosecutor (e.g., if the prosecutor is on holiday and an urgent situation deems necessary further investigations; if the prosecutor has conducted no investigation acts during a period of 30 days); (3) the chief prosecutor may order the takeover of cases from hierarchically lower prosecutor's offices in order to perform criminal investigations; (4) the chief prosecutors may invalidate decisions taken by the prosecutors when they deem them unlawful[21]; (5) the chief prosecutor may order mandatory instructions. These orders must be given in writing and in accordance to the law (Law no. 304/2004, Article 64 paragraph 1) and the prosecutors' failure to comply with them constitutes disciplinary misconduct

the first decision, a complaint can be submitted to the PHJ from the court which otherwise would have been competent to adjudicate the case.

(2) when they present the closing speech during the trial (Article 67.2 Law no. 304/2004) - at trial the prosecutors are free to endorse any verdict they deem appropriate, including an acquittal.

Regarding the organisation we have Prosecutor's Offices attached to the Ordinary Courts, to Tribunals, to Courts of Appeals and the Prosecutor's Office attached to the HCCJ, the latter being led by the general prosecutor of Romania.

5.3.4 Judges. Judge of Rights and Liberties. Preliminary Hearing Judge

The 2014 CCP did not envisage an actual investigating judge. However, it establishes two new judiciary functions, separate from the trial court. These are the JRL and the PHJ. These two judges are the ones who have the power to intervene during the criminal investigation and exercise specific judicial functions at the end of it.

According to Article 53 CCP, the JRL is the judge who, within the court, according to its competence and during criminal investigation, settles the requests, appeals or any other notifications, such as the detention and house arrest, the appeal against the prosecutor's order for judicial supervision, the appeal against the prosecutor's freezing orders, the order for some instruments of investigation (like the search warrant, the surveillance of telecommunications or other communications, the order to draw biological samples, including the ones for a DNA analysis, etc.), the enforcement of medical safety measures, the hearing of witnesses in advance and other situations prescribed by the law.

Article 54 CCP introduced the PHJ. This is the judge who verifies the legality of the indictment, of evidence gathered in the pre-trial stage and the legality of all the actions conducted by the investigating authorities. The PHJ also tries appeals filed against the prosecutor's decision to dismiss

a case[22], to drop the charges[23] and intervenes in any other situations prescribed by the law. We underline that all these functions are regulated by the CCP solely within the preliminary chamber.

5.3.5 Trial Courts

From the perspective of criminal law, the hierarchical structure begins from the district courts, then the tribunals, the courts of appeal and the HCCJ. The general material competence belongs to the district courts. The tribunals have jurisdiction over crimes of a higher gravity, as well as the general competence in the matter of crimes that are prosecuted by the specialised prosecutor's offices – National Anticorruption Department (NAD) and Department for Investigation of Organised Crimes and Terrorism Crimes (DIOCTC). The competence of courts of appeal and of the HCCJ is usually determined by the status of the accused (the so-called personal competence) and only in exceptional cases by the gravity of the crime.

There is usually only one judge in the trial court, except for the situation when the trial court is the HCCJ, in which case there will be a panel of 3 judges. The ordinary way of challenging a judgment in the Romanian system is the appeal, which is settled by a panel of 2 judges[24], with the exception of the case when the court judging the appeal is the HCCJ. In this situation, if the trial court was a court of appeal, the appeal will be judged by the panel of 3 judges, and if the trial court was the panel of

[22] The solution to dismiss the case is regulated by Article 314-315 CCP and refers to the situation when a situation envisaged by Article 16 CCP is present in identified during the criminal prosecution stage [Article 16 regulates all cases when the court would decide an acquittal on merits – see Article 16.1 a)-d) - and a discontinuance of the trial on procedural aspects – see Article 16.1. e)-j)].

[23] The solution of dropping charges (or waiver of prosecution) is provided by Article 318 CCP. In such a case, In this case, the public prosecutor can drop the charges, in cases where the law stipulates the penalty of the fine or the punishment of imprisonment for a maximum of 7 years, and when there is no public interest in the prosecution. Still, even in this case the solution is finale only after the PHJ checks it for both legality and opportunity (in the initial version of the CCP from 2014, the solution thus rendered by the public prosecutor was finale. Following CC, decision no. 23/2016, where the Constitutional Court considered that the legal solution contradicts the requirement of the Constitution if no judicial oversight is provided, the legislator intervened. Emergency Ordinance no. 18/2016, Article 318 paragraphs 12 et seq. were amended and the PHJ control was regulated).

[24] For cases which are sent to trial in front of first instance court after 1 January 2021 the general panel of 2 judges in appeal should have been replaced by a panel of 3 judges – see Law no. 239/2019 (published in M. Of. no. 1024 from 19 December 2019), amending Article 54 from Law no. 304/2004. Following Emergency Ordinance no. 215/2020 (published in M. Of. no. 1316 from 30 December 2020), the date was postponed to 1 January 2023.

3 judges of the HCCJ, then the appeal will be judged by a panel of 5 judges of the same court (none of whom may have been on the initial panel of 3).

5.4 Challenges faced during our research

The most important challenge was represented by the approach of the Romanian legislator who is chaotic when trying to transpose European instruments in general. No clear perspective existed regarding what was already provided by Romanian legislation and what needed to be amended or introduced; no logical recollection of various previous drafts project was available, so we had to operate within an enormous puzzle within the Ministry of Justice, the Parliament and several other institutions; transposition of provisions from the same Directive was accomplished (if and when) by several different domestic laws, over a time span of years etc.

5.5 Outline of the report / link to next sections

The six Directives will be closely analyzed in a chronological order. The report will present the up-to-date normative framework of the national implementing legislation, focusing on the cases where "things" still need to be done (e.g., lack of transposition, partial implicit transposition, etc.) and reasons behind it. From the case law perspective, we will make reference to various judgments of Romanian courts, trying to encompass decisions from all type of courts – district courts, tribunals, Courts of Appeal and the Supreme Court (HCCJ). As a disclaimer, we must admit that, unfortunately, most of these judgments (more or less) make only formal reference to provisions from the Directives which will be analysed, thus subsuming to a general approach by Romanian courts, which generally rely only on national transposing legislation.

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

6.1 Legislation

6.1.1 Preliminary findings

As already mentioned, 1 February 2014 was a turning point in Romanian law, as the new CC and new the CCP entered into force. The 2014 CCP was seriously amended by Law no. 255/2013, *inter alia* in order to incorporate within provisions of EU Directives, adopted since the initial project was drafted by the special expert commission from the Ministry of Justice[25].

Therefore, as a preliminary remark the Directive is explicitly transposed via through the provisions of the 2014 CCP.[26] In addition, especially in the field of the European Arrest Warrant, Law no. 302/2004 on international judicial cooperation in criminal matters[27], republished and amended in 2019, contains several provisions which are part of an indirect (*de facto*) implementation of parts of the Directive. Regarding interpretation and translation services, the special legislation in this field[28], as amended by Law no. 76/2016[29] transposed explicitly the correspondent provisions of the Directive. Last, but not least, relevant dispositions are provided even by the RC.

According to information provided for by the Romanian authorities, the Directive was fully transposed[30]. As the last national instrument dates from 2016, we consider that the full

[25] The initial project was generally drafted by the end of 2010.
[26] Considering that the Directive was already transposed entirely by the 2014 CCP, see M. *Sinteze de procedură penală. Partea generală*, p. 69.
[27] Republished in M. Of. no. 411 from 27 May 2019.
[28] Law no. 178/1997 for the authorisation and payment of interpreters and translators used by the Superior Council of Magistracy, the Ministry of Justice, the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate, the criminal prosecution bodies, the courts, the offices to notaries public, lawyers and executors (published in M. Of. no. 305 from 10 November 1997).
[29] Published in M. Of. no. 334 from 29 April 2016.
[30] See website of European Judicial Network regarding the status of implementation of Directive 2010/64/EU available at: *https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1794*.

implementation moment was 2 May 2016, when Law no. 76/2016 entered into force. Still, as we will elaborate in section 6.1.3, we have doubts regarding the full transposition of the Directive, even at that time.

6.1.2 Analysis of national legislation transposing the Directive

As already mentioned, the draft CCP was amended by Law no. 255/2013 explicitly for the transposition of this Directive. The final part of Law no. 255/2013 explicitly mentions the transposition of Article 1, Article 2.1-5, Article 3.1, 3-2, 3.5, 3.7 and 3.9 and Article 4 from the Directive.

Article 1.1: the general updated and amended provision is to be found in Article 12 (*Official language and the right to an interpreter*) CCP, which provides that parties who do not speak or understand Romanian will be provided, free of charge, with the services of an interpreter. More general provisions, dating before the Directive, are in the 2003 revised RC which regulates the "*Use of the native language and the interpreter in court*" (Article 128.1-4).

In addition, Law no. 304/2004 regarding the judicial organisation[31] provides, in Article 14.1-4 that the trial will be conducted in Romanian, but if any parties request to speak in their native language, the court shall ensure, free of charge, the use of an authorised interpreter or translator.

In case an European arrest warrant is executed, Law no. 302/2004 on international cooperation in criminal matters provided that "*The arrested person who does not understand or speak the Romanian language has the right to an interpreter, provided free of charge by the court*"[32].

Article 1.2: the requirement that these rights must be applied from the first stage ("the time" that the persons are made aware by the competent authorities that they are suspected or accused of having committed an offence) is provided by the CCP, in a series of corroborations of Article 78 (*Rights of the suspect*) and Article 83 (*Rights of the accused person*). Article 78 provides that as a common rule, "*the suspect has the rights provided by law for the accused person, unless the law provides otherwise*", while Article 83 point f) explicitly enumerates " *the right to have an interpreter*

[31] Republished in M. Of. no. 827 from 13 September 2005.
[32] See *Rights of the person arrested under a European arrest warrant*, as provided by Article 106 paragraph 6.

free of charge when he / she does not understand, express himself or herself or cannot communicate in Romanian".

Article 1.3 deals with the imposition of a sanction regarding minor offences by an authority other than a criminal court; it requires that the Directive shall apply only to the proceedings before that court following such an appeal. This scenario is not likely to be met in our system, as sanctions (of criminal nature) can be imposed only after a judicial decision issued by a criminal court. The only case could be the one regulated by Article 318 CCP *(waiver to prosecution)*[33].

Article 2.1.: Article 107 CCP, dealing with initial "*Questions regarding the person of the suspect or the accused person"* provides that "(1) *At the beginning of the first hearing, the judicial body asks questions to the suspect or the accused person (...) if he / she does not speak or not understands the Romanian language or cannot express it (…). (2) The questions provided in paragraph (1) shall be repeated at subsequent hearings only when the judicial body deems it necessary*".

Article 2.2: it is officially considered explicitly transposed by Law no. 255/2013, which amended Article 12.3 CCP by providing free of charge communication with the legal counsel via an interpreter. Still, this is the case only for mandatory legal assistance cases (Article 90 and 91 CCP, to which we will make several references in our study[34]). In all other cases, the use of an interpreter for the communications between the legal counsel and his client (suspect / accused) is of course permitted, but the suspect or accused person must bear the costs, as the state has no involvement.

Article 2.3: Article 105 CCP regulates the assistance granted to persons with hearing or speech impediment. Under the general title of "*Hearing with the help of an interpreter*", the CCP provides that if the person heard is deaf, mute or deaf and mute, the hearing will be conducted with the help of a person using the special language.

Article 2.4*:* the procedure is provided by Article 105 CCP. As a general rule, the hearing will be conducted through an interpreter; exceptionally, in urgent cases (not defined by law), any person who can communicate will be asked to help, until an interpreter arrives.

[33] See *supra*, section 5.3.3, footnote no. 20.
[34] See *infra*, section 8.

Article 2.5: there is no specific right to challenge. In this case, no interlocutory appeal is granted - in fact there is no such mechanism in Romanian criminal procedure. The general right to challenge a decision together with the judgment *per se*, as granted by the CCP, is applicable - namely appeal (in case of judgment on the merits) or challenge – *contestaţie* - (in all other cases, e.g., rulings on preventive detention, preliminary chamber rulings, etc.).

Article 2.6: the use of communication technology is not explicitly provided for such cases - in general, the CCP prefers the replacement of the interpreter with other person who can communicate / speak that language, as already mentioned (see Article 105.2 CCP above)[35].

Article 2.7: as already mentioned, Article 106 paragraph 6 from Law no. 302/2004 provides for the right to an interpreter in the proceedings for the execution of a European arrest warrant.

Article 2.8: the quality of the interpretation services is regulated in domestic law, especially after the amendments made in 2016 to Law no. 178/1997 for the authorization and payment of interpreters and translators[36]. From the CCP perspective, Article 12.4 states that only "*authorised interpreters*" will be used in the judicial proceedings, according to the law, while the special legislation lays down all the procedure and the conditions for such authorisation. Article 1.2 from Law no. 178/1997 specify that "*The courts, the prosecutor's offices and the criminal investigation bodies use interpreters and translators, under the conditions established by the Code of Criminal Procedure or the Code of Civil Procedure, as the case may be, and by Law no. 189/2003 on international judicial assistance in civil and commercial matters, by Law no. 302/2004 regarding the*

[35] The CCP mentions the possibility of video conference but the hypothesis refers to the case where the physical presence of the accused person is not possible (e.g., he is in held in custody) and not the one of the interpreter. So, in this situation, the legal counsel and the interpreter are physically present. Still, a close scrutiny of the relevant legislation reveals that there is a specific provision in the field, but which regulates only the case of the injured party, namely, Article 81 point g[1]) CCP, modified by Emergency Ordinance no. 18/2016, in order to transpose Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Article 81 point g[1]) CCP provides for the injured party "*the right to benefit free of charge from an interpreter when he / she does not understand, does not express well or cannot communicate in Romanian. In urgent cases, technical means of communication may be used, if it is considered that this is necessary and that it does not impede the exercise of the injured person's rights*".

[36] We make reference to Law no. 76/2016 which mentioned that it transposed in national law the provisions of Article 5 paragraphs 1 and 3 from the Directive.

international judicial cooperation in criminal matters and the international treaties ratified by Romania", while Article 2 underlines that "*The activity of interpreter and translator for the Superior Council of Magistracy, the Ministry of Justice, the courts, the prosecutor's offices next to the courts, the criminal investigation bodies, the offices of public notaries, for lawyers and judicial executors are performed by persons certified by the profession and authorized by the Ministry justice*".

Article 3: was theoretically explicitly transposed by Law no. 255/2013, which mentions that it implements in national law the provisions of Article 3.1, 3.2, 3.5 and 3.7. We are, instead, in the presence of a partial (and incomplete) transposition; we will show that the CCP mentions only a written translation of the indictment (this is the explicit transposition referred to by Law no. 255/2013). Still, there are several other provisions that grant oral / verbal translation of documents from the case file. As well, the RC regulates *the right to become aware of all the acts and proceedings of the file.*

From the perspective of the explicit transposition, Article 329 CCP, entitled "*Referral to the court*" provides: "(*3) In case the accused person does not understand the Romanian language, measures will be taken for the authorised translation of the indictment (…). When there are no authorised translators, the translation of the indictment is done by a person who can communicate with the accused person. (4) The accused person, a Romanian citizen belonging to a national minority, may request that a translation of the indictment be communicated in his / her native language*". As we indicate, the special provisions deals only with the translation of the indictment act; still, the general provision from the RC provides that the persons must become aware of "all acts and proceedings of the file"[37].

***Article 3.2*:** aside the above mentioned provision from the RC, which is general and therefore not directly enforceable there is no explicit obligation / duty on authorities to translate any other document, besides the indictment. Thus, there is no transposition of the first thesis of Article 3.2.

***Article 3.3-5*:** the suspect or accused person is entitled to submit any request, including the one mentioned at paragraph 3[38]; so, we can consider being in the presence of an implicit transposition.

[37] See Article 128.4 RC, mentioned at page 10.
[38] See the general rights provided by Article 92.4 CCP for the legal counsel.

Still, we are sceptical about the outcome of such requests, especially due to the latency of the national legislator, who failed to regulate even decision depriving of liberty as essential documents which must be translated. In this context, we are as well reserved about the success of challenging the refusal of such a request, as provided by para. 5. In this case, that the right to challenge such a decision is joined with the general right to challenge of the judgment *per se*, as granted by the CCP namely appeal (in case of judgment of the merits) or contestation (in all other cases, e.g., rulings on preventive detention, preliminary chamber rulings, etc.).

Article 3.6: the provisions of Article 87 Law no. 302/2004, dealing with the "*Content and form of the European arrest warrant*" correspond mostly with the requirements of the Directive. According to the domestic provisions: "(3) *The European arrest warrant transmitted to the competent authority of another Member State shall be translated into the official language or the official languages of the executing State or into one or more other official languages of the institutions of the European Union, which this State accepts, in accordance with the statement submitted to the General Secretariat of the Council of the European Union. (4) The European arrest warrant transmitted for execution to the Romanian authorities must be translated into Romanian or one of the English and French languages*". We consider this case to be one of indirect implementation, since the provisions of Law no. 302/2004 predate the ones from the Directive[39].

Article 3.7: the exceptions from the general rules are *de facto* transposed through several provisions from the CCP as follows:

- Article 329 ("*Referral to the court*") from the CCP: "*(4) When there are no authorised translators, the translation of the indictment is done by a person who can communicate with the accused*".
- In cases involving deprivation of liberty, Article 184.12 ("*Psychiatric forensic expertise*"), Article 209.2 ("*Arrest*") and Article 226.3. ("*Admission of the proposal of preventive detention during the criminal prosecution"*) CCP all provide that the person shall

[39] Being a result of the transposition of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

immediately be informed in the language he / she understands about the reasons for the deprivation of liberty or medical confinement.

In the same context, part of the indirect implementation process, the provisions from the 2003 amended RC must be noted, namely, Article 128.4[40].

Article 3.8: contains the cumulative conditions in order for any waiver of the right to translation of documents to produce effect. From the perspective of national law, there is no such waiver explicitly regulated, but the general principles of the CCP can be applied, as this is a right granted to the suspect and accused person. Violating this right by the judicial organs (e.g., not respecting the conditions set forth by the Directive in order for the waiver to be effective) leads to a serious breach to the right to a fair trial and, hence, the conditions of Article 282 CCP (relative nullity) are incident. According to Article 282.5 CCP the relative nullity (or relative invalidity) is waived when the person concerned did not invoke it within the term provided by law or it expressly renounced the invocation of invalidity

Article 3.9: regarding the translation services and the quality minimum standards required, the final part of Law no. 255/2013 affirms that among others, it transposed Article 3.9 (when amending the CCP).

Article 4: is officially transposed (explicitly) into national legislation by Law no. 255/2013 amending the CCP. For this see Article 12.3-4 ("*Official language and the right to an interpreter*"), Article 78 ("*Rights of the suspect*") and Article 83 ("*Rights of the accused person"*) point f). In addition, the RC provides at Article 128.4 ("*Use of the native language and the interpreter in court*"), that "*in criminal cases this right* (use of interpreter, we add) *is provided free of charge*".

Article 5*:* was transposed entirely when amending Law no. 178/1997 in 2016[41].

Article 3.c) from Law no. 178/1997 was amended, in order to transpose Article 5.1; it provides that in order to qualify as an authorized interpreter and translator, a person must be certified by the Ministry of Culture. From the perspective of the register or registers of independent translators and

[40] Already mentioned, see above, page 10.
[41] Law no. 76/2016 explicitly provides that is transposes Article 5 paragraphs 1 and 3 from the Directive.

interpreters (as required by Article 5.2), Article 5 from Law no. 178/1997 provides that these are organised by the Ministry of Justice and communicated to all judicial authorities. The registers are communicated as well to the police authorities and to the national bodies of public notaries, bars and judicial executors.

Article 5.3 regulates the confidentially issues which may arise during activities of interpretation and translation – again, the amendments made by Law no. 176/2016 transposed explicitly this requirement. Article 6^2 from Law no. 178/1997 now explicitly provides the obligation for authorized interpreters and translators to respect the confidentiality.

Article 6: although the EJN website identifies at the transposition level in Romanian law several regulations adopted by the Romanian Superior Council of Magistrates or by the Ministry of Justice[42], there is no explicit provisions regarding such training. Best case scenario, it can be included in the general good organization of the hearing in court (the assistance of an interpreter being thus included)[43]. In addition, there are several guides drafted in order to facilitate the communication between the judges and the legal counsels and probably general guidelines will be derived from there[44].

Article 7: is indirectly implemented in national law. When an interpreter or a translator is used, he will sign as well each page of the declaration. As well, the presence and help of the interpreter will be noted by the police officer or public prosecutor in a minute (*proces-verbal*) and by the court in a resolution or in its final judgment (if this event occurred in the last session). There is a general

[42] See, Hotărârea Consiliului Superior al Magistraturii pentru aprobarea Regulamentului privind modul de desfăşurare a cursurilor de formare profesională continuă a judecătorilor şi procurorilor şi atestare a rezultatelor obţinute, Hotărârea Consiliului Superior al Magistraturii pentru aprobarea Regulamentului Institutului Naţional al Magistraturii, Hotărârea Consiliului Superior al Magistraturii pentru aprobarea Regulamentului de ordine interioară al instanţelor judecătoreşti, Ordin al ministrului justiţiei privind aprobarea Regulamentului de ordine interioară al parchetelor, mentioned at *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat/EN/96*.

[43] Article 14.4 Law no. 304/2004 provides that "*In case all the parties request or agree to speak in the native language,* the court must ensure the exercise of this right*, as well as the good administration of justice, respecting the principles of contradictory, oral and publicity*".

[44] See "Ghidul de bune practici privind relaţia sistemului judiciar cu celelalte profesii juridice, în special avocaţi", adopted by the Superior Council of Magistrates Decision no. 287 from 16 December 2019 (available at the National Bar's Association website - https://www.unbr.ro/wp-content/uploads/2020/02/Ghid-de-bune-practici-TAEJ.pdf).

obligation to record (video or audio) every aspect and element of the trial. This is always the case in court (generally audio), but in during the investigative, due to the lack of infrastructure, such recordings will be exceptional. When recording is not possible, the police officer or prosecutor will note this in a minute, as well. Regarding waiver or the usage of an oral translation, the investigative authority or public prosecutor will note this in a minute, while the court will do so in a resolution or the final judgment (if this event occurred in the last session).

6.1.3 A critique of the current legislative framework

Although the transposition deadline was October 2013, the national legislation was put in line several years later (2016) and we consider it to be still incomplete. An explanation was the massive legislation change which took place in February 2014, but this can be seen as well as a critique, as the legislator had all the opportunities to embed the Directive in national legislation, even if its moment of entering into force exceeded the deadline[45].

Summary of the deficiencies outlined above:

- ***Article 2.2*** – can be considered to be transposed only in cases where legal assistance is compulsory, as only in these cases the suspect or accused person will be offered free of charge access to legal counsel. In all other cases, the costs of the legal counsel will be supported by the suspect or accused person[46].
- ***Article 2.5*** - there is no interlocutory appeal, so such a decision can be challenged only jointly with the merits (either as appeal or as contestation).

[45] For a similar approach, see A.R. Trandafir (Ilie), D. Pârgaru, *Directiva privind dreptul la interpretare şi traducere în cadrul procedurilor penale, netranspusă în legislaţia românească*, 12 November 2013, available at https://www.juridice.ro/290884/directiva-privind-dreptul-la-interpretare-si-traducere-in-cadrul-procedurilor-penale-netranspusa-in-legislatia-romaneasca.html.

[46] To be accurate, this is a problem of transposition which is generated by the cases of free of charge legal assistance regulated by the CCP. On the other side, Article 83 point f) and Article 78 CCP provides the general right to have an interpreter free of charge for both the suspect and accused person during the entire criminal trial: as well, the RC provides the same in Article 128.4.

- ***Article 3.2*** – there is specific provision only regarding the translation of the indictment and no reference is made to decision depriving the person of liberty[47].

6.2 Case-law

We must underline the fact that the courts usually tend to make reference to the provisions of the Directive only if the defence invoked it. The reasons behind such an approach are based, we consider, on the fact that it is generally accepted that the Directive was transposed in national legislation entirely. In addition, there is prevalence on national authorities to rely only on national legislation and this is the case – as we will see – even when the minimal standards of the Directive are still not met (for example, the translation of essential documents from the case file, when the CCP makes explicit reference only to the indictment).

In a case before the Supreme Court (***HCCJ, criminal division, decision no. 244/2014***), the accused person related to violations of Article 8 1968 CCP, as the translation of intercepted telephone conversations was made by an unauthorised translator. The Court considered that this argument tends to remove records as evidence, alleging, in practice, a breach of the relevant legal rules serious enough to incur nullity. Referring to the particularities of the case, the Court found that there was no violation of the relevant legal provisions on the authorization of translators or their appointment, and it was therefore superfluous to analyse any subsequent infringement of the legitimate interests or procedural rights of the accused person. According to Article 15 Law no. 178/1997 regarding translators, in the situation where there are no translators authorised to exercise the attributions recognized by law in this capacity, the judicial body may use reliable persons, who understand and speak the language from which the translation is made and who use it fluently or professionally.

[47] There is only one provision which mentions the necessity of translating such a decision (of depriving of liberty) – Annex I point G from Joint Order no. 1274/C/111/2037/1123/C/2017 (*infra*, section 7.1.2) – "*If you do not speak or understand the language spoken by the authorities, you have the right to be provided with a written translation of the indictment, as well as the minutes and the court decision*". Still, this is more an administrative tool regarding the model of Point of Rights which must be communicated to the suspects or accused persons and hence, we uphold our opinion that there is no legal text regulating such an obligation for the authorities. The problem was noted by Romanian doctrine – see M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 72: the author does not make the connection with the Joint Order, but implicitly admits that the list of essential documents mentioned by Article 3 paragraph 2 is restricted to the indictments in Romanian law (references are made, in addition, to the European Court of Justice C-216/14 judgment from 15 October 2015, *Gavril Covaci*, but the decision did not concerned the application of the aforementioned provision).

Such a hypothesis was also relevant in this case, as the public prosecutor identified two authorised translators, but none of them were available to certify the reality of the translations. In this context, prior to the preparation of the indictment, the prosecutor considered necessary a new verification of the accuracy of the statements given in the transcript minutes, an operation whose completion involved the participation of one of the categories mentioned in Article 15. Therefore, the designation of such a person as a translator is in full compliance with the requirements of the afore-mentioned law, and there is violation of any legal provision in this regard, which could lead to the sanction of nullity.

In one case (***Bucharest Court of Appeal, I criminal division, decision no. 653/2017***), the accused person's criticism regarded the failure of the prosecutor and the court of first instance to ensure the right to benefit from an Armenian language interpreter. According to Article 105 CCP this criticism is not founded, having in mind that the accused person requested the presence of an interpreter only before the appellate court. In addition, during criminal investigation, within the preliminary chamber stage and during the trial of first instance he proved a good knowledge of the Romanian language.

In a case before Timișoara courts (***Timişoara Court of Appeal, criminal division, decision no. 891/2017***), when requesting the reopening of the case, the convicted person invoked the provisions of Article 3 of Directive no. 2010/64/EU, mandatory for Romania and argued that the national legislation does not comply with the requirements of the Directive. The convicted considered that there is no evidence that at the hearing and notification of his procedural obligations, he was notified in writing (in his native language, translated) about the obligation to notify the change of address. The appellate court dismissed the appeal, approving the arguments of the court of first instance. Related to Directive 2010/64/EU, implemented by Romania in its national legislation, the Court underlined that Article 3.1-2 mentions the written translation of the essential documents, and in no case the written translation of the obligation to announce the change of domicile. Such an obligation is communicated in writing to the convict; last but not least, the convicted appellant did not make a minimal and reasonable effort to announce the change of domicile to the judicial bodies, knowing that there is a criminal trial pending against him.

In one case (***Cluj Court of Appeal, criminal division, decision no. 752/2019***), the accused person appealed the sentence of the first court, invoking that he did not benefit from assistance of an interpreter, as requested by Directive 2010/64/EU. The appeal court rejected the argument, after it was proven from several procedural documents drawn up during the criminal investigation that the accused person speaks and understands the Romanian language and can express himself. Another argument was that during all court hearings, the accused was able to express freely, including the first term in the appeal stage. As a conclusion, the Court underlined that the simple misunderstanding of some legal terms does not oblige the judicial bodies to ensure the presence of an interpreter; the provisions of Article 12.2 from the CCP regulate the situation in which the parties "do not speak or understand the Romanian language or cannot express themselves in the Romanian language", a condition that is not met in the present case.

In another case (***Bucureşti District Court, sector 3, criminal division, decision no. 438/2019***), the defence argued that the convicted person did not understand Romanian and the appointment of an interpreter were required. The court rejected this request, since the documents from the case file indicated that the accused person knew Romanian language, did not even once pretend or invoke he did not understand Romanian and did not request an interpreter during the entire trial. At the same time, in case of finding the violation of this right (which is not the case here), the sanction that intervenes is the relative nullity according to Article 282 CCP and not the reopening of criminal proceedings as requested.

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

7.1 Legislation

7.1.1 Preliminary findings

According to the final part of Law no. 255/2013[48], Articles 3, 4, 6, 7 and Article 8.2 from the Directive are explicitly transposed. In addition, the final part of Emergency Ordinance no. 18/2016 explicitly mentions the transposition of Article 4.4 and Article 5.2 from the Directive.

According to information provided by the Romanian authorities, the Directive was fully transposed (see website of European Judicial Network regarding the status of implementation of Directive 2012/13/EU[49]). As the last national instrument dates from 2017, we consider that this moment was 4 October 2017.

7.1.2 Analysis of national legislation transposing the Directive

Article 1 is covered in national by a comprehensive list of provisions from the CCP and from Law no. 302/2004. In addition, following the amendments brought by Emergency Ordinance no. 18/2016, the written information model regarding the rights of the suspect or accused during the criminal trial or the procedure for executing the European arrest warrant was established by a Joint Order of the Minister of Justice, the Minister of Internal Affairs, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice[50].

Article 2: including the amendments made by Law no. 255/2013, the Romanian legislation enshrined this as part of one of the fundamental principles regulated by the CCP, namely the right to defence. More precisely, Article 10 CPP underlines that "*(3) The suspect has the right to be informed*

[48] As well the Explanatory Memorandum attached to the law.
[49] Available at: *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat/EN/112*.
[50] See Article IV from Emergency Ordinance no. 18/2016. For more details, see commentary of Article 4, *infra* p. 18, footnote 54.

immediately and before being heard about the deed for which the criminal prosecution and its legal classification are carried out. The accused person has the right to be informed immediately of the act for which the criminal action against him and his legal classification was initiated".

From the facet of Article 2.2 we stress out that as a general rule - with no exceptions at this time - in Romanian law, the competence for imposing sanctions - even in relation to relatively minor offences - belongs only to courts with jurisdiction in criminal matters[51].

Article 3: following the amendments made by Law no. 255/2013, Article 78 (*Rights of the suspect*) and Article 83 (*Rights of the accused person*) represent an explicit transposition; in fact, the protection granted by the CCP goes beyond the minimum standards (the "short" list) requested by Article 3 from the Directive[52].

Article 3.2 refers to the "*simple and accessible language*", either orally or in written form, a special emphasis being put on the needs of vulnerable suspects and accused persons. There is no explicit

[51] See, *supra*, section 6.1.2 regarding the commentary of Article 1.3 3.

[52] For a similar approach, see M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 485. The author considers that by regulating the prompt information on procedural rights before first questioning, the CCP transposed Article 3 from the Directive. In a nutshell, Article 83 CCP provides that "*During the criminal trial, the accused person has the following rights:*
a) the right not to give any statement during the criminal trial, drawing attention to the fact that if he refuses to give statements he will not suffer any adverse consequences, and if he gives statements they will be able to be used as evidence against him;
a[1]) the right to be informed about the deed for which it is investigated and its legal status;
b) the right to consult the file, according to the law;
c) the right to have a lawyer elected, and if he does not designate one, in the cases of compulsory assistance, the right to be appointed a lawyer ex officio;
d) the right to propose the administration of evidence under the conditions provided by law, to raise exceptions and to draw conclusions;
e) the right to make any other requests related to solving the criminal and civil side of the case;
f) the right to benefit free of charge of an interpreter when he does not understand, express himself well or cannot communicate in Romanian;
g) the right to call a mediator, in the cases allowed by law;
g[1]) the right to be informed about his rights;
h) other rights provided by law".
According to Article 78 CCP from the CCP, "*the suspect has the rights provided by law for the accused person, unless the law provides otherwise*"; regarding the above list, there is no exception provided by the law, so the suspect is informed accordingly about his procedural rights.

reference to needs of vulnerable persons in national legislation, thus corresponding to a partial implementation. As well, the Directive provides no definition or description of these categories, the only reference being made in the Preamble (para. 11), where the 30 November 2009 Council resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings is mentioned [53]. The resolution, which calls for "Special Safeguards for Suspected or Accused Persons who are Vulnerable" (sea Measure E), offers no definition, but underlines that "(…) *it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition*". In this respect, as regards under aged suspects or accused persons, Directive 2016/800 will be incident[54]; in case of a particular mental or physical condition of the suspects or accuses persons the CCP provides that the criminal investigation will be suspended, if the person can not participate in the proceedings[55]. The same is provided in case where the case is already sent to trial[56].

Returning to the case of non-vulnerable persons, the general provision is Article 108 CCP ("*Communication of rights and obligations*"): "(1) *The judicial body communicates to the suspect or the accused the quality in which he / she is heard, the act provided by the criminal law for the commission of which the suspect is suspected or for which the criminal action was initiated and its legal classification. (2) The suspect or accused is informed about the rights provided in Article 83 CCP (...)*". From the perspective of the time when this information is due, Article 307 CCP ("*Informing about the status of suspect*") underlines that: "*Before the first hearing, the person who has acquired the status of suspect is informed of this quality, the fact for which he is suspect, his legal classification, the procedural rights provided in Article 83, drafting a report (minute) in this regard*". Article 309 ("*Commencement of criminal action*") CCP provides: "*(2) The commencement of the criminal action is communicated to the accused person by the criminal prosecution body who calls*

[53] OJ C 295, 4.12.2009, p. 1.
[54] See, *infra*, section 9.
[55] See Article 312 paragraph 1 CCP. According to paragraph 1^1, inserted by Law no. 228/2020 (published in M. Of. no. 1019 from 2 November 2020), the public prosecutor will suspend the investigation only if the hearing can not be conducted by video conference; in addition, even if a video conference would be possible, the suspension will be ordered in case when the right to defence of the suspects or accused persons could be hampered this way or affect the outcome of the investigation.
[56] See Article 367 CCP, as well amended by Law no. 228/2020.

him to hear him. The provisions of Article 108 are applied accordingly, a report (minute) being concluded in this regard". From the requirement of a "*simple and accessible language*", we will see in the follow-up that the model letter of rights has short explanations which are written in a very simple language, which makes it no doubt accessible to each person, irrespective of level of education, studies, law knowledge, etc.

Article 4: Law no. 255/2013 explicitly mentions that it amended the CCP in order to transpose, *inter alia*, Article 4 from the Directive. In addition, Emergency Ordinance no. 18/2016 amended the CCP in order to fully transpose Article 4.4, with regard to the model Letter of Rights. It made reference to a Joint Order of the Minister of Justice, the Minister of Internal Affairs, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice. This Order was drafted later and entered into force in 2017 – Order no. 1274/C/111/2037/1123/C/2017[57], as an explicit transposition of Annex I[58].

The relevant provisions from the CCP are:

- Article 209.17 ("*Arrest*") and Article 218.4 ("*House arrest*"): the suspect or accused shall be notified, in signature, in writing, of the rights stipulated in Article 83 and Article 210 CCP.
- Article 210 ("*Information about deprivation of liberty*") and Article 228 CCP ("*Information about the preventive detention and the place of detention of the accused person who is under prevention detention*"): the detained person has the right to personally inform of to ask the judicial body to inform a member of his family or another person about the place of detention. When the detained person is not a Romanian citizen, the assistance of the diplomatic mission or consular office can be requested by the detained person. The right to personally make the information can be denied only for well-grounded reasons. The

[57] Order no. 1274 /C/111/2037/1123/C of 2017 of the Minister of Justice, the Minister of Internal Affairs, the President of the High Court of Cassation and Justice and the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the model written information handed over to suspects or defendants in criminal proceedings in which they are deprived of liberty or to persons who are arrested for the purpose of executing a European arrest warrant (published in M. Of. no. 786 from 4 October 2017).

[58] Therefore, the transposition of Article 4 and Annex I is now considered to be realised jointly by the amended CCP and by Order no. 1274/C/111/2037/1123/C/2017.

information itself can be delayed exceptionally for a maximum of up to 4 hours and only in case of arrest (Article 210.6).

Annex I: the explicit transposition is the Joint Order no. 1274/C/111/2037/1123/C/2017. The Annex contains the exhaustive enumeration of all the rights, as well as short explanations of the exercise of each right. According to Annex I: "*If a measure of detention, house arrest or pre-trial detention has been ordered against you, you have the following rights:*

A. The right not to make any statements during the criminal proceedings Refusal to testify will not be construed as a guilty plea and will not have other adverse consequences for you. If you give statements, they can be used as evidence against you.

B. The right to be informed about the act for which you are arrested / detained and its legal classification.

C. The right to consult the file, according to the law.

D. The right to have a lawyer chosen.

E. The right to propose the taking of evidence under the conditions laid down by law, to raise exceptions and to draw conclusions.

F. The right to formulate any other requests during the criminal process, related to the settlement of the criminal and civil side of the case.

G. The right to benefit free of charge from an interpreter.

H. The right to call on a mediator.

I. The right to be informed about your rights.

J. The right to inform another person about the arrest or detention / information of the consulate or embassy of your country.

K. The right to emergency medical care.

L. Period of deprivation of liberty.

M. The right to challenge the measure ordered

N. Right to request the revocation or replacement of the measure of house arrest or preventive arrest

O. The right to challenge the duration of the criminal trial.

As it can easily be seen, the rights provided for in ***Article 4.2*** are identified in Annex I, points C, J, K and L.

The basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention or making a request for provisional release (as requested by paragraph 3) are provided by point M and N from Annex I from the Joint Order.

Article 4.5: can be considered partially transposed by point G from Annex I which provides the general right to an interpreter; in most cases at least orally the rights will be explained[59]. Still, there is no explicit transposition regarding the availability of Letter of Rights in the appropriate language.

Article 5: was transposed in national legislation by Emergency Ordinance no. 18/2016. The Ordinance explicitly mentioned that it transposed Article 5.2 and made no reference to para 1. Still, Annex II from the Joint Order regulates the Letter of Rights in case of European Arrest Warrant proceedings. As well, the provisions of Law no. 302/2004 regulate the rights of the person arrested on the basis of the European arrest[60].

[59] Regarding the appropriate translation, see Article 9.3 CCP read jointly with the rights of the suspect or accused [Article 83.f) and Article 78].

[60] See Article 106 from Law no. 302/2004 – *"Rights of the person arrested on the basis of a European arrest warrant": (1) "The arrested person has the right to be informed about the content of the European arrest warrant. (2) The arrested person has the right to be assisted by a defender chosen or appointed* ex officio*. (3) The prosecutor or, as the case may be, the executing court notifies the detained or arrested person that he has the right to appoint a lawyer in the issuing Member State of the European arrest warrant and to communicate with him, directly or through the lawyer elected or appointed* ex officio *in Romania, under the conditions provided by the Romanian law and with the assurance of confidentiality. (4) If the detained or arrested person shows that he understands to exercise this right, the prosecutor or the executing court shall inform the issuing authority of the European arrest warrant without delay. The information transmitted by the issuing authority, by any means which leaves a written trace, shall be communicated without delay to the requested person through the administration of the place of detention. (5) The provisions of Article 91.4 apply accordingly. (6) The arrested person who does not understand or speak the Romanian language has the right to an interpreter, provided free of charge by the court*".

Annex II (*Information on the rights of the person deprived of liberty on the basis of a European arrest warrant*) enumerates the following rights which must be communicated at once:

"*If you are deprived of your liberty in the proceedings for the execution of a European arrest warrant, you have the following rights*:

A. The right to be informed of the content of the European arrest warrant.

B. The right to remain silent.

C. The right to be assisted by a lawyer.

D. The right to interpretation and translation.

E. The right to notify someone that you have been deprived of your liberty.

F. For foreign nationals: The right to inform the embassy of your country.

G. The right to agree to your surrender from Romania.

H. The right to oppose surrender.

I. Speciality rule.

J. The right to emergency medical care.

K. Remedies.

L. Total length of detention[61].

The current regulation on the Letter of Rights fully corresponds to the Model found as an annex in the Directive[62].

[61] The total duration of the arrest, until the actual surrender to the issuing state, may not exceed 180 days.
[62] On 26 May 2021 a draft project enacted by the Ministry of Justice was presented, for public debate (the project is available online at *http://www.just.ro/proiect-de-ordin-al-ministrului-justitiei-ministrului-afacerilor-interne-presedintelui-inaltei-curti-de-casatie-si-justitie-si-al-procurorului-general-al-parchetului-de-pe-langa-inalta-curte-de-casa/*). According to the project, Annex II is amended as: letter A) a new paragraph is inserted – "in case of judgment in absentia, you have

Article 6: was transposed by Law no. 255/2013, which made explicit official reference to Article 6.

Article 6.1: the CCP provides a series of provisions, which read jointly fully respect the requirements:

- Article 10 (*"Right to defence"*): "(3) *The suspect has the right to be informed immediately and before being heard about the deed for which the criminal prosecution and its legal classification are carried out. The accused person has the right to be informed immediately of the act for which the criminal action against him and his legal classification was initiated*".
- Article 83 *("The rights of the accused person"): "*a[1]) *the right to be informed about the deed for which it is investigated and its legal status*" and *Article 78 CCP (Rights of the suspect)*, which grants as a rule the same rights [including that from point a[1])].
- Article 108 ("*Communication of rights and obligations")*[63].
- Article 307 ("*Informing about the status of suspect")*[64].
- Article 309 ("*Commencement of criminal action*") [65].

Article 6.2: the CCP ensures that information about the reasons for arrest or detention, including the criminal act they are suspected or accused of having committed is promptly given. In this respect, see Article 9 *("The right to freedom and security*") which, with a general character enshrines as one of the fundamental principles of Romanian procedural law, that "*Every arrested person has the right to be informed as soon as possible and in a language he understands about the reasons for his arrest and has the right to appeal against the order*". In addition, Article 209.2 (*"Arrest"*), Article 226.3 ("*Admission of the proposal of preventive detention during the criminal prosecution*"*)* and Article 238.1 *("Preventive detention of the accused in the preliminary chamber procedure and during the trial")* all provide once more this obligation.

the right to receive a copy of the judgment"; letter C) a new paragraph is inserted – "if you were under provisional arrest on the basis of an European Arrest Warrant, you have the right to ask to be assisted by a lawyer in the issuing State, chosen or appointed *ex officio*".

[63] See above, p. 17.

[64] See above, p. 17.

[65] See above, p. 17.

Article 6.3: the CCP fully respects these standards, embedded in a series of provisions dealing with the status of suspect / accused person and communication of the rights which derive from such a status (see Article 108, 307 and 309 quoted above), as well as regarding the content of the indictment and other acts (ordinance) of the public prosecutor – for these, see:

- Article 328 (*"Contents of the indictment"*): "*The indictment is limited to the offence and the person that were the object of criminal investigation and accordingly include the mentions provided in Article 286 paragraph (2), information concerning the offence the accused person allegedly committed and its legal classification,, the evidence and the means of proof, the judicial expenses, the mentions provided in Article 330 and 331, the disposition of the trial, as well as other particulars necessary for the settlement of the case. (...)*.
- Article 286 ("*Acts of the criminal investigation bodies")*: "(2) c) *The Ordinance shall include: (…) the fact that is the object of the criminal prosecution, its legal classification and, as the case may be, the data regarding the person of the suspect or the accused person*".

Article 6.4: the CCP was amended by Law no. 255/2013 in order to fully transpose Article 6; in addition following a series of interventions of the Constitutional Court, the legislation was recently amended, in order to fully satisfy the fairness of the proceedings, thus assuring the exercise of the right of defence[66].

Regarding the relevant provisions from the CCP, we have to refer to the situation when the case is still pending investigation, or, alternatively, is already sent to trial, in front of the competent court.

In the first case, Article 311 CCP ("*Extension of criminal prosecution or change of legal classification*") fully complies with the requirements of the Directive, maybe even providing a higher standard, after the intervention of the Constitutional Court[67] and the amendments thus made by the legislator (Law no. 228/2020[68]). According to the latest consolidated version, Article 311 CCP, the suspect is

[66] See a summary of most relevant decision in section 7.2 below.
[67] See Constitutional Court, decision no. 90/2017 (published in M. Of. no. 291 from 25 April 2017). In a twisted reasoning, the court considered that "the legislative solution (provided by Article 311.3, we add) that excludes the obligation to inform the suspect / defendant about changing the legal classification is unconstitutional".
[68] Law no. 228/2020 for amending and completing legal instruments in criminal matters in order to transpose Directive of the European Union (published in M. Of. no. 1019 from 2 November 2020).

informed about the extension or change of legal classification. When the case is sent to trial, the 2014 CCP departed from the 1968 CCP, which permitted the extension of charges even during trial and regulates only the change of legal classification. According to Article 386 (Changing the legal classification), if during court proceedings a change of legal classification, may occurs, the court is obliged to notify the defendant and inform him that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defence. Once again, the Constitutional Court interfered and considered that Article 386.1 is constitutional "insofar as the court rules on the change of the legal classification given to the offences in the indictment through a court decision that does not resolve the merits of the case"[69].

Article 7: according to Law no. 255/2013 amending the CCP, the provisions were explicitly transposed into national legislation.

Article 7.1: access to the materials of the case when the person is arrested or detained is explicitly provided by Article 225.2 ("*Solution of the proposal of preventive detention during the criminal investigation*") CCP and Article 235.2 ("*Procedure for the prolongation of the preventive detention during the criminal investigation*") CCP. In addition, Article 184.8 ("*Psychiatric forensic expertise*") CCP provides this right in case when involuntary internment of the person is concerned, in order to undergo a psychiatric forensic[70].

Article 7.2 was fully implemented by the CCP, after the amendments brought by Law no. 255/2013. Again, we have to indicate a series of legal texts which, read in conjunction, lead to such a conclusion. We indicate here once more Article 78 ("*Rights of the suspect*") and Article 83 ("*Rights of the accused person*") more exactly point b) which provides for "*the right to consult the file, according to the law*".

Article 94 ("*Right to access the case file*") CCP regulates all procedural aspects regarding access to case file. The lawyer of the parties and of the main procedural subjects is entitled to consult the

[69] See Constitutional Court, decision no. 250/2019 (published in M. Of. no. 500 from 20 June 2019).
[70] Although this is not a preventive measure as regulated by Article 202 et. seq. CCP (and as envisaged by the Directive), it involves deprivation of liberty. In addition, after a series of decisions of the Constitutional Court, the procedure to be followed in such cases is copied from the one of pre-trial arrest (regarding, especially, all the rights and guaranties for the detained person).

case file all throughout the trial. During the criminal prosecution, the prosecutor sets the date and duration of the consultation within a reasonable time. During this stage, the prosecutor may restrict the consultation of the file, if this could affect the proper conduct of the criminal prosecution. After the commencement of criminal proceedings, the restriction can be ordered for a maximum of 10 days. In addition to Article 94 CCP (which can be considered as general norm), Article 92.7. ("*Rights of the lawyer of the suspect and the accused person"*) CCP and Article 356.1 ("*Providing defence"*) CCP provide this right during the *preliminary chamber procedure and during the trial*.

Article 7.3: regarding the implementation at national level, all previous mentioned provisions, namely Articles 92, 94 and 356 are as well applicable here, thus permitting the full exercise of the right of defence throughout the entire process. In addition, Article 329 CCP must be mentioned – entitled "*The act of referral to the court*", it provides: "*(2) The indictment accompanied by the case file and a required number of certified copies of the indictment, to be communicated to the accused person, shall be sent to the competent court to judge the case*". So, when the case is sent to the court, a number of copies of the indictment are provided by the prosecutor, in order to be communicated to all persons who are have the status of accused. From that time on, the entire case file can be consulted in the archive of the competent court.

Article 7.4: according to the CCP, the general rule is the right of access to the case file. As an exception, access to certain materials may be refused by the public prosecutor during the investigation. The public prosecutor must motivate his decisions and it must be related to the fact that access to the case file could affect the ongoing investigation; after the person has the status of accused person, access to all case materials can be restricted for maximum days[71]. In all cases, review is granted by Article 95 ("*The right to make a complaint*") CCP*:* "(1) *The lawyer has the right to file a complaint, according to Article 336-339*[72]*. (2) In the situations provided in (…) Article 94, the superior hierarchical prosecutor is obliged to resolve the complaint and to communicate the solution, as well as its motivation, within 48 hours*".

[71] See Article 94.4 CCP, above mentioned at page 21.

[72] Article 336 – 339 from the CCP regulate the review regarding any criminal investigation measures and act. As a general rule, the public prosecutor in charge of the case solves the complaint referring to acts of the judicial police; if the measure was taken by the public prosecutor (as is the case here), the complaint will be solved by the superior hierarchical public prosecutor.

Article 7.5: the provisions from the CCP already mentioned above reveal that in all cases access is provided free of charge[73].

Article 8: as already mentioned, the CCP was amended by Law no. 255/2013, in order to transpose Article 8 from the Directive. Therefore, there are several provisions which provide for such a recording procedure, namely:

A) In general, for all cases

- Article 108 ("*Communication of rights and obligations*") CCP "*(3)* (…) *These rights and obligations are also communicated to the suspect in writing, under signature, and in case he cannot or refuses to sign, a report will be concluded*".
- Article 307 ("*Informing about the status of suspect*") and Article 309.2 final thesis CCP[74].

B) For the cases where the suspects or accused persons are arrested or detained:

- Article 209.17 CCP and Article 228.2 CCP[75].
- Article 230 ["*Preventive detention warrant*] CCP and Article 231.4 ("*Execution of the detention warrant issued in the absence of the accused person"*) CCP requires that a warrant of arrest must be issued and communicated to each detained person and it must contain several information[76].

[73] If photocopies or electronic copies are requested, this is done by the authorities at the request of the suspect / accused person or other party / main procedural subject, the costs bear on the one that made the request. The general legal disposition is represented by Article 94 CCP "(2) *The consultation of the file implies the right to study its documents, the right to record data or information from the file, as well as to obtain photocopies at the client's expense*". The only case the state provides free of charge documents from the dossier is that regulated by Article 329.2 CCP, namely a copy of the indictment is provided to every accused person.

[74] Already mentioned above at page 17.

[75] Already mentioned above at page 17.

[76] Article 230.3 CCP "(…) *e) the duration for which the preventive arrest of the accused person was ordered, mentioning the date on which he ceases; f) information about the criminal act the person is accused, indicating the date and place of its commission, the legal classification, the offence and the punishment provided by law; g) the concrete grounds that determined the preventive arrest; h) the order to arrest the accused person; i) indication of the place where the accused person arrested will be detained; j) signature of the JRL; k) the signature of the accused person, if he/ she is present. If he /*

- In addition, according to Article IV from Emergency Ordinance no. 18/2016 and to Article 1 from Joint Order no. 1274/C/111/2037/1123/C/2017, the judicial bodies submit to the suspect, the accused or the convicted person written information regarding his rights during the criminal trial or the procedure for executing the European arrest warrant. The information will be made in Romanian, in the native language or in another language that he understands, as the case may be.

Article 8.2: the numerous legal provisions of the CCP (consolidated form) and from the Joint Order lead us to the conclusion that theoretically few cases can be imagined regarding a legal refusal. Such a scenario would be when the person is only suspect or, in case he / she is already an accused person, for no more than 10 days. Having this in mind, we underline that Law no. 255/2013 explicitly mentioned that it amended the CCP in order to transpose, *inter alia*, Article 8.2. We make reference here to the consolidated form of Article 94, as well as to challenge regulated by Article 95.2, which provides that "*in the situations provided in Article (...) 94, the superior hierarchical prosecutor is obliged to resolve the complaint and to communicate the solution, as well as its motivation, within 48 hours*". When the case is already in front of a court (be it the JRL, the PHJ or the competent court which deals with the merits of the case), there is no explicit provision for challenging such a failure or refusal. The general right to challenge a decision together with the judgment per se, as granted by the CCP, is applicable - namely appeal (in case of judgment of the merits) or contestation (in all other cases, e.g., rulings on preventive detention, preliminary chamber rulings, etc.). Still, we stress out that in these cases, there is no legal possibility to refuse access to the case.

Article 9: exactly like in the case of the previous Directive, EJN website identifies at the transposition level in Romanian law several Regulations adopted by the Romanian Superior Council of Magistrates and the Ministry of Justice. Still, we underline that there is no explicit provisions regarding such trainings.

she refuses to sign, an appropriate mention will be made in the warrant. (4) When an arrest warrant was issued after hearing the accused person, the judge having issued the warrant shall hand a copy of the warrant to the arrested person (…). (4[1]) The arrest warrant may also be transmitted to the police bodies by fax, e-mail or by any means capable of producing a written document under conditions which allow the receiving authorities to establish its authenticity".

7.1.3 A critique of the current legislative framework

Setting aside the delays, at the current time, we consider that the Directive is fully transposed, and the only general critique would be the manner in which the legislator did it: by several legal instruments amending the CCP and over several years[77].

Summary of the deficiencies outlined above:

- There are provisions from the Joint Order which do not have a correspondent in legal provision from the CCP - we mention here Point G from Annex I[78].
- Regarding access to case files materials, the restrictions from the CCP apparently respect the standard imposed by the Directive. Two arguments can be invoked for the rebuttal of such a conclusions: first, when the person has the status of a suspect, there is no time limit for the restriction; second, applicable to both thesis of Article 94.4 CCP, there are no clear criteria regarding the conditions which need to be fulfilled in order for the public prosecutor to conclude that a restriction needs to be imposed[79].

7.2 Case-law

While the Romanian courts usually prefer to rely in their judgments on national legislation predating the Directive, the recent case law of the Constitutional Court focused on the provisions of the

[77] For example, exactly like in the case of Directive 2010/64/EU, Law no. 255/2013 – which proposed itself to amend the CCP in order to transpose parts of the Directive – could and should have transposed it entirely, after a more detailed analysis of the correspondence between the at that time draft CCP and the provisions of the Directive. In addition, the Joint Order from 2017 shows, once more the plain wrong manner of transposing the Directive at national level, which is generally characterised by inconsistency and a piecemeal approach.

[78] Which makes reference to the "(…) *written translation of the indictment, as well as the minutes and the court decision*" in cases where the suspect or accused persons don't speak the official language of the authorities. Still, if we have a provision regarding the translation of the indictment, there is no legal text imposing an obligation on authorities to translate the court judgment or even its minute, even when dealing with deprivation of liberty. To be more accurate, as we already mentioned before, this critique regards more the case of Directive 2010/64/EU.

[79] In these cases, Preamble 32 from the Directive which indicates some sort of guidelines criteria, e.g. a balance between the ongoing investigation and the principle of the right to a fair trial under the ECHR can be used; we are at least to say sceptical about the interpretation given by national public prosecutors, especially in cases where there is no clear time limit and no clear sanctions.

Directive combined with the ECHR case law. As we will see, the Constitutional Court often makes reference directly to the provisions of the Directive, even after concluding that (that particular) provisions were indeed fully transposed in national legislation. This is in line with the recent trends of Court's case-law which underlines as much and often as it has the opportunity the importance of EU provisions.

In one case (***Cluj Court of Appeal, criminal division, decision no. 81/2019***), the arguments of the defence were centred upon a corroborated analysis of the requirements of Directive 2012/13/EU and the fact that surveillance measures when undertaken on the basis of national security warrant generally are not available (since information is confidential and special certificates are needed in order to access al case material). The court rejected such reasoning, undertaking a formal approach: first, it reiterated the provisions of Article 7 from the Directive, linking it to Constitutional Court's decision no. 21/2018 which underlined that accused persons or their lawyers must be granted by the authorities "access to at least all the evidence in their possession". Secondly, referring to the special surveillance measures (carried out on the basis of national security warrants) the Court underlined their legality and, as a consequence the legality of the results thus obtained (e.g. the means of proof, which satisfy the requirements of Article 97 CCP).

In another case (***Suceava Tribunal, PHJ, criminal division, decision no. 198/2019***), the defence invoked several provisions of from Directive 2012/13/EU, but also Directive 2013/48/EU, respectively Directive (EU) 2016/343 and Directive (EU) 2016/1919. Among several critiques, the most relevant concerned the irregularity of the indictment, which it considers to be insufficiently describing the criminal charge and thus failing to respect the right to information and the violation of the right to a fair trial, generated by the lack of defence (the absence of the lawyer - case of *ex officio* legal assistance and the general violation of the presumption of innocence). The Tribunal rejected all the critiques, underlining the following: the PHJ from the first instance court fulfilled his obligation to establish a legal balance by applying the pertinent legal provisions with the satisfaction of the standard of clarity and precision, including regarding the motivation of the pronounced conclusion. Both European law and the consistent practice of the Supreme Court provide that in order for the court to be deemed to be legally seized from the perspective of the limits of the indictment, it is necessary to set out in detail the facts which are the subject of the lawsuit and its legal characterization, so that the procedural framework can be established and the unequivocal

will of the prosecutor to be prosecuted can result. The facts retained in the indictment, including the one who formulated the present appeal, are sufficiently described, clear, precise and detailed. As for the legal classification given by the prosecutor to the facts under which charges are brought against a defendant, it is always a provisional one, subject to court censorship and subject to change if necessary, a matter which is the subject of the trial judge's examination. As concerned the incidence of the provisions regarding the mandatory legal assistance this is not the case here. It was correctly underlined that the obligation to ensure the legal assistance of the accused persons, according to Article 90 letter c) from the CCP refers only to the preliminary chamber procedure and the trial phase, not the criminal prosecution phase, in cases where the law provides for the crime of life imprisonment or imprisonment for more than 5 years.

Another reference to the Directive was made in a judgment from ***Braşov Court of Appeal, criminal division, decision no. 838/2018***. In this case, the Tribunal changed the legal classification of the offence without permitting the accused person to present her arguments regarding the new "indictment". The Court of appeal noted that EU Directive 2012/13 on the right to information in criminal proceedings, transposed into Romanian law, requires the application of the principle from the moment a person is informed by the competent authorities of a Member State that he or she is suspected or accused of committing a crime, until the end of the proceedings, by which is meant the final decision ruling on its guilt or innocence, the pronouncement of the sentence and the settlement of an appeal. Regarding the requirements embed in this right, as provided by Article 6 from the Directive and Article 6 from the European Convention, the Court considered it to be violated during the proceedings. The only solution available to the appellate court is to admit the appeal and order a retrial, in order to ensure the right to information of the accused persons and to permit an efficient exercise of the right to defence. This equally applies to the civil parties, which cannot be deprived of the possibility to propose evidence and express their point of view on these issues.

In a case before the Supreme Court (***HCCJ, criminal division, decision no. 164/2015***), it was agreed in all aspect with the findings of the first instance court, namely: the accused person had all the rights circumscribed to the notion of a fair trial respected, the first court examined the essential issues of the case and did not simply "confirm" the indictment and the reasoning of the judgment fully reflected the facts from the case. Reference was made to ECHR case-law, more precise to *Helle*

v. Finland, judgment of 19 December 1997 and *Boldea v. Romania,* judgment of 15 December 2007. Moreover, in accordance with the requirements of the European Court which were constantly invoked as being violated, the Supreme Court pointed out, in disagreement with the defences made, that the entire criminal proceedings took place in the presence of the accused at the court hearing. An essential aspect for the first court was to examine directly not only the person of the accused person, but also to directly analyse the entire factual context, respecting in all its forms fairness of the proceedings and requiring the presence of both the accused and the other injured parties, together with their lawyers (as reffered to *Kremzow v. Austria*, judgment of 21 September 1993.

As anticipated, the Constitutional Court elaborated its case-law on the relevance of the Directive for national law. In the first decision (***decision no. 290/2017***[80]), the Court rejected on ground of admissibility the critics of Article 342 from the CCP regarding the object of the preliminary chamber. In the merits, the Court underlined the importance of a change in the legal classification of the offences from the indictment, the relevance with the right to information as provided by Article 6.3 from the Directive and the general right to a fair trial. The Court concluded that: "Given the consequences of a change in the legal classification, this can take place only under certain conditions, the fulfilment of which constitutes a guarantee of both the right of defence of the parties and, first and foremost, of the accused persons defendant, and of the correct settlement of the case. In such a case, the court is obliged to question the new classification and to draw the accused person's attention that they have the right to request that the case be postponed or possibly postponed, in order to prepare his defence, regardless of whether the change of legal classification creates a easier or more difficult situation for the defendant. Moreover, by the Judgment of April 12, 2011, pronounced in the case of *Adrian Constantin against Romania*, the European Court of Human Rights ruled that the change of legal framework, during the deliberation, leads to non-compliance with procedural guarantees designed to give the accused person the right to defend himself, according to the legal and factual basis of the accusation. Thus, the accused person's right to be informed in detail about the nature and cause of the charge, as well as the right to have the time and facilities necessary to prepare the defence, was infringed. Thus, the European Court ruled that «it is not at all a question of assessing the merits of the defences which the applicant could have relied on if he had had the opportunity to debate the offence for which he was ultimately

[80] Published in M. Of. no. 557 from 13 July 2017.

convicted. It merely states that it may be argued that those grounds were different from those chosen to challenge the main allegation»"[81].

In a more recent case (***Constitutional Court, decision no. 250/2019***[82]), the Court declared that the provisions of Article 377.4 first sentence and Article 386.1 CCP are constitutional insofar as the court rules on the change of the legal classification given to the deed by the act of notification by a court decision that does not resolve the merits of the case.

In the arguments of the decision, the Court made several references to the Directive, its relevance and impact on the minimal standards from national legislation. The Court noted that, as a rule, regarding the change of the legal classification found in the indictment, the ordinary courts rule at the end of the trial, by court judgment (sentence or decision, depending on the procedural stage). The obligations to discuss the new legal classification and to inform the accused person that he has the right to request that the case be adjourned or postponed, in order to prepare his defence are respected[83]. However, the Court underlines that "according to Directive 2012/13/EU (…) «Where, in the course of the criminal proceedings, the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them where necessary to safeguard the fairness of the proceedings and in due time to allow for an effective exercise of the rights of the defence» (Preamble, point 29) and «Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings» (Article 6.4). At the same time, the Court recalls that Article 6.3.a) of the Convention for the Protection of Human Rights and Fundamental Freedoms regulates the right of the accused to be informed of the cause of the accusation (the material facts of which he is accused and on which the accusation is based); the nature of the accusation (the legal classification of the facts in question) and the right to be informed about the nature and cause of the accusation must be analyzed in the light of the defendant's right to prepare his defence" .

[81] See paragraph 25 from the decision.
[82] Published in M. Of. no. 500 from 20 June 2019.
[83] See paragraph 37 from the decision.

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

8.1 Legislation

8.1.1 Preliminary findings

Directive 2013/48/EU was eventually transposed into domestic legislation by Law no. 236/2017[84] amending Law no. 302/2004.

According to the Explanatory Memorandum, Law no. 236/2017 transposed the provisions of Article 10.4-6 from the Directive, thus the Romanian legislator fulfilled its obligations of implementing the directive[85]. This is the case for the EAW, as the other aspects regulated by the Directive were implicitly transposed into national legislation by the CCP, the CC, by Law no. 51/1995 for the organisation and exercise of the profession of lawyer[86] and by Law no. 254/2013 regarding the execution of sentences and detention measures involving deprivation of liberty[87].

The conclusion regarding the full transposition of the Directive seems to be contradicted by the EJN's website, where apparently the Romanian authorities, although communicating the adoption of Law no. 236/2017 (as part of the National Implementing Measures provided to the European Commission) failed to transmit that the Directive is fully transposed. In fact, on 20 April 2020 (the last update) the transposition process was announced to be "ongoing"[88]. In addition, this conclusion was criticised by the Romanian Bar Association, which claimed that the Directive was not fully

[84] Law no. 236/2017 for amending and supplementing Law no. 302/2004 regarding international judicial cooperation in criminal matters, published in the M. Of. no. 993 from 14 December 2017.
[85] The conclusion was in the Explanatory Memorandum of the draft Law no. 236/2017 (available at *http://www.cdep.ro/proiecte/2017/300/00/7/em389.pdf*) and was embraced by the Ministry of Justice.
[86] Republished in M. Of. no. 440 from 24 May 2018.
[87] Published in M. Of. no. 514 from 14 August 2013.
[88] For details see Status of implementation of Directive 2013/48 available at *https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?l=EN&CategoryId=116*.

transposed and the Ministry of Justice's opinion that the CCP already provided for the rest of the obligations set in the Directive is inaccurate[89].

8.1.2 Analysis of national legislation transposing the Directive

Article 1: the national legislation corresponding to it is comprised of the CCP and CC as well as Law no. 254/2013 and Law no. 51/1995, all legal instruments amended several times. In the particular field of the EAW, the transposition legislation is represented by Law no. 302/2004, amended by Law no. 236/2017, especially in order to implement this Directive.

Article 2: we are in the presence of a *de facto* (implicit) transposition, as most of the rights pre-existed the Directive, being already enshrined by the 1968 CCP, as amended especially following the case-law of the ECHR and of the Constitutional Court. Regarding the moment from which these rights apply in national law, Article 78 and Article 83 CCP (on the rights of the suspect and accused person) provide it as such starting the moment the person is notified by the competent authorities about the status of a suspect, irrespective of any deprivation of liberty. All the rights are granted until the end of the trial (e.g., when the judgment is finale and enforceable, usually after the resolution of the appeal). In addition, most of these rights are also provided by Law no. 254/2013 during the enforcement of the penalty (e.g., the communication with the legal counsel in the penitentiary spaces, etc.)

Article 2.2: Law no. 236/2017 explicitly mentions amending Law no. 302/2004 in order to transpose this Directive – exact reference is made to Article 10 paragraphs 4 – 6, as these provisions had at that time no correspondent in national legislation[90].

[89] Gh. Florea, *Stadiul de transpunere al directivelor europene vizând dreptul la apărare și consolidarea drepturilor persoanelor suspectate și acuzate prin stabilirea unor standarde minime comune privind drepturile la un proces echitabil. Impactul acestora asupra exercițiului profesiei de avocat (1)*, 10 January 2018, at *https://juridice.ro/essentials/1908/stadiul-de-transpunere-al-directivelor-europene-vizand-dreptul-la-aparare-si-consolidarea-drepturilor-persoanelor-suspectate-si-acuzate-prin-stabilirea-unor-standarde-minime-comune-privind-drepturile*.

[90] See Article I (7) - (9) from Law no. 236/2017 amending Articles 90, 95 and 104 from Law no. 302/2004 dealing with both the issuing and the execution of the EAW. We mention that Law no. 302/2004 was republished in 2019, so at this time the amendments made by Law no. 236/2017 are no longer seen distinctively, being incorporated in the latest version of the legal texts, most of which have no new numbers.

Article 2.3: according to national legislation (Article 118 CCP), if, during the questioning, the person (witness) incriminates himself, the judicial body (police officer or public prosecutor) has the positive obligation to stop the declaration and warn the person about the right to silence, in order to protect against self-incrimination[91].

Article 2.4: we made several comments in the previous sections that the competence for imposing sanctions - even in relation to relatively minor offences - belongs only to courts with jurisdiction in criminal matters. This is the case even if deprivation of liberty cannot be imposed, e.g. the case of waiver of prosecution where only community service can be imposed (which is not a criminal sanction and where the PHJ is the one confirming the solution rendered by the public prosecutor).

As already mentioned, in cases where suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings or the penalty provided by law for the offence being tried, we are in the cases of compulsory legal assistance. Therefore, an *ex officio* lawyer will be appointed by the authorities, if the suspect or accused person does not hire a retained lawyer. For this, see:

- Article 90 ("*Compulsory legal assistance of the suspect or the accused person*") CCP: "*Legal assistance is mandatory: a) when the suspect or the accused person is a minor, admitted to a detention centre or to an educational centre, when he is detained or arrested, even in another case, when against him the security measure of medical admission was ordered, even in another cause, as well as in other cases provided by law; b) if the judicial body considers that the suspect or the accused person could not defend himself; c) during the*

[91] According to Article 118 CCP ("*The witness's right against self incrimination*"): "*The witness statement given by a person who, in the same case, prior to the statement had or subsequently acquired the status of suspect or accused person cannot be used against him. The judicial bodies have the obligation to mention, when the declaration is recorded, the previous procedural quality*". If this obligation is not respected, Article 118 CCP is considered to be violated and the declaration thus obtained will (should) be removed from the case file. In addition, the Constitutional Court decided in June 2020 that the provision of Article 118, which does not regulate for the witness the right to silence and not to incriminate himself, is unconstitutional (CC, decision no. 236/2020, published in M. Of. no. 597 from 8 July 2020). At current time, there are several draft laws amending the CCP, which, *inter alia*, introduce new provisions, aimed to cover such hypothesis. All these drafts were rejected by the Romanian Constitutional Court and the legislative body is still working on it. At this time, due to political instability, these projects are *de facto* suspended, so no reference is worth being made.

preliminary chamber procedure and during the trial in cases where the law provides for the crime committed for life imprisonment or imprisonment of more than 5 years".

- Article 91 ("*Ex officio lawyer*") CCP: "(1) *In the cases provided in Article 90, if the suspect or the accused person has not chosen a lawyer, the judicial body takes measures to appoint an* ex officio *lawyer. (2) Throughout the course of the criminal trial, when legal assistance is obligatory, if the lawyer chosen is unjustified, does not ensure the substitution or unjustified refusal to exercise the defence, even though the exercise of all procedural rights has been ensured, the judicial body takes measures to appoint an* ex officio *lawyer to replace him, giving him a reasonable term and the necessary facilities for the preparation of an effective defence, mentioning it in a minutes or, as the case may be, at the conclusion of a hearing. During the trial, when the legal assistance is obligatory, if the lawyer chosen is not justified at the time of trial, does not ensure the substitution or refuses to defend, although the exercise of all procedural rights has been ensured, the court takes measures to appoint an ex officio lawyer replace it, granting it a minimum of 3 days for the preparation of the defence. (3) The lawyer ex officio is obliged to appear whenever requested by the judicial body, ensuring a concrete and effective defence in the case. (4) The delegation of the defending office shall cease upon presentation of the chosen defender*"[92].

Article 3: part of an implicit transposition process, Article 10 CCP ("*Right to defence*") provides that: "(1) *The parties and the main subjects in the proceedings have the right to defend themselves or to be assisted by the lawyer. (2) The parties, main subjects in the proceedings and the lawyer have the right to benefit from the time and facilities necessary for the preparation of the defence. (…) (5) The judicial bodies have the obligation to ensure the full and effective exercise of the right to defence by the parties and main subjects in the proceedings throughout the criminal trial*".

Article 3.2: part of an implicit transposition, Articles 78 and 83 CCP provide that during the entire criminal trial the suspect and accused person have "*the right to have a lawyer elected, and if he does not designate one, in the cases of compulsory assistance, the right to have appointed a lawyer* ex officio" [point c)]. In addition, Article 89 ("*Legal assistance of the suspect or the accused person*")

[92] For an analysis of the provision of Article 90 and 91 from the CCP, see M. Udroiu, S. Răduleţu in M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, p. 482-491.

CCP underline that "(1) *The suspect or the accused person has the right to be assisted by one or more lawyers throughout the course of the criminal prosecution, of the preliminary chamber procedure and of the trial, and the judicial bodies are obliged to inform her about this right. Legal assistance is provided when at least one of the lawyers is present*".

Read jointly, Articles 78 and 83.c), 108.1-2 ("*Communication of rights and obligations*"), 307 ("*Informing about the status of suspect"*) and 309 ("*Commencement of criminal proceedings*") CCP reveal that the access is granted before the first questioning.

In most cases, this is the earliest point in time, but in case where a home search is conducted (logically, prior to any questioning), Article 159 ("*Conducting a home search*") CCP provides that the persons "*(9) (…) shall be informed of their right of having a counsel participate in the search conducting. If the presence of a counsel is requested, the search initiation shall be postponed until their arrival, but no more than two hours after the the right was communicated, and steps for the preservation of the venue to be subject to search shall be taken. In exceptional situations, requiring the conducting of a search on an emergency basis, or when the counsel cannot be contacted, a search can be started even prior to the expiry of the two-hour term*". In addition, Article 92 ("*The rights of the lawyer of the suspect and of the accused person*") from the CCP provide that: "*(1) During the criminal prosecution, the lawyer of the suspect or of the accused person has the right to attend the execution of any act of criminal prosecution, except: a) the situation in which the special methods of supervision or research, provided for in Chapter IV of Title IV; b) bodily or vehicle searches in the case of flagrant offences. (2) The lawyer of the suspect or of the accused person may request to be informed of the date and time of the criminal prosecution or of the hearing conducted by the judge of rights and freedoms. The acknowledgment is made by telephone, fax, e-mail or other such means, in which case a report is concluded. (3) The absence of the lawyer does not prevent the carrying out of the criminal prosecution or the hearing, if there is evidence that he was aware under the conditions of para. (2). (4) The lawyer of the suspect or the accused person also has the right to attend the hearing of any person by the judge of rights and freedoms, to formulate complaints, requests and reports. (5) In case of conducting the house search, the knowledge provided in para. (2) it can be done after the presentation of the criminal prosecution body at the domicile of the person to be searched. (6) If the lawyer of the suspect or the accused person is present at the execution of an act of criminal prosecution, mention shall be made of this and of the possible*

objections made, and the act shall be signed by the lawyer. (7) During the preliminary chamber procedure and during the trial, the lawyer has the right to consult the documents of the file, to assist the accused person, to exercise his procedural rights, to formulate complaints, requests, reports, exceptions and objections. (8) The lawyer of the suspect or the accused person has the right to benefit from the time and facilities necessary for the preparation and execution of an effective defence".

When deprivation of liberty is involved, the following provisions from the CCP apply:

- Article 89 ("*Legal assistance of the suspect or the accused person*"): "*(2) The detained or arrested person has the right to contact the lawyer, ensuring the confidentiality of the communications, in compliance with the necessary measures of visual surveillance, security and security, without intercepting or recording the conversation between them (…)*" and Article 90[93].
- Article 209 ("*Arrest*"): "*(5) The detention measure may be taken only after the hearing of the suspect or the accused person, in the presence of the lawyer chosen or appointed ex officio. (6) Before the hearing, the criminal investigation body or the prosecutor is obliged to inform the suspect or the accused person that he has the right to be assisted by a lawyer chosen or appointed ex officio and the right not to make any statement, except for the provision of information about his identity, noting that what he declares can be used against him*".
- Article 219 ("*Taking the measure of house arrest by the JRL*"): "(6) *The legal assistance of the accused person and the participation of the prosecutor are mandatory*".
- Article 222 ("*Duration of house arrest*"): "*(11) The provisions of Article 219.4-6 apply accordingly*".
- Article 225 ("*Solution of the proposal of preventive detention during the criminal prosecution*"): "*(5) In all cases, the legal assistance of the accused by a lawyer, elected or appointed ex officio, is mandatory*" and Article 235.2[94].

[93] Already mentioned above.
[94] Already mentioned above.

- Article 356 ("*Providing defence*"): "*(2) When (…) one of the parties is detained, the president of the panel shall take measures (…) to make contact with their counsel*".

When the person is summoned to court, aside Articles 78, 83 point c), 89, Article 92 and 356 CCP (all applicable here), Article 344 ("*Preliminary measures*") CCP provides: "(1) *After the indictment is filed with the court, the case is assigned randomly to a PHJ. (2) (…) the accused persons shall also be informed of the object of the preliminary chamber procedure, their right to retain a defence counsel (…)".*

Article 3.3: regarding point (a), see the implicit transposition from Article 89 paragraph 2 CCP above mentioned, as well as Article 209 ("*Arrest*") CCP which provides that "*(9) The lawyer of the suspect or the accused person has the right to communicate directly with him, under conditions that ensure confidentiality*".

Point (b): the requirement is implicit transposed by the CCP, as it can be seen from an outlook over the dispositions of Article 92 CCP already quoted above.

Point (c): regarding the minimum threshold, Article 92 CCP is once more applicable.

Article 3.4: there is no legal obligation for the authorities to facilitate obtaining information regarding lawyers by the suspects or accused persons. Also, there is no procedure in this regard after the suspects or the accused have been informed that they have the right to a lawyer. Only in the case of those who have the right to an *ex officio lawyer*, steps are taken for the appointment of a defence lawyer (application to the bar). Trying to identify a partial, incomplete and implicit transposition, this would consist in the fact that each Bar has a public website[95], with the contact dates of all lawyers. In addition, the Ministry of Justice provides a portal where all the data of the lawyers can be identified[96]. Still, we mention that this latter portal is mostly for the use of the judicial organs, in order to check the legality and qualifications of the lawyers involved. Regarding the case of person deprived of liberty, this is the first (and most common) case of mandatory legal assistance,

[95] See, for example, the dedicated page from Cluj Bar website (organisation from which the author belongs) which contains information about all lawyers who have passed all exams required by the profession in order to fully exercise the profession - *https://www.baroul-cluj.ro/tabloul-avocatilor/avocati-definitivi/*.
[96] See, *Tabloul avocaţilor din România* avalaible at *https://www.ifep.ro/Justice/Lawyers/LawyersPanel.aspx*.

so an *ex officio* lawyer will be provided by the authorities (via a protocol between the Ministry of Justice and the National Bar Association), if the suspect or accused person does not have one of their choice.

Article 3.5 – 6: the national legislation (which pre-existed the Directive, in a similar form in the previous CCP) respects all the standards, as there are no derogations permitted in case where deprivation of liberty of the suspect or accused is involved. In other cases, the *only derogations from the general right of the lawyer to attend all investigative acts are regulated by Article 92.1.a) and b) CCP which refers to situations in* which special methods of supervision or research have been ordered[97] or in the case of bodily or vehicle searches in the case of flagrant offences.

Article 4: it is a case of a *de facto* transposition, as previous dispositions from the CCP and from several other laws provided the need for such confidentiality, in order to respect the right of defence. We make reference to Article 89.2 CCP mentioned above and to following special legislation provisions.

- Article 35 Law no. 51/1995 for the organisation and exercise of the profession of lawyer: "(1) The contact between a lawyer and his client cannot be impeded or controlled, directly or indirectly, by any state body. (2) In case the client is under arrest or detention, the administration of the place of arrest or detention has the obligation to take the necessary measures to respect the rights provided in para. (1)".
- Article 62 Law no. 254/2013 regarding the execution of sentences and detention measures involving deprivation of liberty: *"(1) The convicted persons benefit from the space and facilities necessary to ensure the right to legal assistance. (2) The convicted persons may consult lawyers elected by them, in any matter of law deduced from the administrative or judicial procedures. (3) The consultation with the lawyer, elected or ex officio, is done with the respect of the confidentiality of the visit, under visual supervision*".
- Article 128 ("*Ensuring the exercise of the right to legal assistance"*) Government Decision no. 157/2016 for the approval of the Regulation implementing Law no. 254/2013: "*(1) The*

[97] These refer to those provided for in Chapter IV of Title IV of the CCP (e.g., wiretapping of communications or of any type of remote communication, etc.).

detainees may be visited by their defendants, based on the power of attorney and the approved document attesting the capacity of lawyer, under the conditions of Article 62 from Law (no. 254/2013, we add) *and of Article 143. (2) The meetings with the lawyers are confidential and are carried out under supervision, in specially arranged spaces, provided with separation devices that limit the physical contact, but which allow the transmission of documents. Surveillance can only be visual, as it is not allowed to listen to the conversation held by the inmate with his defender. (3) The visit with the lawyer is granted outside the rights regulated by Article 142, but it is recorded in the transcripts of records from the visiting sector within the penitentiary and in the corresponding module from the computerised data management application on detainees*".

Article 5: there are several provisions at national level which enshrine this right, namely:

- Articles 210.1, 218.4 and 228.2 CCP[98].
- Article 43 ("*Receiving convicted persons*") Law no. 254/2013: "*(4) As soon as is received in the penitentiary, the convicted person has the right to personally inform or to ask the administration to inform a family member or another person designated by him, about the penitentiary in which he detained*".
- Article 108 ("*Confirmation of the communication about the presence of the detainee in the place of detention*") Regulation implementing Law no. 254/2013: "(1) *The content of the minutes, in which the exercise of the right stipulated in Article 43.4 of the Law (no. 254/2013, we add), it is brought to the notice of the detainee, under signature, and is submitted to the individual file. (2) The minutes provided for in Article 43.8 of the Law contains statements regarding (…) the measures that have been or are to be taken, in order to exercise the right to know a family member or other person about the penitentiary in which they are and how the law was exercised*".

Article 5.2: Article 243 ("*Special conditions for applying preventive measures to minors*") CCP: "*(4) When the arrest or preventive detention of a minor has been ordered, the knowledge provided in Article 210 and 228 must be made also to his legal representative or, as the case may be, to the*

[98] All mentioned above, at page 17.

person in the care or supervision of the minor". Important amendments have been made very recently to the CCP regarding minor offenders, in the context of transposing Directive 2016/800; in this regard, Article 244[1] CCP was introduced. According to it: "(1) *If the arrested or detained person is a minor, together with the information provided in Article 209.17 and Article 228.2, it is also communicated the right to special conditions of execution, according to Article 244. (2) The information provided in para. (1) shall also be made to the parents or, as the case may be, guardian, curator or the person in whose care or supervision the minor is temporarily. (3) If the parents or, as the case may be, the guardian, curator or person in whose care or supervision the minor is temporarily could not be found or their information would affect the best interests of the minor or the conduct of criminal proceedings, the information shall be made to another adult who is appointed by the minor and accepted in this capacity by the judicial body. (4) If the minor does not designate another adult according to para. (3) or the designated adult is not accepted by the judicial body, the information will be made to another person chosen by the judicial body, taking into account the best interests of the minor. (5) If the circumstances provided in para. (3) or (4) ceases, the information will be made according to para. (2)*". Therefore, at current time, Article 5.2 is explicit transposed.

Article 5.3: is *de facto* partial implemented by Article 210.5-6 CCP and Article 228.7 CCP[99]. Article 210.5 CCP provides that, in case of arrest, the person may not be permitted to exercise the right to information personally for serious reasons[100]. We stress out that the exception refers only to the right to be personally informed and not to the general obligation to inform. So, the obligation exists even in this case, but the information will not be made personally. In addition, Article 210.6 CCP seems to regulate the general exception – as a derogation for serious reasons (as well, not defined), the information can be postponed for maximum 4 hours. In this case, the information covers both the personal information made by the arrested and the general information made by the authorities. In case of preventive detention Article 228.7 CCP refers only to the case when the

[99] Above mentioned, at page 17.

[100] No legal definition of these serious reasons is provided, but there is a positive obligation for the authorities to record these reasons in a written format in the minute (note) drafted for this. We did not identify any case law on these "serious reasons" and the legal doctrine hardly mentions it theoretically, linking it with the exception provided by Article 5.3 from the Directive. See C. Jderu, *Article 210. Commentary* in M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, p. 1025.

information is made personally by the detained accused. There is no provision about a general exception on the right of information, so it seems that the obligation rests in all cases of preventive detention on the authorities.

Article 5.4: is indirect implemented after the amendments made by Law no. 284/2020, Article 244[1].4 CCP permits that the information is made in such cases to "*(...) another person chosen by the judicial body", taking into account the best interests of the minor". We consider that* the competent authority responsible for the protection or welfare of children could be, in the conditions are met, such a person; still, we must be honest and recognise that this was not the reasons behind the amendments, as the legislator had in mind only Directive 2016/800[101].

Article 6: the so-called execution law body of law (comprising of Law no. 254/2013 and of Regulation implementing this law) contains detailed provisions regulating the right of visit, the persons entitled to such visits, as well as the exceptions when the exercise of the right can be limited. Generally, both Law no. 254/2013 and the Regulation deal with the case of penalty enforcement and execution (after the final judgment), but special provision regulate the case of preventive measures, taken during the criminal trial. According to Article 110 Law no. 254/2013 (to which several references will be made in the following sections), all provisions of the Law apply as well in case of suspects or accused persons deprived of liberty and any exception or derogation must be explicitly provided by the Law or by the Regulation. Having this in mind, punctual, the relevant provisions are:

- Article 68 Law no. 254/2013: "(1) *The convicted persons have the right to receive visits, in specially arranged spaces, under the visual supervision of the prison administration personnel. (2) Visiting persons are subject to specific control. (3) The duration and the periodicity of the visits, the way of organizing them, as well as the quality of the visitors, are established by the regulation of the application of the present law*".
- Article 110 ("*Execution of preventive measures in retention and preventive detention centres) from Law no. 254/2013*") Law no. 254/2013: "(1) *The provisions of Title I, Title II, as well as of the Chapter II, IV-VI and IX of Title III, insofar as they do not contravene the provisions of this Title, shall apply accordingly*".

[101] See below, section 9.

- Article 137 ("*Organisation of the granting of the right to visit*") from Regulation implementing Law no. 254/2013: "(1) *In order to maintain the connection with the family and to keep in contact with various persons and organizations, the prison administration ensures the possibility of visiting the detainees. (2) The detainees have the right to receive visits in arranged spaces, according to the Regulation provided by Article 15 paragraph (3) of the Law* (no. 254/2013, we add), *under the visual supervision of the prison staff, directly or through electronic systems. (3) Detainees may be visited by family members or relatives. (4) With the consent of the prisoner, he may also be visited by other persons, with the written approval of the director of the place of detention*".

- Article 140 ("*Visiting persons admitted to hospitals or nursing homes*") from Regulation implementing Law no. 254/2013: "(1) *Inmates detained in the hospital penitentiaries, who are not transportable, may be visited by family members, carers or other persons, including in the detention rooms, with the opinion of the attending physician and with the approval of the director of the place of detention. (2) Inmates detained in hospital units outside the place of detention may be visited, in the presence of a visiting sector worker, with the opinion of the attending physician and with the approval of the director of the penitentiary*".

Article 6.2: regarding the limits imposed on the exercise of this right, the consent of the public prosecutor in charge of the case is requested - as a form of control over the visits - in order not to hinder the ongoing criminal prosecution. In addition, the written approval of the director of the penitentiary / detention centre is needed in order to manage the visiting facilities and to keep track of the visitors - in reality, this is a mere formality. The director of the penitentiary / detention centre may suspend the right to visits as a disciplinary sanction for a period of up to 3 months; the director can refuse or interrupt a visit, in certain special cases (e.g., the visitor does not respect the Regulation, etc.). The explicit provisions in this field are as follows:

- Article 110 Law no. 254/2013 ("*Execution of preventive measures in retention and preventive detention centres*") : "*(2) The right of the person arrested pre-emptively during the criminal prosecution to receive visits and to communicate with the media can be realised only with the consent of the prosecutor who carries out or supervises the criminal prosecution".*

- Article 101 Law no. 254/2013: "(1*) The sanctions that can be applied in the case of committing disciplinary violations are: (…) e) suspension of the right to receive visits* (…)".
- Article 138 Regulation implementing Law no. 254/2013 ("*Organisation of the granting of the right to visit*"): "(3) *Detainees may be visited by family members or relatives. (4) With the consent of the prisoner, he may also be visited by other persons, with the written approval of the director of the place of detention. (...) (6) The right to visit the detainees shall be granted on the basis of a prior appointment. The programming is done before the presentation date in order to grant the visit*".
- Article 141 Regulation implementing Law no. 254/2013: ("*Refusal to grant the visit and to interrupt the visit*") *"*(1) *The director of the penitentiary may refuse, by reasoned decision, to carry out the requested visit, in the following situations: a) weapons, ammunition, hallucinogenic substances, drugs, drugs or other prohibited objects were discovered on the visitors, which they did not declare before starting the check; b) visitors can have a negative influence on the behaviour of the prisoners; c) the visitors are in a state of intoxication; d) there are data and information according to which visitors could endanger safety, order and discipline in the place of detention; e) visitors are not subject to specialized control. (2) In case of refusal of the visit, by the decision provided in para. 1 the period is established in which the visitors are not allowed access to the visit, which cannot be more than 6 months. The decision shall be communicated in writing to the person concerned, specifying the reason and the period established (…). (4) Failure to comply with the rules for conducting the visit shall lead to its termination, with the approval of the director of the penitentiary. The reasons for the cessation of the visit shall be recorded in a register which shall indicate the date and time of the occurrence of the incident, a brief description of it and the persons involved*".

Article 7: was *de facto* transposed into national legislation, through a series of provisions from the CCP, Law no. 254/2013 and the Regulation for implementing this law. In a nutshell:

- Articles 210.2-3, 218.4, 228.2 CCP[102].

[102] All mentioned at p. 18.

- Article 43.6 ("*Receiving convicted persons*") and Article 74.1. from Law no. 254/2013 provides the right to request the authorities to inform the diplomatic mission or consular post and the right to be visited by diplomatic or consular representatives. These rights are reiterated by Article 167.1 ("*The right to diplomatic assistance*") from Regulation implementing Law no. 254/2013[103].

Article 8: under national law there is no derogation corresponding to that provided by Article 3.5. Referring to Article 3.6, a partial correspondence may be identified as regards point (b) and this operates only in case of surveillance measures. Regarding derogations under Article 5.3 from the Directive, the national legislation permits such exception in case of arrest and preventive detention but only in so far as personal information is concerned, made by the retained / arrested person. In this case, serious reasons must be identified and detailed in writings. In case of retention, the derogation can cover even the general information made by the authorities, but in this case a time limit of no more than 4 hours must be respected[104].

Article 9: has no clear correspondent in national legislation, so general provisions must be looked upon. First, we must stress out that according to the CCP, all cases involving deprivation of liberty (including arrest for the execution of an EAW) are cases of mandatory legal assistance[105]. Second, according to Article 31 ("*The rights of lawyers"*) Law no. 51/1995, "*(2) The lawyer, as well as the client, has the right to renounce the legal assistance contract or to modify it by mutual agreement (...)*". So, among the rights of the suspect and the accused person stands the right to a lawyer or to benefit from one free of charge in cases of mandatory legal assistance. Along side the other rights, this information is provided before the first questioning. In cases where the assistance of a lawyer is mandatory (Article 90 CCP), if the suspect or accused does not choose one, the investigative organ (either police officer or the public prosecutor) or the court will appoint one ex officio, free of charge, according to a special memorandum with the Bar. The suspect of accused can waive this right (which includes the presence of the lawyer), but in cases of mandatory legal assistance, an ex officio

[103] We already mentioned that all provisions from Law no. 254/2013 and from the Regulation, although provided for the case of penalties rendered after final judgments, are as well applicable in the case of preventive measures, according to Article 110 from Law no. 254/2013 and Article 245 from the Regulation.
[104] For this, see CCP - Article 210.5-6; Article 218.4; Article 92.2.(a)-(b); Article 228.
[105] For this, see CCP – Article 90.(a) and (b); Article 91; Article 83.(c) and Article 78.

lawyer will be provided. If the suspect or accused revokes such a waiver and hires a lawyer, the mandate of the ex officio one cease to exist, but only after the chosen defender actually is present.

Article 10: Law no. 236/2017 explicitly mentions amended Law no. 302/2004 in order to transpose, among other, the provisions of Article 10.4-6.

Article 10.1: once the person is requested following an EAW, according to national legislation (pre-existing the Directive), the assistance of a lawyer is mandatory, according to the general provisions of the CCP - see Article 90 et. seq. CCP. *So, if the arrested person does not choose a lawyer, one will be nominated ex officio, free of charge.*

In addition, Law no. 302/2004 has several provisions underlying the necessity that a lawyer is present in the EAW proceedings. In a nutshell,

- Article 101 ("*Retention of the requested person*"): "*(1) The measure of detention of the requested person may be taken by the prosecutor only after his or her listening in the presence of the lawyer*".
- Article 104 ("*Procedure for the execution of the European arrest warrant*:): "(3) *After receiving the European arrest warrant, the judge shall inform the requested person of the rights provided in Article 106 (...) (10) In all cases, the measure of arrest for the surrender can be taken only after listening to the requested person in the presence of the lawyer*".
- Article 106 ("*The rights of the requested person, arrested under an European arrest warrant"*): "(2) *The arrested person has the right to be assisted by a lawyer, chosen or appointed ex officio*".

Article 10.2: the national legislation meats the standards imposed. Alongside the relevant provisions from the CCP – right to defence (Article 10), rights of the lawyer (Article 92), Law no. 302/2004 has

several dispositions that enshrine the rights of the requested person[106] and the general procedure of execution of an EAW when Romania is an executing state[107].

***Article 10.3*:** during the EAW proceedings, assistance of a lawyer is mandatory (see Article 101 et. seq. from Law no. 302/2004), so all the rights provided by Article 4, 5, 6, 7 and 9 from the Directive are hence applicable in the case where Romania is the executing state.

Article 10.4: in the consolidated version of Law no. 302/2004 (republished in 2019 and thus incorporating the amendments made by Law no. 236/2017), Article 106 ("*The rights of the person arrested under a European arrest warrant*") provides: "*(3) The prosecutor or, as the case may be, the executing court notifies the detained or arrested person that he has the right to appoint a lawyer in the issuing Member State of the European arrest warrant and to communicate with him, directly or through the lawyer elected or appointed ex officio in Romania, under the conditions provided by the Romanian law and with the assurance of confidentiality*".

Article 10.5: when Romania is the issuing state, Article 91[108] ("*Additional information and guarantees*") Law no. 302/2004 underlines: "*(4) The role of the Romanian lawyer, designated*

[106] We make reference to Article 106.2 quoted above, to subsequent paragraphs of Article 101: "(2) *The detained person shall immediately be informed, in the language they understand, the reasons for the detention and the content of the European arrest warrant. When the provisions of Article 99 para. (2) lit. i) point (iv) and was sent by the issuing authority, the prosecutor orders the communication of the sentence of conviction to the requested person. The requested person will be informed about the effects that, according to the law of the issuing state, the transmission of the sentence of conviction has. (3) A copy of the European arrest warrant and its translation shall be communicated to the detained person. This provision will also apply if the competent prosecutor receives a new European arrest warrant after the competent court of appeal has been notified under the conditions provided in Article 103*".

[107] See Article 104 ("*Procedure for the execution of the European arrest warrant*"): "(1) *The judge first verifies the identity of the requested person and ensures that the requested person has been communicated, in copy and in the language they understand, the European arrest warrant and, if applicable, the sentence of conviction given in default. When it has been transmitted by the issuing authority, the judge gives the requested person the sentence of sentence given in default. (2) If necessary, at the request of the requested person, the judge postpones the case only once, no later than 5 days, and asks the issuing authority to transmit, in copy and in the language that the requested person understands, the sentence of conviction given in default. Failure by the issuing authority to send the missing sentence has no effect on the continuation of the procedure for executing the European arrest warrant and on the surrender of the requested person (…) (10) In all cases, the measure of arrest for the surrender can be taken only after listening to the requested person in the presence of the lawyer*".

[108] Article 91 was recently amended by Law no. 51/2011, published in M. Of. no. 310 from 26 March 2021. These

according to para. (3) (at the request of the person arrested in the executing state, we add), *is to provide assistance to the lawyer in the executing Member State, by providing him with information and advice, in order to allow the requested person to formulate his defences in the procedure of executing the European arrest warrant*".

Article 10.6: Article 106 from Law no. 302/2004 underline that "*(4) If the detained or arrested person shows that he understands to exercise this right, the prosecutor or the executing court shall inform the issuing authority of the European arrest warrant without delay. The information transmitted by the issuing authority, by any means which leaves a written trace, shall be communicated without delay to the requested person through the administration of the place of detention. (5) The provisions of Article 91.4 apply accordingly*". In so far, Romania is the issuing state, Article 91 provides: "(3) *If the requested person, under arrest in the executing State, exercises his right to appoint a lawyer in Romania, the Romanian court issuing the European arrest warrant shall send, upon request and without undue delay, to the executing authority information on the list of lawyers with the right to practice in one of the member bars of the National Union of Romanian Bars. The information may also be transmitted in electronic form*".

Finally, Article 112 ("*Deadlines"*) Law no. 302/2004 is the explicit transposition of Article 10.6, mentioning that "*(6) The procedure provided for in Article 106 paragraphs 3 and 4 shall not affect the terms set out in this Article*".

Article 12: according to Article 281.1.f) CCP when the law request the presence of the lawyer and this was not respected, a case of absolute nullity is present. In such cases, the harm is presumed *ex lege* and must not be proven; it can be raised, in any stage of the proceedings (as an exception or as a ground of appeal, or – in case of preventive measures or the EAW as a ground for the so-called *contestaţie*) and it will lead to a retrial [see Article 421.1.b) CCP regarding the solutions from appeal].

8.1.3 A critique of the current legislative framework

As already mentioned [109], although official statements consider that the Directive was fully transposed after the 2017 amendments, communications to the European Commission seem (in

amendments concern Directive 2016/1919 and will be analysed in section 10.

[109] *Supra*, section 8.1.1.

best case scenario) not to be updated[110]. In addition, at the national level there are critical voices, arguing that the Directive has not been fully transposed, even after the amendments made by Law no. 236/2017. Still, no example is given about provisions of the Directive which are not fully implemented or about cases where problems can be imagined, according to national legislation, at the current time[111].

Summary of the deficiencies outlined above:

- Article 3[112]: the national legislation does not provide in all cases access to a lawyer (only in cases of compulsory legal assistance), but only provides for such a right (e.g., the possibility for the suspect or accused person to contact a lawyer, is she / he so desires).
- Article 3.3.(a): the national legislation explicitly provides as such only in case when deprivation of liberty is involved (Article 89.2 CCP). Although it is common practice that private meetings and communication with the suspect or accused is permitted before questioning, there are no explicit legal provisions imposing such an obligation on the authorities.
- Article 5.2: can be considered fully transposed only after Law no. 284/2020, which transposed Directive 2016/800[113].
- Article 5.4: such provisions were inserted in the CCP only after the amendments made by Law no. 284/2020 mentioned above.

[110] We underline that the latest amendments regarding the transposition of the Directive entered into force in December 2017. As well, the EJN website (which, as well, considers that the transposition process is still ongoing) is updated at 22 April 2020.
[111] See, Gh. Florea, *op. cit.*
[112] Article 3.1. Directive mentions that "Member states shall ensure that suspects and accuse persons have the right of access", while Article 3.2 provides that "suspects or accused persons shall have access to a lawyer". The national legislation makes reference in both cases to the "right to have access", which is an accurate translation of the regulation from Article 3.1.. The national legislation is probably inspired by the translation of the Directive, as the Romanian version makes no difference between paragraphs Article 3.1. and 3.2. and in both cases mentions "*dreptul la avocat*" ("*right to access*", more precisely) .
[113] See, *infra*, section 9.

8.2 Case-law

Especially in the field of the executing an European arrest warrant there are several decisions rendered at the court of appeal or Supreme Court level which mention the provisions of the Directive. As well, the Directive is referred to in principle, part of the relevant "*acquis*" in the field of procedural rights

In one case (***HCCJ, criminal division, decision no. 653/2017*****),** Iaşi Court of Appeal was notified by the Prosecutor's Office attached to it requesting the provisional arrest of person B., based on the Schengen report (SIRENE National Office of Germany, of 24 April 2015, transmitted through the Center for International Police Cooperation, Sirene Bureau, on 16 March 2017), based on the EAW issued on 30 March 2015 by the Hamburg Prosecutor's Office in Germany. The warrant was issued in order to investigate B. for complicity in the commission of the several serious offences committed in Germany.

Prior to the order of provisional arrest, the requested person was informed of the rights provided by Article 104 Law no. 302/2004 and the rights provided for in Directive 2012/13/EU and Directive 2013/48/EU; a written copy of the note on these rights was handed over to B., while a copy signed by him was attached to the case file. The requested person was heard on the proposal for provisional arrest, being informed of the content of the Schengen alert. The Court decided to execute the warrant (Iaşi Court of Appeal, criminal division, sentence no. 17/2017), but B. challenged the sentence. The Supreme Court noted that during the proceedings B. withdraw his challenge (*contestaţie*) and therefore, the warrant was executed.

In another case (***HCCJ, criminal division, decision no. 653/2017***) an EAW was issued by the Deputy Prosecutor of the Republic of the High Court of Créteil, France. The French authorities requested the temporary surrender of the requested person A., on the grounds that he had objected (appealed) a conviction of 4 years imprisonment judgment rendered by Chamber 10 of the Correctional Court of Créteil, France of 12 October 12 2015. The Iaşi Court of Appeal admitted the execution of the warrant, but postponed its execution after A will be conditionally released from another penalty currently being executed at that time in Romania (Iaşi Court of Appeal, criminal division, sentence no. 61/FCJI/2016). The French authorities requested once again the temporary surrender of A. to France for a defined period of time (29 June – 10 July 2017) in order to participate

in the appellate proceedings. Iaşi Court of Appeal rejected such a request by decision no. 5/FCJI/2017, although A expressed his agreement to such a transfer. The Court of Appeal considered that A could be acquitted in France and, hence, there are no guarantees he will be returned to Romania to execute his remaining penalty. A challenged the decision before the Supreme Court. The Supreme Court noted that A. was informed of the rights provided by Article 104 Law no. 302/2004 and those provided for in Directive 2012/13/EU and Directive 2013/48/EU; a written copy of the note on these rights being handed to the requested person, and one, signed by the requested person, was attached to the case file. At the same time, the requested person was heard regarding the proposal for provisional arrest. In addition, the Court concluded that all conditions for the temporary surrender, as envisaged by the Framework Decision and its transposition in Law no. 302/2004 are fulfilled – the French authorities offered sufficient guarantees that A. will be returned to Romania after his participation in the appellate proceedings. Therefore, the challenge was admitted and the temporary transfer was approved.

In another case, the Supreme Court had so solve an appeal in the interest of law at the request of the General Public Prosecutor (***HCCJ, decision in the interest of law no. 5/2016***). The legal problem at stake was the interpretation of Article 7.1 Law no. 76/2008 on the organization and functioning of the National Judicial Genetic Data System, namely the possibility to collect genetic data in the case when educative measures were imposed on children. Departing from the legal question, the procedure in itself is relevant here, as the opinion of the Ggovernment Agent for the Court of Justice of the European Union (CJEU) was requested as well. He conveyed the following view: a) with regard to acts of Community law which concern aspects of criminal proceedings with a view to developing the European area of justice based on mutual recognition and mutual trust, the European Union has so far adopted a number of directives on the procedural rights of suspected or accused persons: - Directive 2010/64/ EU; Directive 2012/13 / EU on the right to information in criminal proceedings; Directive 2013/48 / EU on the right to have access to a lawyer and the right to communicate following deprivation of liberty. At the same time, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions was adopted. It consists of three proposals for directives, one of which concerns special safeguards for children suspected or accused in criminal proceedings. The special guarantees for children referred to in the above-mentioned communication concern the difficulty or even impossibility of them to understand and follow the procedures, but also the increased risk

of being subjected to ill-treatment due to their vulnerability. The proposed directives do not contain any express provision for the taking of biological samples from minors (provided that they constitute ill-treatment). It is important to point out that, at present, those provisions of the proposal for a directive on special safeguards for suspected or accused children are not in force and, therefore, there is no relevant case law of the CJEU in this regard.

The Supreme Court reached a similar conclusion, based on the European legislative framework in the case of children – it underlined that genetic (biological) sampling is an interference with the right to privacy and should therefore be expressly provided for in law. In cases where is not explicitly provided, like in this situation, the courts can not order the collection (sampling) of such data when educative measures were imposed.

9 Directive (EU) 2016/800: Procedural safeguards for children who are suspects or accused persons in criminal proceedings

9.1 Legislation

9.1.1 Preliminary findings

As regards this Directive, the 2014 CCP already provided a distinct status for children who are suspects or accused persons in criminal proceedings, so most parts of the Directive were already covered by national legislation, pre-existing the directive[114].

This status-quo was recognised by the Explanatory Memorandum of a draft law project aimed at transposing the provisions of the Directive which were not already found in national legislation. According to it, although "most provisions of the Directive were already transposed into national law, in particular by the provisions of the Code of Criminal Procedure and Law no. 254/2013 regarding the execution of penalties and deprivation measures of freedom ordered by the judicial bodies during the criminal trial", several requirements were not yet fulfilled and needed to be amended, in order for the transposition of the Directive. The provisions from the Directive that required the amendment of national law (the CCP to be more accurate), were the one regarding the minor's right to information, the right to individual assessment and medical examination, the right to inform the holder of the parental responsibility.

Although the transposition deadline was expected on 11 June 2019, only in December 2020 Law no. 284/2020[115] was adopted. It entered into force on 12 December 2020 and according to a final

[114] For a general overview regarding the procedure applicable in case of minors, before the latest December 2020 amendments, see M. Udroiu, *Sinteze de procedură penală. Partea specială*, C.H. Beck Publishing House, Bucharest, 2020, p. 765-774.
[115] Published in M. Of. no. 1201 from 9 December 2020.

explicit provision its purpose is to transpose in national legislation the provisions of Article 2.3, Article 3 final paragraph, Article 4.1. letter a) points (i), (iii) and (iv), letters b) and c) and Article 4.2, Article 5, Article 7.5- 8, Article 8.2, Article 15 .2-4 and Article 22 of Directive 2016/800.

9.1.2 Analysis of national legislation transposing the Directive

Article 1: the Explanatory Memorandum of Law no. 284/2020 underlines, the national legislation which corresponds is represented mostly by the CCP and, in addition by Law no. 254/2013. The Explanatory memorandum does not mention Law no. 302/2004 on international cooperation in criminal matters; he reasons for this is probably the fact that that all the standards from the CCP apply in EAW proceedings, especially as it involves preventive measures, usually retention and afterwards provisional arrest (in which cases all the common provisions from pre-trial arrest apply).

Article 2: was considered implicit transposed by the pre-existing provision of the CCP and of Law no. 302/2004.

Article 2.3: Law no. 284/2020 explicitly amended the CCP in order to transpose it; Article 504.2 CCP and amended Article 507.3 CCP. At current time:

- Article 504 ("*Procedure in cases with juvenile offenders*"): "*(2) The special rules regarding minors may also apply to persons who are older than 18 years of age and until they are 21 years if, at the time when acquiring the status of suspect were minors and the judicial body considers it necessary, taking into account all the circumstances of the case, including the degree of maturity and the degree of vulnerability of the data subject*".
- Article 507 ("*Composition of the court*"): "*(3) The accused persons who committed the offence while he was a minor shall be tried in accordance with the procedure applicable in cases with juvenile offenders, if at the time of the notification of the court he was not 18 years old. The court may decide to apply the procedure for cases with juvenile offenders and persons who, at the time of acquiring the status of suspect, had not turned 18, when it considers it necessary taking into account all the circumstances of the case, including the degree of maturity and the degree of vulnerability of the data subject*".

***Article 2.4*:** is implicit transposed, as according to the Article 118 CCP ("*Right of witnesses to avoid self-incrimination*"): "*A witness statement given by a person who had the capacity as suspect or accused person before such testimony or subsequently acquired the capacity of suspect or accused person in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity*". In everyday practice, if during questioning a witness becomes a suspect, the police or the public prosecutor must end the questioning and immediately inform the person about the consequences of his / her declarations. After this moment, once the status of suspect is acquired, all the rights (provided by Article 83 CCP) are granted. In this regard, the special procedure for minors from the CCP mentions that – as a common rule – all provisions from the CCP are applied as well[116], with some exceptions which are explicitly mentioned (in this later case, a more powerful standard of protection is granted, because of the age of the suspect).

Article 2.5: the national rules determining the age of criminal responsibility are prescribed by the Article 113 CC ("*Limits of criminal liability*") - "(1) *The minor who has not attained the age of 14 years is not liable criminally. (2) The minor between the ages of 14 and 16 years shall be liable criminally only if it is proved that he committed the act with discernment. (3) The minor who has reached the age of 16 years is criminally liable according to the law*".

Article 2.6: is *de facto* implemented in national law. In cases in which minors are criminally responsible, only education measures can be enforced. In this case it presents relevance the age at the moment when the offence was committed, not at the moment when the trial is taking place. Therefore, in all cases – before the investigative body or the court – and irrespective if the sanction imposed can not be privative of liberty (e.g., non-privative educational measures, the only sanction enforceable in case this is the first offence and the sanction provided by law does not exceed 7 years) all the general standards and rights apply. The only scenario in which no educational measure

[116] See Article 504.1 CCP: "*The prosecution and trial of the crimes committed by minors, as well as the enforcement of the judgments regarding them are made according to the usual procedure, with the additions and exceptions provided in this chapter and in the section 8 of the chapter I of Title V of the General Part*".

will be enforced is regulated by Article 318 CCP, as procedural law institution – the so-called waiver of prosecution solution[117].

Article 3: with the sole exception of the last paragraph, the pre-existing national legislation constituted an implicit implementation. Accordingly, a set of legal instruments provided for the above-mentioned definitions:

Law no. 272/2004 on the protection and promotion of the rights of the child[118]:

- Article 4: *For the purposes of this law, the terms and expressions below have the following meanings: "a) child - the person who has not attained the age of 18 years and has not acquired the full capacity of exercise, according to the law; (…) g) legal representative of the child - the parent or the designated person, according to the law, to exercise the rights and fulfil the parental obligations towards the child*".
- Article 5: *"(2) Parents are responsible for raising and ensuring the development of the child, and they have the obligation to exercise their rights and fulfil their obligations towards the child, taking into account the best interests of the child. (3) In the alternative, the responsibility rests with the local community of which the child and his family belong. The authorities of the local public administration have the obligation to support the parents or, depending on the particularities of the case, another legal representative of the child in carrying out their obligations regarding the child, developing and ensuring for this purpose diversified, accessible and quality services, corresponding to the needs of the child*".

[117] See *supra*, section 5.3.3, footnote no. 20. Even in such low importance cases the PHJ must validate the decision of the public prosecutor. In cases where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings or the penalty provided by law, we are in the cases of compulsory legal assistance. Therefore, an *ex officio* lawyer will be appointed by the authorities, if the suspect or accused person does not hire a certain lawyer. In addition, in Romanian law, all cases where the suspect or the accused is a minor are cases of mandatory legal assistance. Therefore, in all proceedings the suspect or accused will be assisted or represented by a lawyer, with no exception. If he does not choose a lawyer, one will be appointed by the judicial organs *ex officio*, free of any charge.
[118] Republished in M. Of. no. 159 from 5 March 2014.

The Civil Code, Article 38 ("*The beginning of exercise capacity*"): "*(1) The full exercise capacity begins on the date when the person becomes of age. (2) The person becomes of age (major) when she / he is 18 years old*".

Article 3 final paragraph: was explicit transposed by Law no. 284/2020 which inserted Article 504.3 CCP: "*Whenever the judicial body cannot determine the age of the suspect or the accused person and there are reasons to consider that he is a minor, the respective person will be presumed to be a minor*".

Article 4: was partially implicit transposed by pre-existing legislation[119]. After considerable delay, Law no. 284/2020 intervened, in order, among other, to explicit transpose Article 4.1 point (a) (i), (iiii) and (iv), (b), (c) and Article 4.2. Article 505[1] CCP was introduced, which provided, under the title "*Informing the minor who is suspect or accused person*" the following:

"*(1) In cases with juvenile suspects or accused persons, before the first hearing, they are informed, in addition to those provided in Article 108 of the following:*

a) information on the main stages of the criminal process;

b) the right of the parents or, as the case may be, the guardian, curator or person in whose care or supervision the minor is temporarily or another adult who is designated by the minor and accepted in this capacity by the judicial body to receive the same information communicated to the minor;

c) the right to the protection of privacy, in accordance with the law;

d) the right to be accompanied by the parents or, as the case may be, the guardian, curator or person in whose care or supervision the minor is temporarily or by another adult who is designated by the minor and accepted in this capacity by the judicial body, during the various stages of the procedure according to this law;

e) the right to be evaluated through the evaluation report;

[119] All part of the reform brought in the criminal law field once the 2014 CCP entered into force. In addition, the amendments made by Law no. 255/2013 and Emergency Ordinance no. 18/2016 in order to transpose Directive 2012/13 had as effect that a solid body of law was in force at the time this Directive needed to be transposed

f) the right to medical evaluation and medical assistance in case they will be subject to a preventive measure of deprivation of liberty;

g) the preventive measures that may be applied to them, as well as the right for the preventive measure of deprivation of liberty to be applied exceptionally, according to Article 243, the period for which the maximum duration of the preventive measure of deprivation of liberty may be ordered, the conditions for its prolongation and maintenance, as well as the right to periodic verification of the measure, in accordance with the law;

h) the right to be present at the trial of the case;

i) *the right to exercise remedies, in accordance with the law*".

Comparing the introduced Article 505[1] CCP with the wording of Article 4 from the Directive, it can easily be seen that the provisions of point (a) (i), (iii) and (iv) are explicit transposed. Regarding point (a) (ii) on the right to be assisted by a lawyer, this was already part of national legislation, in all cases, irrespective of the age of the suspect or accused person; in addition, in case of children, legal assistance is mandatory. From the perspective of point (b) from Article 4.1, it is explicit transposed, as well, by Article 505[1] CCP. Point (c) was explicit transposed by newly introduced Article 244[1].1 CCP, entitled "*Information on the special conditions for the execution of the detention and pre-trial detention of the minor"* and which provides that "*If the detained or arrested person is a minor, together with the information provided in Article 209.17 and Article 228.2, it is also communicated the right to special conditions of execution, according to Article 244".*

Article 4.2: is explicit transposed by Article 505[1].2 CCP, which provides that "*All communications to the minor suspect or accused person shall be made in simple and accessible language, appropriate to his age*".

Article 4.3: Law no. 284/2020 makes no reference to the model of the letter of rights, as regulated in national law (see Joint Order no. 1274/C/2017[120]). As mentioned above, at this time there is only a draft project enacted by the Ministry of Justice in public debate stage[121]. According to the draft

[120] See *supra*, p. 18, footnote 54.
[121] See *supra*, p. 20, footnote 59.

project, a new Annex 3 is inserted entitled "*Information about the rights of children who are deprived of liberty in the criminal trial*"[122]. When the new provisions will enter into force, the Article 4.3. will be fully explicit transposed.

Article 5: was explicitly transposed into national legislation by Law no. 284/2020. According to newly introduced Article 505[1] CCP: "(3) *The information provided in Article 108, as well as those provided in para. (1) shall also be communicated to the parents or, as the case may be, to the guardian, curator or person in whose care or supervision the minor is temporarily. (4) If the persons provided in para. (3) could not be found or the communication to them would be contrary to the best interests of the minor or would affect the conduct of the criminal proceedings, the communication of the information provided in Article 108, as well as those provided in paragraph 1 is made to another adult designated by the minor and accepted by the judicial body. (5) If the minor does not designate another adult according to para. (4) or the designated adult is not accepted by the judicial body, the communication of the information will be made to another person chosen by the judicial body, taking into account the best interests of the minor. (6) If the circumstances provided in para. (4) cases, the communication will be made to the parents, guardian, curator or the person in whose care or supervision the minor is temporarily*".

Article 6: is *de facto* implemented in national legislation. According to the CCP, in cases where the suspect or the accused is a minor, legal assistance is always mandatory. Therefore, in all proceedings the suspect or accused person will be assisted or represented by a lawyer, with no exception. If he does not choose a lawyer, one will be appointed by the judicial organs *ex officio*, free of any charge [see Article 90 letter a) and Article 91.1–3 CCP]. Besides Article 90 and 91, the right to a lawyer is guaranteed according the general provisions of the CCP - see Articles 10, 78, 83, 89, 108 from the CCP, all already mentioned when analysing the previous directives, especially Directive 2013/48. Therefore, all the requirements from Article 6 are respected in national legislation. Trying to be accurate, the sole provision which does not have an explicit or implicit correspondent in national legislation is that regarding confidentiality of discussions between the suspects or accused persons

[122] The full text of draft Annex III is available online at *http://www.just.ro/proiect-de-ordin-al-ministrului-justitiei-ministrului-afacerilor-interne-presedintelui-inaltei-curti-de-casatie-si-justitie-si-al-procurorului-general-al-parchetului-de-pe-langa-inalta-curte-de-casa/*.

and their lawyer prior to any questioning [Article 6.4(a) Directive]. We already showed[123] that the national legislation explicitly provides as such only in case when deprivation of liberty is involved (Article 89.2 CCP). Although it is common practice that private meetings and communication with the suspect or accused is permitted before questioning, there are no explicit legal provisions imposing such an obligation on the authorities.

Article 7: the pre-existing national legislation respected the minimum standards provided by the Directive with the exception that an individual assessment must be carried out before indictment and that it should be updated through criminal proceedings if the elements that form the basis of it change significantly. Law no. 284/2020 explicitly transposed Article 7.5 and Article 7.8, amending Article 506 ("*The evaluation report of the minor*") from the CCP. Carefully reading the provision of Article 506.1[1]1 (newly inserted) and 2 (now amended) it is our opinion that even paragraph 6 from Article 7 was as a consequence explicitly transposed.

According to the updated version, Article 506 CCP provides that individual assessment is an option for the public prosecutor; if the case is sent to trial, the individual assessment must be carried out before the indictment is issued, wit the sole exception when such an assessment would be contrary to the interest of the juvenile. If the case is sent to trial and an individual assessment has not been carried out, the court is compelled to request such an assessment, in all cases.

Article 7.2-4: Law no. 252/2013 on the organisation and functioning of the probation system[124] contains all the relevant information, as follows:

- Article 33 provides that the assessment of the accused that is minor is performed at the request of the judicial bodies; the report must be communicated within 21 days from the moment it was requested.
- Article 34 provides the data to be considered when drafting the report, as well as the proposal made to the judicial body regarding the education measure considered best

[123] *Supra*, section 8.1.2.
[124] Published in M. Of. no. 512 from 14 August 2013.

suitable in the particular case. The structure and standard format of the evaluation report are established by the implementing Regulations of the law.

- Article 36 provides that the assessment has a personal character and is based on one or more meetings between the probation counsellor and the minor accused person and on the data obtained from other sources of information.

Additional information regarding the assessment process can be found in Government Decision no. 1079/2013 for the approval of the Regulation applying the provisions of Law no. 252/2013 regarding the organisation and functioning of the probation system[125]: Article 14[8] ("*Information contained in the evaluation report*) and Article 14[14] ("*Chapter «Conclusions and proposals»*") provide the detailed sources for the assessment process and the conclusions which need to forwarded by the probation counsellor.

Article 7.5-7.8: are now explicit transposed by the final version of Article 506 CCP, following the amendments made by Law no. 284/2020.

Article 7.9: the only provision in national law is the one from Article 506.1[1] CCP, where it is written that the assessment evaluation is mandatory, when the indictment is sent to the court "*unless this would be contrary to the best interests of the juvenile*". After corroborating this provision with the one of Article 506.2. CPP (where it is stipulated that the court is under an obligation to request an evaluation in all cases when no assessment was made during pre-trial) we conclude that at current time there is no possibility to derogate from the individual assessment procedure.

Article 8: was partially *de facto* transposed into national legislation by pre-existing norms. Very recently, Law no, 284/2020 introduced Article 505[1] CCP which provides *"f) the right to medical evaluation and medical assistance in case they will be subject to a preventive measure of deprivation of liberty*". From the perspective of pre-existing legislation, the common provision was that of Article 43 ("*Receiving convicted persons*") from Law no. 254/2013, which at letter d) underlined the process of "*performing a general clinical examination by the specialised staff of the penitentiary, the result of which is recorded in the medical record*". Corroborating Article 43 with other legal texts from this law, namely Article 110 ("*Application of provisions in cases of preventive measures*) and Article 156

[125] Published in M. Of. no. 5 from 7 January 2014.

("*Receiving person in an educational or detention centre"*), we can conclude that there is no exception from such a medical examination in case of children who are deprived of liberty**.**

Article 8.2: was explicitly transposed by Law no. 284/2020 – Article 504.4. CCP was inserted: "*The results of the medical examination of the suspected or accused minor who has been sentenced to a pre-trial detention measure, carried out at the place of detention, according to the law on the execution of sentences and custodial measures ordered by the judicial bodies during the trial, are taken into account when determining the capacity of the child to be subject to acts or measures ordered during the criminal trial*".

Article 8.3: Article 43.7 Law no. 254/2013 mentions that medical examination is carried out at the moment when the person first arrives at the detention unit. There is no exception. As well, there is no indication about who / what person has the initiative, as it represents an obligation for the authorities.

Article 8.4: the same Article 43.7c) Law no. 254/2013 mentions that the results of the general clinical examination are recorded in the medical record of the person, part of the personal dossier formed while deprived of liberty.

Article 8.5: regarding the general obligation imposed to carry out another medical investigation "*where the circumstance so require*", there is no such explicit provision in national legislation. Still, there is nothing banning the authorities in ordering a new examination, or the medical staff deciding to do one more, if there are particular circumstances which so require.

Article 9: is *de facto* transposed by pre-existing legislation. Audiovisual recording of questioning in case of minors is not particularly regulated by national legislation. Therefore, in such cases the general provisions in the field of audiovisual recording will apply - Articles 110 and 369 CCP:

- During the criminal prosecution stage - Article 110 ("*Recording of statements*"): "*(5) During the criminal prosecution, the hearing of the suspect or the accused person shall be recorded by audio or audiovisual technical means. When the registration is not possible, this is recorded in the statement of the suspect or the accused person, with the concrete indication of why the registration was not possible*".

- When the case is in front of a judge (JRL, PHJ or trial court) - Article 369 ("*Notes regarding the conduct of the hearing*") CCP: "*(1) The conduct of the hearing shall be recorded by audio technical means*".

From a practical perspective, in general when the case is during the criminal prosecution stage, due to lack of technical infrastructure, there is no such audiovisual recording. When the case is in front of a judge, usually audio recording is available and in very few cases also visual recording (when a videoconference system is in use, due to the fact that suspect or accused person is not present at the place where the hearing is taking place)

Irrespective of recording the questioning, in all cases where the suspect of accused person is a child, the presence of his / her lawyer (either chosen or *ex officio*) is mandatory, as we already mentioned.

In all cases, irrespective if audiovisual recording is present or absent, the questioning is recorded in written matter. During the criminal prosecution stage, the declaration is signed by all persons present (including the prosecutor or the police officer in charge of the questioning, the suspect or accused persons and their lawyer, as well as other lawyers representing other parties). During the trial phase, besides the written declaration, which contains all the questions and the answers (and which is signed), there are there are special court minutes for each session, and, in addition, the clerk takes notes in a special handbook. In this regard, the following provisions from the CCP are relevant: Article 110 ("*Recording of statements*"). Article 369.2 ("*Notes regarding the conduct of the hearing*") and Article 370.4-6 ("*Types of decisions*").

Article 10: was implicit implemented in national law, by pre-existing legislation. According to Article 243 ("*Special conditions for applying preventive measures to children*") CCP: "(1) *Preventive measures may be taken against the suspect and the accused person who is a child in accordance with the provisions set out in sections 1-7 of this chapter, with the exceptions and additions provided in this article. (2) Retention and preventive arrest may be ordered against a child, exceptionally, only if the effects that deprivation of liberty would have on his personality and development are not disproportionate to the purpose pursued by taking the measure. (3) In determining the duration for which the measure of preventive arrest is taken, the age of the accused person shall be taken into account from the date on which the measure is taken, prolonged or maintained*".

Article 10.2: the relevant provision is Article 114 ("*Consequences of criminal liability*") CC which underlines that custodial educational measures must be seen as last resort. Accordingly, such measures may be imposed only "(…) *in the following cases: a) the juvenile committed another offence for which an educational measure was taken and served or the service of which started before the commission of the offence for which the juvenile is subject to trial; b) the penalty provided by law for offence is imprisonment of seven years or more, or life imprisonment*".

Article 11: as indirect implementation, reference must be made to Article 243 CCP, which provides that detention (arrest and preventive detention) is an exception in case of children. As regards the sanctions that can be imposed on children following the final judgment, Article 114 CC mentioned above provides that educational measures which involve deprivation of liberty (custodial ones) must be considered the exception, while non-custodial measures are the general rule.

Article 12: is *de facto* / indirectly implemented in national law. Although the necessity of specific treatment is generally acknowledged in the CCP, detailed provisions are in Law no. 254/2013 and its Regulation.

- Article 244 CCP ("*Special conditions for the execution of the detention and preventive arrest of minors*"): "*The special regime of detention of children, in relation to the particularities of the age, so that the preventive measures taken against them do not harm their physical, mental or moral development, will be established by the law on the execution of the punishments and of the measures ordered by the judicial bodies during the trial criminal*".
- Article 117 Law no. 254/2013: "(1) *Minors who are arrested or in preventive detention are held separately from adults*" (we add that this provision is applicable in cases where the trial is still during criminal prosecution stage).
- Article 123 Law no. 254/2013: "*(1) During trial, the detained minors execute the preventive measure in detention centres or detention centres. (2) In order to be presented to the judicial bodies, the minors may be transferred to the special detention units in penitentiaries for a period of maximum 10 days, being held separately from the adults. (3) In the interval provided for in par. (2), the minors execute the measure of the preventive arrest, respecting the particularities of the age, with the assurance of the necessary psychosocial assistance,*

in order not to be prejudiced their physical, mental or moral development" (this provision is applicable once the case is sent to trial, in front of a judge, either a PHJ or a trial court).

- Article 264 Regulation ("*Regime of minors who are arrested*"): "(1) *The accommodation of the minor persons detained or preventively arrested is carried out, in common, as a rule, separately from the adult persons, respecting the principle of gender separation*" (this is while the case is during the criminal prosecution stage).
- Article 274 Regulation ("*Regime of minors arrested and the case is sent to trial*): "*(1) The preventive arrest measure shall be carried out in the detention centres or in the preventive arrest centres. (3) The accommodation of the minors who are pre-trial arrested persons (...) is carried out separately from the adult persons (…) in compliance with the principle of gender separation*".

As the provisions above mentioned from both Law no. 254/2013 and the Regulation underline the principle that minors are in all cases held separately from adults, there are no exceptions in national legislation when, with due consideration of the child's best interest, a different solution can be taken.

Article 12.3: is implicit implemented by provisions from the CC, Law no. 254/2013 and its Regulation.

- Article 123 Law no. 254/2013 deals with the case when the trial is still ongoing and it underlines that "*(4) Upon reaching the age of 18, the arrested minor* (former minor, we add) *remains in the detention centre or is transferred to one*"[126].
- Article 126 CC ("*Replacement of the execution regime*"): "*If, during the execution of a custodial educational measure, the person that has turned 18 has demonstrated conduct with negative impact on other interned persons or prevents the recovery or reintegration of these persons, the court may order the service of the rest of the educational measure in prison*". The analysis of this provision reveals that the general rule is that the measure will continue to be executed in the special facilities designated to juvenile offenders and the transfer to regular prisons will be decided

[126] We mention that the detention centre is one of the special units designated for the execution of the custodial education measures (see Article 125 CC).

only if the person who turned 18 has a negative conduct or a negative impact on other detainees[127].

- Article 134 CC ("*The minor who turns 18*") provides that if at the moment of the final judgment the accused person already turned 18, the court, "*(2)* (…) *considering the possibility of rehabilitation of such offender, as well as the other criteria provided under Article 74*[128]*, may order the execution of the educational measure in prison*". So, the exception is when the measure will be executed in a prison facility, together with other adults.

Article 12.4: is implicit implemented by Article 123 Law no. 254/2013 which provides that in case of a child who is arrested during ongoing trial such a measure can be taken, by way of exception, namely "(*2) In order to be presented to the judicial bodies, detained juveniles can be transferred to special detention units in prisons for a maximum period of 10 days, being kept separately from the adults. (3) In the period of time paragraph (2), the minors execute the measure of the preventive arrest with respect to the particularities of the age, with the assurance of the necessary psychosocial assistance, in order not to be prejudiced their physical, mental or moral development*". As it can easily be seen this provision has taken into consideration not the best interest of the child, but the necessities of the judicial investigation. In so far a final judgment has been rendered there is no such provision in national legislation, as Article 126 and 134 CC only deal with the case when the minor turned 18. So, theoretically, after the judgment on merits, the minor is always kept separately from young persons and adults. This is (should) be the case even after he / she turns 18. In reality, due to lack of infrastructure, there are cases in which the minor has only separate rooms (no special

[127] Article 182 from Law no. 254/2013 details the procedure and defines the negative conduct / behaviour as follows: "By behaviour that negatively influences or impedes the process of recovery and reintegration of the other interned persons is understood: *a) initiation of actions that lead to his constant non-attendance or refusal, as well as of other interned persons to participate in training courses and vocational training, educational programs, psychological assistance and social assistance; b) introduction, possession or trafficking of weapons, explosive materials, drugs, toxic substances or other objects and substances that endanger the safety of the centre, missions or persons; c) non-observance of the prohibitions provided in Article 82 letters a) -c); d) non-compliance, repeatedly, with the prohibitions provided in Article 82 letters f) and h)".*

[128] Article 74 CC provides for the general criteria which will used by the court to impose concrete sanctions (e.g., sentencing).

buildings or institution) – this happens especially in case of preventive measures during ongoing investigation (criminal prosecution stage).

Article 12.5: requires a set of measures to be taken by national authorities when children are detained. With the general introductory remarks that the relevant national provisions are Law no. 254/2013 and its Regulation and that with few exceptions all the requirements are implicitly implemented, we will focus on each distinctively, as follows:

(a) ensuring and preserve the health and physical and mental development

Article 117 Law no. 254/2013: "(2) *During the execution of the preventive arrest, the minor is granted psychological assistance, under the conditions established by the regulation provided in Article 107.2, in order to diminish the negative effects of deprivation of liberty on its physical, mental or moral development*". This is also applicable in the case the child who is arrested was sent to trial, according to Article 123.5 Law no. 254/2013.

(b) ensuring the right to education and training, including where the children have physical, sensory or learning disabilities

Having in mind the provisions of both Law no. 254/2013 and of the Regulation for the application of the law, it appears that although generally regulated, the right to education is "suspended" during the execution of preventive measures. This appears to be the case even when speaking about the general and compulsory learning, according to Law no. 1/2011 on education. After an in-depth analysis of the provisions of the Regulation, the abovementioned conclusion is valid only in cases where the case is still in the criminal prosecution phase. If the case is sent to trial (e.g., in front of the court), the arrested person will be transferred to detention centres. In this situation, the provisions of Article 274 Regulation will be incident, namely: the restriction of Article 187 regarding the general right to learning is no longer applicable, and in addition there are several provisions dealing with the exercise of the right to education. For the relevant provisions, see:

- Article 79 ("*The right to education*") Law no. 254/2013: "*The convicted persons can participate, depending on the possibilities of the penitentiary, in courses of school or university training, under the conditions of the collaboration protocol concluded with the Ministry of National Education, taking into account the priority needs of intervention*

identified, the state of health, the type of the regime of enforcement and the security measures applied".

- Article 110 Law no. 254/2013: "(1) *The provisions of Title I, Title II, as well as of the Chapter II, IV-VI and IX of Title III, insofar as they do not contravene the provisions of this Title, shall apply accordingly, with the exception of the following provisions regarding: (…) c) the right to education, provided for in Article 79*".
- Article 122 Law no. 254/2013: "(1*) Preventive detained children (…) may carry out educational, moral-religious, cultural, therapeutic, psychological counselling and social assistance, school training and vocational training, in groups, inside the preventive arrest centre or the penitentiary, under guard and supervision, under the conditions established by the Regulation (…)*".
- Article 245 ("*Application of provisions*") Regulation: "**(***2) The provisions of this Regulation, insofar as they do not contravene the provisions of this chapter, shall apply accordingly, depending on the possibilities of the detention and preventive detention centre, and to persons deprived of their liberty, with the exception of the following provisions regarding: (…) b) the right to education, provided for in Article 172*".
- Article 172 ("*The right to education*") Regulation: "*The right to education of the prisoners is exercised in accordance with Article 79 of the Law and Article 191-195*".
- Article 264 ("*Regime of minors who are arrested*") Regulation: "*(4) The provisions of this Regulation regarding the conditions of detention, rights and obligations, rewards and penalties, the means of restraint and their use, insofar as they do not contravene the provisions of this chapter, shall apply accordingly, depending on the possibilities of the pre-trial detention and detention, and of incarcerated minors, with the exception of the following provisions regarding: (…) b) the obligation to attend the courses of compulsory general education*".
- Article 274 ("Regime of minors who are arrested and the case is sent to trial) Regulation: "*(5) The provisions of Chapter VII of Title III shall apply accordingly, except for the provisions of Article 187 paragraph 5 and 6, Article 188, 191-193, 198 and 199. (…) (8) Pre-arrested*

minors may be included as assistants in the school groups constituted, with the consent of the educational unit, under the conditions of Article 122 paragraph 1 of the Law. They will not appear in the specific school documents and will not record changes in the school situation".

(c) ensuring the effective and regular exercise of the right to family life.

This is *de facto* implemented by Article 117 Law no. 254/2013: "*(3) To the extent that the proper conduct of the criminal trial is not hindered, the minor shall be assured of the possibility of maintaining the connection with the persons with whom he has family relationships or strong emotional connections, by supplementing the right to visits, telephone or online conversations*".

(d) ensuring access to programmes that foster the development and the reintegration into society

Just like in the previous case, the corroborated provisions from the Law no. 254/2013 and the Regulation lead to the conclusion of implicit implementation. Accordingly:

- Article 122 Law no. 254/2013: "(1) *Preventive detained children are usually accommodated, in common, they may carry out educational, moral-religious, cultural, therapeutic, psychological counselling and social assistance, school training and vocational training, in groups, inside the preventive arrest centre or of the penitentiary, under guard and supervision, under the conditions established by the regulation of the application of this law*".
- Article 274 Regulation: *"(8) Pre-arrested minors may be included as assistants in the school groups constituted, with the consent of the educational unit, under the conditions of Article 122 paragraph (1) of the Law. They will not appear in the specific school documents and will not record changes in the school situation*".

(e) ensuring respect for the freedom of religion or belief

An entire "set" of provisions from both the Law and the Regulation have as a combined effect the implicit implementation of all standards regarding freedom of religion and belief. We make reference to the following provisions:

- Article 6 Law no. 254/2013 which forbids any form of discrimination based on religion.
- Article 58 Law no. 254/2013 which provides the freedom of religious belief and prohibits any restraints[129].
- Article 122 Law no. 254/2013 which provides the possibility to carry out religious activities under the conditions established by the Regulation. The conditions are laid down in Article 124 ("*Freedom of conscience, opinions and freedom of religious beliefs*") from the Regulation and generally concern the access of representatives from cults and religious associations in the penitentiaries, the declaration of religious belonging, the change of the confession or religious affiliation during the period of detention and the administrative conditions for participation in religious activities.

Finally, regarding the necessity that measures taken pursuant to Article 12.5 Directive shall be proportionate and appropriate to the duration of the detention, we consider that the applicable provisions from national law, coupled with a consolidated case law respect this threshold. In addition, regarding the requirements that points (a) and (e) shall also apply to situations of deprivation of liberty other than detention, respectively that points (b), (c), and (d) of the first subparagraph apply to situations of deprivation of liberty other than detention[130], the national pre-existing legislation corresponds (in this respect, see Article 110 and 117 Law no. 254/2013, above mentioned) where no such exception is permitted in case of preventive measures taken during the trial.

Article 12.6: is implicit implemented by Law no. 254/2013. Article 117 deals with the situation in which the case is still during the criminal prosecution stage, while Article 123 covers the situation in which the case is already sent to trial:

- Article 117: "*(3) To the extent that the proper conduct of the criminal trial is not hindered, the minor shall be assured of the possibility of maintaining the connection with*

[129] According to Article 162.1 from Law no. 254/2013, the provisions of Article 58 are applicable, as well, in case of children.
[130] Although the requirement is a little vague, Recital 53 helps understating the meaning, as it makes reference to "*other situations of deprivation of liberty (…)*".

the persons with whom he has family relationships or strong affective links, by supplementing the right to visits, telephone or online conversations":

- Article 123 "*(5) The provision of Article 117 applies accordingly (…)*".

Article 13: is *de facto* transposed in national law. Pre-existing Article 509 ("*Conduct of the trial*) CCP provides: *"(1) The cases with juvenile accused persons shall be judged urgently and especially. (2) The hearing shall not be public. With the approval of the court, in addition to the persons mentioned in Article 508 at the hearing other persons may assist. (3) When the accused person is a minor under the age of 16, if the court, considers that the administration of certain evidence may have a negative influence on the minor it may order his removal from the hearing. Under the same conditions, the parents, the guardian or the person in whose care or supervision of the minor may be temporarily removed from the courtroom. (4) When recalling the persons mentioned in paragraph (3) the president of the panel shall inform them of the essential acts performed in their absence. (5) The hearing of the minor shall take place only once, and his re-hearing shall be admitted by the court only in duly justified cases*".

Article 14: is implicit transposed by previous provisions from the CCP. Accordingly, see:

- Article 509.2 CCP, above mentioned, regarding the non-public character of the hearing.
- Article 352 ("*Public character of court hearings*) CCP: "(1) *The court hearing shall be public, except for the cases provided by law. The hearing taking place in chambers shall not be public. (…) (3) If a public hearing in court were to harm (…) the interests of juveniles (…), the court, based on application by the prosecutor, the parties, or ex officio, may declare that the court hearing shall not be public for the entire duration of the court proceedings in this case, or only for a certain part of the court proceedings in this case. (9) Throughout the trial, the court may ban the publication and broadcasting, through printed and audiovisual media, of texts, sketches, photographs or images likely to reveal the identity of the victim, the civil party, the party with civil liability or witness (…)*".

Article 15: was transposed explicitly by Law no. 284/2020. According to the last part of this law, it transposed Article 15.2 -4, by inserting para. 4 – 6 within Article 508 ("*Persons summoned in court when the accused person is a minor*") CCP.

Article 15.1: Article 508.1 CCP provided that "*For the trial of a child who is accused, summons shall be sent to the Probation Service, the accused person's parents or, as the case may be, their legal guardian, custodian or person or person in whose care or under whose supervision the child was placed temporarily*".

Article 15.2–3: have, since December 2020, an exact correspondence in the provisions of Article 508.4-5 CCP. According to the newly inserted provisions: "(*4) If none of the persons provided in paragraph 1 could be found or their presence would affect the best interests of the minor or the conduct of criminal proceedings, the summons will be made to another appropriate adult who is appointed by the minor and accepted in this capacity by the judicial body. (5) If the minor does not designate another adult according to paragraph 4 or the designated adult is not accepted by the judicial body, the summons shall be made to another person chosen by the judicial body, taking into account the best interests of the minor*".

Where the circumstances which led to an application of point (a), (b) or (c) of para. 2 cease to exist the child shall have the right to be accompanied by the holder of parental responsibility during any remaining court hearings. Article 508.6 CCP now underlines: "*If the circumstances of paragraph (4) or 5 ceases, the summons will be made according to paragraph (1)", thus leading to the logical conclusions that the holder of parental responsibility will be along side the child during the rest of the proceedings*".

Article 15.4: was explicit transposed by Law no. 284/2020 which inserted para. 1^1-1^3 in Article 505 ("*Persons summoned before the criminal prosecution body*") CCP. According to this last version, children have the right to be accompanied by parents, legal guardians or other persons in whose care or supervision they temporarily are, except the cases when the authorities consider that this would not be in the best interest of children or it would affect the conduct of the trial. If the holder of parental responsibility is not found, another adult will be nominated by the child and if accepted by the judicial body will accompany the child. Where the child has not nominated another adult or where the adult that has been nominated has not been accepted by the judicial body, another adult will be nominated by the judicial body taking into account the best interests of child.

Article 16: has no explicit corresponding legal text in national law. Part of an implicit implementation, the general rules will apply, as suspects or accused person must be present at all

calling of the judicial organs and the trial takes place in their presence. The relevant provisions from the CCP which regulate this aspect are:

- Article 108 ("*Communication of rights and obligations*:): provides the general obligation for the suspect or accused person to appear at the calls of the judicial bodies; in case of failure, a warrant will be issued and the person will be brought by the police.
- Article 353 ("*Summons to appear in court*"): provides the general principle according to which the trial takes place only if all the parties are legally summoned.
- Article 364 ("*The accused person's participation in the trial and his rights*"): deals with the particular situation of the accused person – in this case, the rule is that the person must be present; in addition if the accused persons is deprived of liberty the presence at trial is compulsory. The only exception is the presence via videoconference, but the chosen or ex officio lawyer must be present in court. Throughout the trial, the accused person, including if deprived of liberty, may request, in writing, not to be present in court (even by videoconference), but in this case the lawyer must be present, with no exception.

Article 16.2: there is no specific provision for children, so the general procedure in cases of trial *in absentia*, as regulated by the national legislation in force (see CCP, Special Part, Title III. Judgment*, Chapter V.* Extraordinary remedies*, Section 4.* Reopening of the criminal case in the case of the judgment in the absence of the convicted person, Articles 466-469) will be applied. Regarding Directive 2016/343, very recently steps have been made in order to transpose (at least parts of) it, and – embedded in the general regulation of judgment in absentia – it will also be incident in case of children[131].

Article 17*:* is implicitly implemented in national law - as the general principle, Law no. 302/2004 is being completed, whenever necessary by the general provisions of the CCP, except for the cases where otherwise is explicit stipulated.

Regarding the relevant provisions see:

[131] See, *infra*, section 11.2.

- Article 106 ("*The rights of the requested person, arrested under an European arrest warrant"*) Law no. 302/2004, to which we made several references until this point.
- Article 7 ("*Applicable law*") Law no. 302/2004, where it is mentioned that all request *"(...) addressed to the Romanian authorities in the fields regulated by the present law are fulfilled according to the Romanian norms of criminal procedural law, unless otherwise provided by this law*".

Article 18: is implicit implemented in national law by several pre-existing provisions of the CCP. In order not to seem (very) repetitive, we underline once more that in all cases where the suspect or accused person is a minor there is a case of mandatory legal assistance, according to the Article 90.a) CCP. In such cases, legal assistance is free of charge, being funded by the state.

Article 19: part of implicit implementation, our conclusions regarding similar provisions from previous Directive are as well applicable. We mention the provisions of Article 336 CCP, which regulate the challenge when the case is during investigation (criminal prosecution), as well as the judicial review of contestation or appeal (if reunited with the merits of the case), when the case is already in front a judge (be it a JRL, PHJ or trial court dealing with the merits).

Article 20: we are not aware of any implementation, not even *de facto* / implicit. From the perspective of staff of law enforcement authorities and of detention facilities, the annual reports of the National Administration of Penitentiaries have no information on this topic. However, there were several projects in the last years organized under the Norway Grants agreements. For example, see the project „Strengthening the capacity of the penitentiary system in the area of human capital development at the level of prison staff" or "Strengthening the capacity of Bacău Penitentiary for Minors and Young Offenders to Comply with the International Instruments on Human Rights"[132]. In the case of judges and prosecutors, according to the National Institute for Magistrates' website, each year there are several training courses organised as part of the continuous training for judges and prosecutors. Usually in groups of about 20 participants, 2 experts (usually prosecutors / judges or university professors) take on an intensive 2 days long course[133]. Among the courses organised

[132] Information available at *http://anp.gov.ro/despre-anp/rapoarte-si-studii/*.
[133] The author is part of such training processes, being selected as an "expert" working with the Institute, especially in *continuous training courses* (dedicated to aspects of Criminal Law and European Criminal Law).

during the year 2019 there were several which could be included here, for example, special techniques of organising the course of the hearing in court when dealing with vulnerable persons. Still, we must mention that the agendas of these meetings are not public[134]. Finally, in the case of lawyers, the 2018-2019 National Bar Association's annual report underlined the lack of coherence for "specific treatment including preliminary counselling for certain vulnerable groups", including children. We were unofficially informed that special courses were organised in order to help the lawyers when assisting children, under EU finance (grants)[135].

9.1.3 A critique of the current legislative framework

After a serious delay, Law no. 284/2020 explicitly transposed provisions which had no correspondent in pre-existing legislation. Beside the considerable delay, several aspects regarding the promised full transposition still can be regarded from a critical perspective. We mention the following:

- Article 3: the national pre-existing legislation (Law no. 272/2004) mentions as a "disclaimer" that the definitions thus provided are "*for the purpose of this law*". So one can argue that the definitions, although corresponding to those from the Directive, are restricted to this law and do not apply in all other cases (e.g., a criminal trial).
- Article 4: was explicitly transposed in the CCP, the Joint Order no. 1274/C/111/2037/1123/C/2017 which provides the letter of rights was not amended at all. So, no information about the "new" introduced rights is given to the child, according to the letter. Even at this time (July 2021), there is only a draft project introducing Annex III regarding children.

[134] Public information is available at *http://inm-lex.ro/formarea-continua/*.
[135] Unfortunately, although the author is a member of the Cluj Bar and an "expert" within the National Institute for Training and Improvement for Lawyers, no official data could be obtained, we received no official information on this topic and the agenda of these training programs is not available on the official website of the National Bar or the National Institute for Training and Improvement for Lawyers.

- Article 6.4(a): is explicitly provided by national legislation only when deprivation of liberty is involved (Article 89.2 CCP). We mention though that this is generally accepted in case law, even with no explicit legal provisions imposing such an obligation on the authorities.
- Article 7.9: the current legal framework does not permit from any derogation from the necessity of individual assessment (Article 606.1[1]-2 CCP).
- Insofar as the right to education is concerned, after an in-depth analysis of the numerous and overlapping provisions, we concluded that this is not possible in case of children deprived of liberty during the criminal prosecution stage (before the indictment is submitted to the competent court).

9.2 Case-law

As we mentioned, Directive (EU) 2016/800 was transposed only in December 2020, so, the case-law referred is previous to this time. Still, a part of the Directive was implicitly transposed by pre-existing legislation and the provisions of the Directive were invoked directly especially by the defence.

In the judgment of the ***Timişoara Court of Appeals (decision no 851/2020)***, a minor was sent to trial for attempted murder. In the appeal, both the accused person and the prosecutor's offices criticized the following: the public hearing which took place in front of the Tribunal, and the omission to draw up an evaluation report by the Probation Service. The Court of Appeal rejected all the appeals, considering that the administration of evidence and the hearing of the accused person in public hearing, all within the plea bargaining procedure, did not lead to a violation of the provisions of Article 6 of the European Convention of Human Rights. In addition, although invoked by the defence, Article 14 from the Directive was respected, according to Article 508 from the 2014 CCP. In addition, only a case of relative nullity would arise and the accused person did not identify any harm thus produced. As regards the lack of the individual assessment report, the Court considered that no absolute nullity case is present and that the assessment was made in the appeal stage, so, again no harm was made especially as the first court provided a reasoned judgment regarding the applied sanction. For all these reasons, the Court rejected all appeals, considering that there is no reason retrial of the case.

The decision is interesting, as the Court considered (erroneously, of course) that the Directive was already transposed in national law by Article 508 CCP at that time. Moving alone this formal critique, the manner in which the Court validated the lack of an individual assessment, although the CCP was precise that is was mandatory is, to say the least, surprising[136]. The only explanation for such a "generous" approach by the Court could be that the procedure was a simplified one, as the accused person made use of Article 374 from the CCP (the plea bargaining procedure), but this had no impact on sentencing, where the absence of the individual assessment should have been sanctioned.

The same line is to be seen in another decision (***Suceava Court of Appeal, criminal division, decision no. 854/2019)*** where to the Court considered that the Directive was already transposed by pre-existing provisions of the CCP regarding the special procedure when children are suspects or accused. The Court focused only on the fact that the legislation in force at that time provided mandatory individual assessment when the case is sent to trial, failing to see that the directive required for such an assessment to be made, as a rule, prior to any indictment.

In another case (***Suceava Tribunal, criminal division, decision no. 223/2019***), the defence of the accused person invoked the direct applicability of Directive 2016/800 establishing the right of the child to be accompanied by the holder of parental responsibility, irrespective of the age of the minor at that time (16, we add). The PHJ rejected the contestation, considering that Article 505 CCP and Article 508 CCP (which prior to the explicit transposition corresponded to Article 15 from the Directive) refer only to the criminal prosecution stage and the trial on merits. As regards the preliminary chamber procedure, Article 352 from the CCP mentions that the hearing is not public, so that there is no reason to summon the accused person's parents. We underline that the formal (and plain wrong) approach of the Suceava Tribunal was rendered after the ***Constitutional Court*** issued ***decision no. 102/2018***, in which it declared partial unconstitutional Article 505 paragraph 1 from the CCP. According to it, a distinction was made between the age of the suspect or accused persons: only if the minor was under the age of 16 it was necessary for the authorities to summon to holder of parental responsibility. The Constitutional Court found that such a differentiated regulation has no justification in any objective and reasonable argument, especially since, according to Article 114 CC, all minors aged between 14 and 18, as a consequence of criminal liability, are

[136] Especially the references made to ECHR case –law regarding fair trial by the Court, upholding the trial court's sentence – the Court mentioned *Khan v. Great Britain*, *P.G. v. Great Britain*, *Heglas v. the Czech Republic* and *Bykov v. Russia*.

subject to educational measures in this regard. In addition, the Court underlined that Directive (EU) 2016/800 seeks to establish common minimum rules in order to establish procedural safeguards to ensure that all children, who are persons under the age of 18, and who are suspects or accused in criminal proceedings, are able to understand and follow the respective procedures and exercise their right to a fair trial. To this end, new complementary safeguards have been put in place regarding the information to be provided to children and the holder of parental responsibility, in order to take into account the specific needs and vulnerabilities of children - recital 18 in the preamble to the Directive.

10Directive (EU) 2016/1919: Legal aid

10.1 Legislation

10.1.1 Preliminary findings

In March 2021, Law no. 51/2021 amended Law no. 302/2004 on international cooperation in criminal matters, in order to explicitly transpose Article 5 from the Directive. There are no other official records regarding the transposition of any other provisions. Most probably latency on behalf of the legislator is backed up by the confidence that most provisions from the Directive were already incorporated in the 2014 CCP, which considers that access to a lawyer is a fundamental principle. However, there are provisions from the Directive which are not currently *per se* covered by domestic legislation.

10.1.2 Analysis of national legislation transposing the Directive

Article 1: the Directive itself proposes to complement Directives 2013/48/EU and (EU) 2016/800. Therefore, our analysis will be in this context more synthetic, trying not to repeat ourselves.

Article 2.1: from the perspective of national legislation, point (a) and (b) are covered – we mentioned before that in all cases where the suspect or accused person is deprived of liberty legal assistance is compulsory [Article 90.a) CCP]; as well, although we are sceptical about the transposition of a number of provisions from Directive 2013/48/EU [137] and Directive (EU) 2016/800/EU[138], we consider that the cases where these two acts require the presence of a lawyer have a correspondent in national law [see Articles 78, 83, 108, 307, 309 CCP as well as Article 92 CCP on the rights of the lawyer of the suspect or accused]. In the sub-cases provided by point (c), although Article 92 CCP permits the lawyer to assist, there is no obligation for authorities to provide a lawyer (e.g. legal aid).

Article 2.2: the national pre-existing provisions represent a fully *de facto* implementation. Article 101 ("*Detention of the requested person*") and Article 106 ("*Rights of the person arrested under a*

[137] See *supra*, section 8.1.3.
[138] See *supra*, section 9.1.3.

European arrest warrant") from Law no. 302/2004 provide the right for an *ex officio lawyer* if the person has not chosen another lawyer.

Article 2.3: the same reserves mentioned when analysing para. 1 point (c) apply, namely although a full set of provisions from the CCP mention the right to a lawyer, there is no obligation for the state to provide one free of charge

Article 2.4: the same conclusions apply to all the sub-cases and hypothesises envisaged; in the last part, "(…) *when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings*" the national legislation fully corresponds, as we are in the presence of a mandatory legal assistance cases as provided by Article 90 from the CCP.

Article 3: from the perspective of national legislation, legal aid is regulated by Government Emergency Ordinance no. 51/2008 regarding legal aid in civil matters. The definition and the criteria correspond in general to the Directive, but, unfortunately, there is an explicit provision that the Ordinance does not apply in criminal cases. In such cases only the provisions of CCP apply – these are represented by Article 90 ("*Mandatory legal assistance of the suspect or accused person*") and Article 91 ("*Ex officio lawyer*"). Besides these two articles, Article 274 ("*Reimbursing expenses covered by the State in advance in cases of dropping charges, conviction, postponement of penalty enforcement or waiving penalty enforcement*") CCP is relevant, as it provides that all expenses regarding ex officio lawyer bear on the state, in all cases, with no exceptions: *"(1) (…) the accused person shall be compelled to cover the judicial expenses paid by the State, except for public defender fees and the fees for interpreters appointed by the judicial bodies, which will remain the charge of the State*".

Article 4: the national legislation suffers seriously due to lack of transposition, as in addition no (*de facto*) implementation can be identified. The only relevant provision is that of Article 90 CCP which enumerates the cases where legal assistance is mandatory; in addition, Article 91 CCP provides an *ex officio* lawyer in cases where the suspect or accused person has no chosen lawyer. In this case, the costs bear entirely on the state, irrespective of the financial situation of the suspect or accused person, going therefore beyond the standards required by the Article 4.2 Directive. Still, we underline once again that this is valid only in cases of mandatory legal assistance, cases which correspond to those regulated by Article 4.4.

Article 5: Law no. 51/2021 explicitly mentions amending Law no. 302/2004 in order to transpose Article 5.

Article 5.1: from the perspective of legal aid upon arrest pursuant to a European arrest in the executing member state, this already is covered by Article 90 CCP regulating mandatory legal assistance; in addition Article 101 and 106 from Law no. 302/2004 explicitly mention that the arrested person has the right to an *ex officio* lawyer.

Article 5.2: in the case Romania is an issuing member state, Article 91.3[1] Law no. 302/2004, as inserted by Law no. 51/2021 provides that "*If the European arrest warrant is issued in the criminal investigation phase, in the preliminary chamber procedure or in the trial phase, and the requested person exercises his right to have a lawyer in Romania, he may benefit from legal assistance free of charge, if requested. In that case, the issuing court shall take steps to appoint an ex officio defense counsel and inform the enforcement authority accordingly*".

Article 5.3: the national provisions set a higher standard. When Romania is an executing member state, legal assistance is always mandatory, no matter the case; when it is an issuing member state, Article 91.3[1] Law no. 302/2004 regulates, as indicated above, free of charge legal assistance, when requested.

Article 6: aside Law no. 51/2021, there is specific legal instrument has been enacted with a view to implement the Directive. Therefore, in our opinion, the concept of legal aid in criminal matters is regulated only by Article 91.3[1] Law no. 302/2004. In that case, legal aid is granted once requested; in all other cases, since there is no legal aid in criminal matters regulated, there is no possibility to decide on whether or not to grant legal aid. In criminal matters legal assistance is either mandatory, where the authorities will appoint an *ex officio* lawyer or the presence of an attorney is optional (even where the requirements of the Directive regarding legal aid would be fulfilled).

As regards the measures about informing suspects and accused persons if their request for legal aid is refused in full or in part, there is no such provision

Article 7: partial correspondence can be inferred with other provision from special legislation, namely Law no. 51/1995 for the organisation and exercise of the profession of lawyer:

- Regarding general duties of lawyers - Article 38: "(1) T*he lawyer is obliged to study thoroughly the cases that have been entrusted to him, employed or ex officio, to present at each term to the courts or to the criminal investigation bodies or to other institutions, according to the entrusted mandate, to show conscientiousness and professional probity, to plead with dignity in front of the judges and the parties in the process, to submit written conclusions or hearing notes whenever the nature or the difficulty of the case requires it or the court has to this effect. Failure to comply with these professional duties constitutes a disciplinary offence*. (*2) The lawyer is obliged to do all the diligence to defend the rights, freedoms and legitimate interests of the clients and to use the means provided by law, which he considers favourable to them. (3) The lawyer is obliged to refrain from assisting and advising a client in the accomplishment by him of acts or facts that could constitute crimes. (4) The lawyer is entitled to withdraw immediately and to renounce the assistance and representation of the client if his actions and goals, apparently legal at the beginning of the assistance and / or representation, prove, during the course, as criminal*".

- In the context of adequate training to lawyers providing legal aid - Article 22: "*(2) The trainee lawyers, after registering in the bar, have the obligation to attend the courses of the National Institute for the Training and Improvement of the Lawyers, during the internship period. (...) (4) The definitive lawyer is obliged to attend the forms of continuous professional training organized by the bar, the National Institute for the Training and Improvement of Lawyers or by the forms of practicing the profession, under the conditions provided by the Statute of the lawyer profession*.

In so far replacement of the lawyer assigned is concerned (***Article 7.4***), in criminal matters the replacement of the *ex officio* lawyer (in cases of mandatory legal assistance) is possible, on a case by case basis, e.g., if the lawyer fails to fulfil his duties, if there is a conflict between the client and the lawyer, etc. Although such cases are not explicitly provided by the legislation, the replacement operates at the request of either the person or the lawyer, as part of the right to an effective defence (since otherwise is hard to consider such a defence would be accomplished).

Articles 8-9: due to the lack of transposition, there is no such provision in national law. In the case of remedies, the general ones can be applied if the conditions are fulfilled – e.g., in case of mandatory legal assistance *the ex officio* lawyer fails to make an adequate defence. In this case, the court – if generously – can conclude that the accused lacked any defence, thus considering that *de facto* there was no lawyer and applying by analogy the case of absolute nullity provided by Article 281.1 CCP (when a provision requiring the presence of the lawyer was breached).

10.1.3 A critique of the current legislative framework

Although several provisions can be considered to be *de facto* implemented and Article 5 was explicit transposed, the "core" of legal aid and its components is not yet provided by national legislation in criminal matters. At this point, we underline the following critical omissions from national legislation which should be stringently solved by the legislator:

- Article 2.(c): was not transposed – there is no possibility of legal aid in such a case.
- The definition of legal aid is regulated only in civil matters, but the relevant legislation is explicit precluded from application in criminal matters.
- There is no legal aid in criminal matters, with the sole exception regulated by Article 91.3[1] Law no. 302/2004; we can refer only to partial implicit implementation, for the cases that can be subsumed to mandatory legal assistance, as provided by Article 90 CCP.

10.2 Case-law

Consequence inexplicable latency on behalf of the legislator, we did not identify relevant case-law as regards the provisions of this Directive. The only exceptional references to the provisions of the Directive were in the arguments of the defence, generally enumerating the Directive, alongside several others, in order to underline the importance of the right to lawyer and a fair trial[139].

[139] See for example, Suceava Tribunal, PHJ, criminal division, decision no. 198/2019 – *supra*, section 7.2.

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

11.1 Legislation

11.1.1 Preliminary findings

The transposition process of this directive is still ongoing, although the transposition deadline is well surpassed, being 1 April 2018.

Even if the presumption of innocence is a constitutional right (Article 23.11 RC) and a procedural right stipulated in the Article 4.1 CCP, there are several provisions from the Directive which still needed to be transposed. Therefore a draft law amending the CCP and Law no. 304/2004 on judicial organisation contained provisions which should have transposed, *inter alia*, the Directive. The draft law was adopted in June 2018 by the Parliament, but the law was not promulgated by the President, as it was challenged in the Constitutional Court regarding certain aspects of unconstitutionality regarding provisions different from the law than the ones transposing the Directive[140]. The Constitutional Court quashed the entire project in October 2018[141] and it was sent back to the Parliament. In April 2019 a new draft law was adopted, but following a similar scenario, with the Constitutional Court quashing also this one in July 2019[142].

Trying to avoid entering the politics, the reason for the interventions of the Constitutional Court (itself accused of bias and party pries with the political party which governed in 2018-2019) was that both draft laws were seriously amending the CCP under the false motive of transposing, *inter alia*, the Directive.

[140] See the "history" of PL-x no. 373/2018 Draft Law for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure, as well as for amending and completing Law no. 304/2004 on judicial organisation (available at *http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=17179*).
[141] CC, decision no. 633/2018 (published in M. Of. no. 1020 from 29 November 2018).
[142] CC, decision no. 467/2019 (published in M. Of. no. 765 from 20 September 2019).

In the follow up, as the Directive is still not transposed (last update is on 23 March 2021 when the Chamber of Deputies from the Parliament rejected the draft form of the law project) we will make reference to the in-force legislation, as the entire draft laws was considered unconstitutional. Still, we will make reference to the corresponding provisions from the latest version of the draft law (the April 2019 being the only available version even at current time). In addition, recent amendments have been made to the CCP by Law no. 228/2020, in order, among others, to transpose the provisions of Article 8.4. Still, as we will underline in the following section, this is a punctual transposition of a certain provisions and the Directive is far from being transposed. When transposed, it will certainly enhance the right to a fair trial in Romania's criminal justice system.

11.1.2 Analysis of national legislation transposing the Directive

Articles 1-2: some of the provisions can be considered implicit and partially transposed, as correspondent national legislation pre-existed the Directive. As we will develop, this regards the regulation as a general principle of the presumption of innocence, partially presentation of the suspect or accused, burden of proof, right to be silent and, partially, right to be present at trial.

Article 3: is implicitly implemented by pre-existing legislation, which enshrines the presumption of innocence (or benefit of the doubt) as one of the fundamental principles of criminal law legislation.

- Article 23 ("*Individual freedom*") RC: "*(11) The person is considered innocent until the conviction judgment becomes final*".
- Article 4 ("*Presumption of innocence*") CCP: "(1) *Any person shall be considered innocent until their guilt is established by a final criminal judgment. (2) After all the evidence is presented in the case any doubt persisting in the mind of the judicial bodies shall be interpreted in favour of the suspect or accused person*".
- Article 99 ("*The burden of proof*") CCP: "*(2) The suspect or the accused person benefits from the presumption of innocence, being not obliged to prove his innocence, and has the right not to contribute to his own accusation*"[143].

[143] For an analysis of Article 4 from the CCP, see M. Udroiu, in M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, p. 23-50.

Article 4: there is no current in force legislation corresponding, but the draft law proposed to insert the following paragraphs in the body of Article 4 CCP, aimed at transposing entirely the requirements from the Directive: *"(3) During the criminal prosecution and the trial of the case are prohibited public communications, public statements as well as the provision of other information, directly or indirectly, from public authorities regarding the facts and the persons who are the subject of these procedures. People within the public authorities cannot refer to the suspected or accused persons as if they were guilty unless there is a final judgment on conviction to those facts. (4) By way of exception, in the course of the criminal prosecution or trial, the organs of criminal prosecution or the court can publicly communicate data about criminal proceedings that take place only when the data provided justify a public interest provided by law or this is necessary in the interest of discovery and finding out the truth in question. (5) The public communications provided in paragraph 4 cannot be referred to persons suspected or accused of being guilty of an offence (…) (7) If the judicial bodies have publicly disclosed data and information regarding the commencement of the criminal prosecution, the taking of preventive measures or the prosecution of a person, they have the obligation to publish, under the same conditions, the solutions of classification, renunciation of criminal prosecution or cessation of criminal proceedings, or solutions payment, termination of criminal proceedings or restitution to the prosecutor's office, pronounced by the courts. (8) The fulfilment of the obligation provided in paragraph 7 can be requested by any interested person".*

Article 5: there is no explicit transposition, but the draft law aimed at inserting an Article 4.6 CCP: "*During the criminal trial, is forbidden the public exhibit of persons suspected of having committed offences wearing handcuffs or other means of immobilization or affected by other ways of inducing the public perception that these persons are guilty of committing crimes*".

Leaving aside the draft law, the pre-existing legislation which can be considered to be a partly *de facto* implementation (of paragraph 2 we add) is represented by the so-called body of law including the execution law (namely Law no. 254/2013 and the Regulation for its application). The provisions of physical restraint are incident even in the case of suspect or arrested person if taken into custody or pre-trial arrested (see Article 110 Law no. 254/2013 referring to the general provisions on convicts). Accordingly:

- Article 16 Law no. 254/2013: regulates the use of handcuffs and other means of restraint, which is considered an exception, only in particular situations (prevent escapes, protection against self-harm or other persons or belongings, restore order and discipline etc.). In all cases, the judicial bodies in charge will evaluate and decide on the application, maintenance or removal of the means of immobilization, during the presence of the person detainees before them.
- Article 15 ("Use of immobilization means") Regulation: provides the general principle of gradual use of means of immobilization and details the conditions when such means will be used. The procedure itself is provided by an Order of the Minister of Justice. In addition, Article 106.1 c) Law no. 254/2013 provides a special archived registry for the use means of immobilization, where the date and hour of such use is noted, as well as the moment when the measures ceased..

Article 6: is *de facto* implemented in our system by pre-existing legislation. According to the CCP:

- Article 99 ("*The burden of proof*"): provides the principle that in the criminal trial the burden of proof for establishing the guilt is on the prosecution. The suspect or accused person has no obligation to prove their innocence, and has the right not to contribute to their own incrimination.
- Article 103 ("*Assessment of evidence*"): provides that evidence has no legal pre-established value and it's solely for the judicial bodies to asses its value in the particular case.

The Romanian legislator wanted to add several other provisions and mechanisms and the final version of the draft law inserted several provisions, most of which redundant and useless and some literally affecting the conduct of the ongoing criminal trial[144]. We will make no reference to these provisions as they are not in force, but especially because the current legislation respects the requirements of the Directive[145].

[144] For a critique on this, see section 11.1.3.
[145] For a similar approach, see M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 19-21; Gh. Mateuţ, *Tratat de procedură penală. Partea generală*, Ed. Universul Juridic, Bucureşti, 2019, p. 167.

Article 7: can be considered partially *de facto* implemented by correspondent national legislation pre-existing the Directive. Some references will be made to the draft law as well, as new provisions were proposed to be inserted.

Article 7.1: has as correspondent Article 10 ("*Right to defence*") CCP which underlines that: "*(4) Before being heard, the suspect and the accused person are reminded that they have the right not to make any statement. (5) The judicial bodies have the obligation to ensure the full and effective exercise of the right to defence by the parties and the main procedural subjects throughout the criminal trial*"[146].

Other provisions from the CCP (which enshrine the right not to make any statements / to be silent are:

- Article 78 ("*The rights of the suspect*") and Article 83 ("*The rights of the accused person*") which provides as the first right of the accused *"the right not to give any statement during the criminal trial, drawing attention to the fact that if he refuses to give statements he will not suffer any adverse consequences, and if he gives statements they can be used as evidence against him*".
- Article 109 ("*Manner of hearing*"): "*(3) During the hearing, a suspect or accused person may use their right to remain silent in respect of any of the facts or circumstances about which they are asked*".
- Article 374 ("*Informing on the charges, explanations and requests*"): "*(2) The President of the panel explains to the accused person what the charge is about, notifies the accused*

[146] The draft law inserted in the body of Article 10 a new para. 4^1 with the following content: "*The exercise of the right not to give any statement may not be used against the suspect or the accused person in any phase of the criminal trial, since it cannot be a personal circumstance that will establish the conviction of the judicial bodies that the person is guilty of committing the crime for which he is investigated and it cannot be used to corroborate the evidence*". In addition para. 5 should have been amended and have the following content: "(5) *The judicial bodies have the obligation to ensure the full and effective exercise of the right to defence by the parties and the main procedural subjects throughout the criminal trial, while respecting the principle of equality of arms*". From our perspective, the amendments from the draft law had no added value and merely tried to develop the content of the right to defence and the right to remain silent, a task which should belong to the doctrine and the case-law.

person about the right not to make any statement, noting that what he declares can be used against him (…)".

- In the case of preventive measures - Article 209.6 ["*Arrest*"], Article 225.8 ("*Solution of the proposal of preventive detention during the criminal investigation*"), quoted above.

Article 7.2: we consider it to implicit implemented by pre-existing provisions from the CCP. We make reference here to:

- Article 79 and Article 83.a), Article 109 and Article 374, all mentioned already.
- Article 118 ("*Right of witnesses to avoid self-incrimination*"): "*A witness statement given by a person who had the capacity as suspect or accused person before such testimony or subsequently acquired the capacity of suspect or accused person in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity*".

Article 7.3: is *de facto* implemented, as the according to the evidence system regulated by the CCP[147] in case the suspect or the accused person decides to remain silent in relation to the criminal offence that he / she is suspected or accused of having committed, all the rest of the methods of proof and evidentiary processes remain unaffected. So, nothing is there to prevent the competent authorities from gathering evidence.

Article 7.4: the cooperative behaviour of the suspect or accused person is regulated in Romanian legislation starting with 2010, when the 1968 CCP was amended, among others, introducing the plea bargaining procedure. The 2014 CCP continues on this line and provides for an improved plea bargaining procedure and it regulates, for the first time, the guilty plea procedure. In both cases there is a win – win situation: for the accused persons a legal mitigation of their punishment and for the authorities a speedier and less expensive trial. We must mention that the procedures are available only for accused persons, not for mere suspects. In the latter cases, the cooperative behaviour can be an argument for the public prosecutor to consider dropping the charges, but this

[147] See General Part, Title IV – "*Evidence, methods of proof and evidentiary processes*".

is possible only when the offence(s) committed are sanctioned with a maximum of 7 years imprisonment. The relevant provisions from the CCP are as follows:

- Article 374.4 *("Informing on the charges, explanations and requests"):* after the indictment is read in open court, the president of the panel asks the accused person if she fully admits all the acts held against him. In addition, it informs the accused that following such a procedure, the trial will be conducted only on the evidence submitted during the prosecution and on documentary evidence submitted by the parties. In this case the penalty limits provided by law will be decreased with one third in case of imprisonment and one fourth in case of fine.
- Article 375 ("*Plea bargaining procedure*"): it provides the procedure which will be followed when the accused person fully admits all the acts from the indictment (the 'shortened' hearing of the accused, the submission of documentary evidence, etc.).
- Article 396 ("*Settling the criminal proceedings*"): it provides the 'substantial law' effect of procedure, namely the decrease of the penalty limits provided by law.
- Article 478 ("*Parties to the guilty plea and its limits*"): the accused person and prosecutor can conclude an agreement as a result of the accused person pleading guilty. The agreement is subject to the approval of the hierarchically superior prosecutor.
- Article 480 ("*Conditions for concluding a guilty plea*"): it provides the conditions in which such an agreement can intervene (penalty provided by law not exceeding 15 years, sufficient evidence regarding the guilt of the accused person, the full admission on behalf of the accused person and the legal assistance when concluding the agreement) as well the material effects (penalty limits provided by law will be decreased with one third in case of imprisonment and custodial education measures and one fourth in case of fine).
- Article 318.2 ("*Waiver of prosecution*:"): the public interest regarding dropping charges is considered by taking into consideration the cooperative behaviour of the suspect or accused after the commission of the offence. In addition, Article 74 ("*General criteria for sentencing*") CC provides as a sentencing criterion the "the accused person's conduct after committing the offence and during the trial".

Article 7.5: regarding the prohibition to use against suspects and accused persons the exercise of right to silence or to be considered evidence, the corresponding legal norm is the general Article 10 CCP on the right to defence[148].

Article 7.6: the current national legislation provides higher standards. According to the CCP, the only situations which can correspond to this provision would be the plea bargaining procedure (Article 375 CCP already mentioned), the guilty plea one (Article 480 CCP, already mentioned) or dropping of charges (Article 318 CCP, already mentioned). Regarding the first two, the accused person is heard in front of the court (even if at this stage emphasis is made especially on the legality of these procedures and the valid consent of the accused person), while in the latter the person is summoned in court in front of the PHJ, who can decide not to confirm the solution of the public prosecutor, if legality issues arise.

Article 8: is *de facto* implemented by pre-existing legislation in national law. It seems the Romanian legislator had another opinion – as the draft law we mentioned proposed several amendments in this field; in addition, very recently, Law no. 228/2020 was adopted. According to the final part of the law, it transposed, *inter alia*, the provisions of Article 8.4.

Article 8.1: the right to be present at trial as provided is generally enshrined by Article 364 CCP ("*The accused person's participation in the trial and his rights")*, already mentioned[149].

Article 8.2: the *trial in absentia* is regulated by Article 364.3 CCP corroborated with the legal citation of the suspect or accused. In addition, Article 466.2 ("*Reopening criminal proceedings in case of an*

[148] The draft law aimed at introducing a new para. 4^1 within the body of Article 10, with the following content: "*The exercise of the right not to give any statement may not be used against the suspect or the accused person in any phase of the criminal trial, since it cannot be a personal circumstance that will establish the conviction of the judicial bodies that the person is guilty of committing the crime for which he is investigated and it cannot be used to corroborate the evidence*".

[149] See, *supra*, section 9.1.2. As anticipated the draft law considered that explicit transposition is still required and therefore a new para. 6^1 should have been inserted in the body of Article 364 with the following content: "*A person may be convicted of the offense only if he has been legally summoned for each phase of the trial or has entered by other official means in possession of information regarding the place and date of the trial was informed about the possibility of making a judgment in default or if it was represented by a lawyer elected or appointed ex officio and benefited from appropriate defence during the trial*". From our perspective, the amendment had no added value and was a mere combination between various already existing legal provisions – Article 353 CCP ("*Summons to appear in court*") CCP and Article 364 CCP ("*The accused person's participation in the trial and his rights*").

in absentia trial of the convicted person") CCP provides an exact definition of the notion of "trial *in absentia*". According to it: "*The following shall be deemed as tried in absentia: the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal*". It is our opinion that the logical (*a contrario)* interpretation of Article 466.2 CCP leads to the conclusion that para. 2 points (a) and (b) are implicit implemented in national law[150].

Article 8.3: is implicit implemented in national law. We stress that according to the general system on enforcement of judgments regulated by the CCP, once a judgment is final, it will automatically be enforced. This is valid even in cases where the trial took place *in absentia*. In cases where the legal requirements for such a trial were not actually present, the convicted person may request the reopening the criminal proceedings (see Article 466 et seq. CCP).

Article 8.4: Law no. 228/2020 explicitly transposed it. Accordingly, it inserted a new para 1^1 within the body of Article 557 ("*Execution of the warrant for the execution of the sentence and the order prohibiting the leaving the country. The court agreement to leave the country*") CCP, with the following content: "*Once the execution warrant is handed over, the convicted person shall be informed, under signature, in writing, of the right provided in Article 466.1, and in case the person cannot or refuses to sign, a report will be concluded*"[151].

[150] Again, the draft law considered this insufficient and proposed explicit transposition, the first thesis of paragraph 6^1 mentioned above serving (in theory) to such a purpose.

[151] We mention that a similar provision was introduced in 2017 (see para. 1^1 from Article 557 CCP, inserted by Emergency Ordinance no. 13/2017). In that case, based on the "stringent" need to transpose the Directive, a new Government act was adopted literally in the middle of the night, with the aim to decriminalise certain offences related to corruption. All was "nicely wrapped" in the context of transposing the Directive. After several demonstrations, the Government backed down and by Emergency Ordinance no. 14/2017 abolished in entirely Emergency Ordinance no. 13/2017 (which, among others, indeed transposed Article 8.4). It took more than 3 years to have the text back in the CCP and – for what it worth's mentioning as a "fun fact" – we now have an Article 557.1^2, although there is no para. 1^1 (this being abolished by

Article 8.5: the "disclaimer" is a case of no needed implementation. A correspondent exists in Article 359 CCP ("*Ensuring the order and solemnity of the court hearing*"): "*(4) When one party or any other person disturbs the court hearing or disobeys the measures taken, the president of the panel shall warn them to keep order in court, whereas if this is a repeated situation or the misconducts are severe, the president shall order them to be removed from the court room. (5) The party or the person who was removed from the court room shall be called in before the beginning of the debates. The president shall inform them on the essential actions taken while they were absent and shall read to them the statements of persons heard in court. If the party or the person continues to disturb the court hearing, the president may order them again to be removed from the room, while the debates shall take place in their absence. (6) If the party continues to disturb the court hearing also during the issuing of the court ruling, the president may order for the former to be removed out of the room, in which case, the court ruling shall be notified to this party*".

Article 8.6: the additional "disclaimer" corresponded to the logic of the CCP which regulated have several proceedings conducted in writing (e.g., the preliminary chamber, the plea bargaining procedure, the guilty plea, etc.). After several interventions of the Constitutional Court, which considered that such proceedings hinder the right to a fair trial, the relevant provisions were amended and now all these stages and procedures involve debates. In case of the plea bargaining procedure and the guilty plea one, there is no more court investigation on evidence, as one precondition is that regarding evidence, this will be restricted to documents.

Article 9: form of an implicit implementation, the CCP dedicates several provisions to the special case of reopening the proceedings in case of *in absentia* trial, which now is regulated as an extraordinary remedy, within Articles 466 – 460 CCP[152].

According to the CPP, the person must request to reopen the trial conducted in absentia no later than one month since notification of the final judgment was made. A case is considered tried in absentia when the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of

Emergency Ordinance no. 14/2017).

[152] For a general presentation of the procedure, prior to the 2020 amendments, see M. Udroiu, *Sinteze de procedură penală. Partea specială*, p. 705-728.

the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal.

Regarding the procedure, the motion to reopen the trial must be filled with the court that tried the case in absentia as a court of first instance. The motion shall be examined by the Court as a matter of emergency. The court shall hear the arguments by the prosecutor, the parties and the main subjects of the proceedings, and examine: if the motion was submitted within the deadline and by the entitled persons; if legal grounds to reopen the criminal proceedings are present; c) if these legal ground on which the motion was submitted had not been shown in a prior motion to reopen criminal proceedings, that had been tried by the court of last resort. If the court decides to reopen the case, this decision can be appealed only together with the new judgment which will deal with the merits of the case. If the court decides not to reopen the case, the decision can be appealed similarly with the initial court judgment rendered *in absentia*.

Article 10: no specific remedies for breach of the Directive are regulated, but, as we will show below, in cases where implicit and partial transposition is considered, general remedies apply.

Article 10.1: regarding certain aspects of the presumption of innocence in criminal proceedings, as mentioned before, the Directive is not transposed in national law. Therefore, it would be logical that no effective remedy is provided. Since some provisions (e.g., presumption of innocence, burden on proof) are implicitly and partially transposed by previous existing national legislation, remedies in this field can be subsumed to the general right to defence and the fair trial concept. In case of public references to guilt, we already mentioned that there are no current remedy afforded, *de lege lata*, but the draft law proposed a kind of remedy in such cases, namely the obligation to publish the solution favourable to that particular person[153].

[153] See paragraph 7, as inserted by the draft law within Article 4 CCP.

Article 10.2: dealing with evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, there are several provisions from the CCP which can be regarded as partial and implicit implementation. In a nutshell, Article 102 ("*Exclusion of evidence obtained illegally*") CCP provides that e*vidence obtained through torture, as well as evidence deriving from such may not be used in criminal proceedings; in addition, evidence obtained unlawfully may not be used in criminal proceedings*. Article 103 ("*Assessment of evidence*") CCP underlines that there is no pre-established by law value of evidence and the judicial bodies will assess its relevance. In addition, the sanction of nullity (either absolute or nullity[154]) will be incident when an infringement of the right to defence occurred.

11.1.3 A critique of the current legislative framework

As a general critique, we can point out that, despite Law no. 228/2020, the Directive is not yet transposed. Various draft laws that circulated all used this Directive as a mean in order to amend the CCP regarding several legal institutions, although not even connected to the requirements of the Directive. Although not explicitly mentioned, this also determined the Constitutional Court to reject all these draft laws.

Trying to reconcile the current situation with the existing relevant provisions from the CCP, some requirements from the Directive can be considered to be *de facto* implemented by pre-existing legislation and partially transposed by Law no. 228/2020. Therefore, the following can be regarded as the most vulnerable aspects:

- Article 4: there is no provision dealing or sanctioning any public reference to guilt[155].
- Article 5: although there are several provisions dealing with the use of physical restraint, none "covers" para 1. In addition, the national authorities, as we will develop in the case-law section, generally used this practice in order to attract media attention and put pressure

[154] See, *supra*, section 5.2.3.

[155] An important omission having in mind the consistent case-law of the ECHR against Romania regarding the violation of Article 6.2 from the European Convention due to public statements of authorities regarding the guilt of a person prior to a verdict of conviction. For mode details, see M. Udroiu, *Sinteze de procedură penală. Partea generală*, p. 25, who enumerates: Bivolaru v. Romania, judgment of 28 February 2016; *Samoilă şi Cionca v. Romania*, judgment of 4 March 2008; *Păvălache v Romania*, judgment of 18 October 2011; *G.C.P. v Romania*, judgment of 20 December 2011; *Neagoe v. Romania*, judgment of 21 July 2015; *Burzo v. Romania*, judgment of 30 June 2009.

on the suspects or accused persons. Finally, from the perspective of para. 2, the national legislation leaves at the discretion of the judicial organs the decision on maintaining handcuffs, thus contradicting the requirements of the Directive[156].

Similar conclusions have been reached by the European Commission, which sent a letter of formal notice, part of the infringement procedure – regarding Romania, the Commission considered "(…) that the national transposition measures notified by Romania constitute only a partial transposition of the Directive and that some provisions of the directive are missing. In particular, the Commission has identified shortcomings in relation to public references to guilt, for example, when public authorities refer to a person as being guilty in public statements, and the availability of appropriate measures if this happens. There are also gaps related to how suspects and accused persons can be presented, for example at court, using physical restraint measures, and to the right to be present at the trial"[157].

11.2 Case-law

Although the directive has not been transposed in national law yet, it is probably the most often quoted EU Directive in judgments of national courts. This is generally part of the model reasoning of certain courts which tend to underline in the introductory part of the judgment the importance of fundamental principles (access to a court, the presumption of innocence, burden of proof)[158].

[156] From this perspective, we draw attention to the case law of the ECHR against Romania, as the Court underlined that the use of handcuffs should be limited to exceptional circumstances and not exceed what is absolutely necessary (*Cășuneanu v Romania*, judgment of 16 April 2013 and *Costiniu v Romania*, judgment of 19 February 2013). The court denied the applicants' claim for non-exhaustion of domestic remedies. However, the court ruled that, because the Romanian law strictly regulates the use of handcuffs, the problems have therefore arisen as a consequence of the implementation norms and regulations adopted by the executive and the police. Contrary to the law, these regulations made the use of handcuffs a default practice, due to the cultural conservatism of judicial organs.

[157] See Reasoned opinions and/or Letters of formal notice *Fair Trial: Commission urges BULGARIA, CROATIA, CYPRUS and ROMANIA to fully transpose the EU rules on the presumption of innocence*, last updated at 30 October 2020, available at *https://ec.europa.eu/commission/presscorner/detail/en/INF_20_1687*.

[158] Unfortunately, the numerous decisions do not deal with a common practice of judicial organs (especially during the criminal prosecution stage) to release so called "press communications" with detailed information about the case and the persons who are suspects or accused. This was already common practice for the National Anticorruption Department which mentioned the full name and position of the person, as well as a short summary of the offences she / he allegedly

In the first case (***Iaşi District Court, criminal sentence no. 822/2020***), the accused person was sent to trial for driving a vehicle under the influence of alcohol or other substances (Article 336 CC). The Court, when admitting the accused person's request for the simplified procedure (the plea bargaining one), underlined that this right derives from the general right to a fair trial and it imposes on the Court the obligation to consider the presumption of innocence by reference to both to the standard of proof as provided by the CCP and the Directive (EU) 2016/343.

In another case (***Alba Iulia Court of Appeal, criminal division, decision no 775/2019***) the Court actually made an analysis of the provisions of the directive in case of the presumption of innocence.

The trial was focusing on custom offence (provided by Law no. 141/1996 and later on, Law no. 86/2006) and the defence argued that the presumption of innocence principle had been violated by the first court, as no clear evidence indicated that the accused person committed the offences he had been charged with. The appeal was rejected and the Court reasoning was centred upon the balance between the use of factual presumptions to establish a person's guilt and the presumption of innocence. In this regard, the Court noted that in *Salabiaku v. France*, the ECHR ruled that the use of factual presumptions to establish a person's guilt does not run counter to his or her presumption of innocence. Any system of law is aware of such presumptions, but in criminal matters States are obliged not to exceed certain limits in their use, as by their excessive use the judge's discretion would be emptied of content if a person's guilt were established on the basis of presumptions. Consequently, the Court considered that such presumptions are admissible only in so far as they are reasonable, presume difficult or impossible to prove and can be rebutted by the person concerned.

A very similar approach was undertaken in another case, this time by the first instance court, when dealing with tax evasion offences (***Ilfov Tribunal, criminal division, sentence no. 251/2019***). The

committed, are presented (see Press Communicate from 14 November 2018, available at http://www.pna.ro/comunicat.xhtml?id=9139; Press Communicate from 12 November 2018, available at http://www.pna.ro/comunicat.xhtml?id=9137; Press Communicate from 7 November 2018, available at http://www.pna.ro/comunicat.xhtml?id=9136). Following above-mentioned decisions of the ECHR, all the press communications end with the same stereotype, namely: "We point out that this stage of the criminal proceeding is - according to the Criminal Procedure Code - finalising the criminal investigation and sending the indictment to the court for trial, and it does not represent a breach of the principle of the presumption of innocence". In addition, in last years, the name of the persons is hidden in the "press communicates", but in reality it can be easily identified.

copy-pasted paragraph on presumptions and the exact same reference to ECHR case-law underline our conclusions that the Directive is mostly used as part of an introductory "model reasoning".

In another case (***Caraş Severin Tribunal, criminal division, sentence no. 41/2019***), the instance made reference to this directive, but this time in the context of burden of proof and the in *dubio pro reo* principle. The accused person complained about a reversal of the burden of proof, feeling it must prove his innocence, once certain documents provided by the fiscal administration were added to the case file. The Court rejected such reasoning, and made reference including to the adoption of the EU level of Directive 2016/343. After a corroborated analysis of the provisions regarding evidence in the CCP (Article 99, 100 and 103), the Court concluded that in no circumstance can be considered that the proposal of evidence by the parties amounts to a reversal of the burden of proof.

The *in dubio pro reo* principle and its connection with the directive was once again recalled (***Oradea Court of Appeal, criminal division, decision no. 49/2019***). In this case, the accused person was convicted by the Tribunal for drug trafficking. In the appeal, the Court emphasizes the provisions of paragraph (22) of the Preamble to Directive 2016/343 regarding the infringement of the presumption of innocence when the burden of proof is shifted from the prosecution to the defence. In a theoretical manner, the Court underlined that, unlike civil proceedings, where the standard of proof does not operate beyond any reasonable doubt, in the criminal trial, the accused person benefits from the presumption of innocence; thus, the burden of proof belongs to the prosecution and the standard of proof beyond any reasonable doubt requires the retention only of the facts that are in the vicinity of certainty, any doubt benefiting the accused. In fact, presumptions are logical conclusions, based on the legal procedure of moving the object of evidence, drawing its power from the reasoning of the judge (judicial presumptions) or the legislator (legal presumptions). Compared to the different standards of evidence existing in criminal and civil proceedings, the Court is of the opinion that in criminal matters the court cannot retain the objective typicality of a deed only on the basis of a simple presumption which is capable of detecting with a certain probability norms of the crime imputed to the accused person. Even if they are compatible with the probation system in criminal proceedings, simple (judicial) presumptions can acquire probative value for the formation of the court's conviction only insofar as they corroborate with other legally administered evidence in question, because only in this way can they contribute to the definite configuration of the

accusatory evidentiary thesis imposed by the standard of proof beyond any reasonable doubt. Returning to the case facts, the Court considered summarized it: in the backpack abandoned by the unidentified person who got out of the accused person's car was found - in addition to the substance likely to have psychoactive effects and an electronic scale - papillary traces of the accused. Under the standard of proof beyond any reasonable doubt, the Court concluded that is not possible to reach the definite conclusion that the accused transported, distributed and put on sale or placed on the market through that unknown person products likely to have psychoactive effects. For these reasons, the appeal was admitted and the accused person was acquitted.

In the context of the trial *in absentia*, the case-law usually consists of decisions when the courts conclude that all the requirements were met for the holding of the trial in the absence of the suspects or accused persons and no retrial is ordered. For example, in one case (***Sibiu District Court, criminal division, sentence no. 329/2019***), the court found that the convicted was not tried *in absentia* within the meaning of the provisions of Article 466 CCP and he is not entitled to retrial. During the criminal prosecution stage, he gave a declaration in front of the authorities and was informed about his rights and obligations he has on throughout the criminal proceedings, including the obligation to communicate in writing any change of address, within 3 days, drawing attention to the fact that the summonses or any procedural documents communicated to the initial address remain valid and are considered to have taken note. This information was made according to the criminal procedural legislation in force, in accordance with the requirement provided by Article 8 paragraph 2 from Directive 2016/343.

In one case (***Bacău Court of Appeal, criminal division, decision no. 747/2019***) the Court ordered the reopening of the trial, according to Article 466 from the CCP. The Court noted that at the time of the indictment, the accused person was cited in a place he had never even visited. He has been working in Germany and Austria for about 10 years and, although he informed the prosecution about this issue, he was never cited in this place. He did not in any other way become aware of the conduct of the trial, nor did he request in person or through his representative that the trial be held in absentia. Also, he was not informed by anyone in his family about receiving any summons that would have reached him, all summonses being returned to the court, proving that no one lived at that address and thus had no knowledge of the conduct criminal proceedings. During all this time, he was not aware of the existence of a criminal trial before the courts and he was not communicated

the minute of the criminal sentence. The Court of Appeal considered that the accused cannot be blamed for failing to communicate in writing, within 3 days, any change of address, as the authorities were notified that he works in Austria with an employment contract indicating a telephone number, so the criminal investigation body could have asked him to indicate the address of residence or place of work in Austria. Therefore, the first instance decision was quashed - the convict was not legally summoned to trial and was not become aware of it in any other official way, so that the conditions provided by law are met to be considered a convicted person *in absentia* who has the right to request retrial.

In the end, we rely on ***Constitutional Court's decision no. 633/2018***. The Court exercised the *a priori* control over the law amending the CCP. The purpose of the law was, *inter alia*, to adopt a set of measures to bring criminal proceedings into line with decisions of the Constitutional Court and Directive (EU) 2016/343[159].

In a nutshell, the Court considered that the provisions which sought to transpose Articles 4 and 5 from the Directive comply with the constitutional requirements of clarity and predictability[160].

As regards the newly introduced right for the suspects or accused persons to be informed about the ongoing investigation, it implicitly regulates their right to personally participate in the performance of any act of criminal investigation. This flagrantly ignores the effects produced on the criminal investigation[161] and, in addition, the Court considers that it not only ignored the provisions of European law which it should transpose, but ruled otherwise, by granting additional procedural rights which hamper the investigation and the rights of other parties. Therefore, these provisions are unconstitutional *per se*, as they infringe the right to a fair trial enshrined in Article 21 paragraph 3 from the Constitution, and the provisions of Article 148 paragraph 2, which establish the binding nature of European law[162]. When analysing the right to access the case file and to consult its content, the Court underlined that the national provisions in force are "the express consequence of European

[159] See para. 259 from the decision.
[160] See para. 274 et seq.
[161] See para. 400 from the decision.
[162] See para. 404 from the decision.

Union law, materialized by Directive 2012/13, which emphasizes the need for such internal regulation".

With regard to the stricter conditions on restricting access, the Court considers that the legislature's option for this solution falls within its scope and does not contravene any norm or constitutional principle[163]. So, the intervention of the law project cannot be motivated by the transposition of European provision, as the regulation already respected the requirements. On the other hand, related to the amendments made in case of preventive measures (especially those depriving of liberty), the deadlines are not correlated, so all the criticisms are well-founded[164].

The proposed extension of the right to silence and with regard to witnesses is in itself more than questionable, as both the jurisprudence of the European Court of Human Rights and Directive (EU) 2016/343 grant this right exclusively to persons suspected or accused of committing offences. Even more, the approach of the legislator contradicts both the requirements of Article 1 paragraph 3 of the Constitution, which incorporates the principle of finding the truth, as the supreme value of the rule of law, and which imposes on the legislator the obligation to take measures to defend public order and safety, by adopting the necessary legal instruments to reduce crime, excluding any regulations likely to lead to the encouragement of this phenomenon, as well as to the provisions of Article 1 paragraph 5 of the Constitution, in its component regarding the quality of the norm[165].

Finally, the extension of the scope of incidence of the cassation appeal, motivated by the transposition of provisions of Article 3 and Article 6 from the Directive are again questionable. The amendments are characterized by the lack of correlation with other institutions and using notions and phrasings that are either not defined by law or have a high degree of generality, aspects that are true impediments in the interpretation of the law, generating an abusive or discretionary application. As a result, the criticized provisions, by the way they are formulated, enshrine legislative solutions likely to affect the principle of security of legal relations, enshrined in Article 1 paragraph 5 of the Constitution, constituting the premise of reconsidering all final court decisions rendered so far, provided that the appeal in cassation in favour of the accused persons can be declared at any

[163] See para. 419.
[164] See para. 421.
[165] See para. 480.

time. Also, the criticized provisions fail to respect neither the norms of legislative technique nor the quality requirements of the law, being thus unconstitutional[166].

Finally, we make reference to ***Constitutional Court's decision no. 650/2018***[167], where in a similar manner with decision no. 633, the Court exercised the *a priori* control over the law amending the CC and the special legislation on corruption, rejecting it entirely. The purpose of the law was among others to transpose several provisions from the Directive (EU) 2016/343 – in essence, it regulated offences and aggravated circumstance in cases where state official made public references to guilt, based on the provisions of Article 1 paragraph 2. The Court, once again, considered that these amendments go way beyond the requirements of the Directive and, due to lack of predictability and clarity are in flagrant violation with constitutional provisions.

[166] See para. 950.
[167] Published in M. Of. no. 97 from 7 February 2019.

12 Concluding remarks

From a comparative view, we consider that in the case in relation to all six directives the Romanian legislator was more than confident that the 2014 body of legislation, comprising mostly, but not only, the CCP, corresponded to an implicit implementation. This conclusion was based on the novelty of the 2014 body of law and presumably its high standards, as it was supposed to embody all relevant case-law of the Constitutional Court, the European Court of Human Rights and, generally, the recent trends at the European law level (including the EU level and the relevant case-law of the European Court of Justice). Unfortunately, it wasn't seen that in the case of the CCP the project was already adopted by the Parliament in 2010, so it was already outdated in 2014. The amendments made my Law no. 255/2013, prior to 1 February 2014 (the date when the CCP entered into force) already had as a major argument the objective of transposing parts of the EU Directives (from our perspective Directive 2010/64/EU is presents interest), but this was scarcely sufficient. It was literally impossible for the national legislator to update the then draft CCP in order to align it to the new version of the draft CC[168], the new relevant case-law at the national and European level, the new national legislation which emerged between 2009-2013 and, eventually, the EU Directives for which the transposition deadline expired or was about to expire. Despite declarative statements made by national authorities, the failure of such an approach was visible when years later other amendments were made, this time being targeted on transposing certain provisions which were forgotten (e.g., Law no. 76/2016 in the case of Directive 2010/64/EU). In addition, as our punctual analysis revealed in each section, there are still cases when the corroborated application of the national legislation does not fully "cover" the provisions of theoretical fully transposed directives. Our previous example referred to Directive 2010/64/EU as a case-study, but the situation is similar in case of Directive 2012/13/EU (see the intervention of both Law no. 255/2013 and later on Emergency Ordinance no. 18/2016), Directive 2013/48/EU (see the amendments made by Law no.

[168] Although, the CC and the CCP are part of the same 2014 major reform, the draft CC was adopted by the Parliament in 2009. It was amended in 2012 (through Law no. 187/2012). The draft CCP was adopted in 2010 and amended in 2013 (though Law no. 255/2013). All these four major laws entered into force on the same day, mentioned several times before – 1 February 2014. In reality, the expert commissions drafting the CCP and later on Law no. 255/2013 worked with legislation in force and the CC and later Law no. 187/2012 (although adopted by the Parliament) were not in force yet. This was a major mistake from the secretariat of the Ministry of Justice, who overlooked the commissions.

236/2017) and Directive (EU) 22016/800 as well as its very recent transposition through Law no. 284/2020. In all these cases, we consider that the approach should have been an explicit legal instrument aimed at transposing a certain directive. This way that particular law would have amended and supplemented all previous existing legislation in order to fully respect the standards of a particular Directive. The fragmented approach of the legislator, who intervenes repeatedly amending existing legislation via several new acts and trying to transpose several Directives at once is bound to failure. The plain wrong approach is to be seen in the case of Directive (EU) 2016/343, when the project of law transposing, *inter alia*, this directive was to an enormous law, aimed at "solving" numerous other - real or presumed – legislation gaps by the political agenda of the legislator. The two time intervention of the Constitutional Court demonstrates the flaws of the transposition process. In addition, even as we speak, both Directives (EU) 2016/343 and (EU) 2016/1919 are still not transposed, this being another argument supporting our pessimist conclusions.

Referring to the case-law on this topic, our report focused less on this – not due to a lack of interest from our behalf, but mainly because most of the Romanian courts are plain and simple not interested in the interpretation and application of European law provisions. It is part of our juridical culture to make explicit reference to an existing provision from a national instrument and this is the case even now. Explicit references to provisions of EU Directives and / or its transposition in the national law were to be found especially when one of the parties invoked it or when the courts used a stereotype argument (found in several judgments of the same panel) in order to reach a certain conclusion (e.g., the presumption of innocence is a fundamental principle, as is provided by Article 3 from Directive (EU) 2016/343). In addition, reference to judgments of the European Court of Human Rights and – more scarcely – of the European Union Court of Justice is usually made to subjects and topics which are now generally recognised (e.g., the theory on direct applicability of EU directives, the breach of the presumption of innocence after several convictions from the European Court of Human Rights etc.). To conclude, most of national case-law which even considers making reference to European law provisions denotes a formalistic approach, as these references do not add value to the decisions rendered therein or the interpretation or application of the quoted legal provisions. In fact, in most cases the sole purpose is to (at least apparently) add more arguments to the conclusions proposed by the court.

To conclude, the promising guidelines which we would propose? For the legislator, a punctual approach when considering transposing a directive, which would consist of several steps: (1) in-depth analysis of the national legislation and the requirements of the directive; (2) drafting an unique law aimed at amending or supplementing existing legislation only in regard with a particular directive and only in so far these aspects are not already provided (as it is a habit for the national legislator to regulate repeatedly); (3) doing it all according to a calendar which permit respecting the deadlines found in that particular Directive. From the perspective of the case-law our deepest concern is that the Romanian judge is more a bureaucrat rather than a judge. Using stereotype model of judgments, identifying some reasoning in various judgments can be understood until a certain level. At current time that level is way overcome and a general "brake" must be used. If, as mentioned, due to the volume of activity, some repetitions and model of acts can be admitted, we cannot have the same indulgence as regards the actual merits of the case. For example, although there are several cases when physical restraining measures are used or when public references to guilt are made, the courts do not sanction such abuses, although the transposition deadline of Directive (EU) 2016/343 is long overpasses. As we already mentioned in one of our previous studies[169], in order to overcome the legacies from the past, the drafting of a new statutory law is not sufficient and it must be coupled with a change in the mentalities of all the judicial actors in charge of applying the law - judges, prosecutors, lawyers, but most important the judges. This category, the top of the juridical pyramid, must understand its fundamental role in the criminal trial and act accordingly, with more responsibility, departing from the bureaucratic status which seems to be so convenient to many.

[169] See, D. Nițu, D. Ionescu, *Romanian criminal procedure at a crossroads: Legacies on the past and current challenges* in E. Sellier, A. Weyembergh (coord.), *Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice*, Éditions de l'Université de Bruxelles, Bruxelles, 2020, p. 222 and 250-251.