



APPLICATION OF
EU INSTRUMENTS
IN CRIMINAL JUSTICE

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INTRODUCTION: CRIMINAL LAW IN EU LEGAL FRAMEWORK

Criminal law undoubtedly belongs to the most sensitive areas of national law; not only from the perspective of individuals facing criminal charges, but also from the perspective of nation-states that wish to retain as much control over this area of legal regulation as possible. In spite of this sensitivity, national criminal law has not remained untouched by international institutions, including the **European Union**¹ and the **Council of Europe**.²

The international (and supranational) influence on national criminal law stems primarily from the fact that the **right to a fair trial** is guaranteed not only by national constitutional orders, but also by the European Convention of Human Rights and by the EU Charter of Fundamental Rights.

<p>European Convention on Human Rights (Council of Europe, 1950)</p>	<p>Charter of Fundamental Rights (European Union, 2000)</p>
<p style="text-align: center;">Article 6</p> <p><i>1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.</i></p>	<p style="text-align: center;">Article 47</p> <p>Right to an effective remedy and to a fair trial</p> <p><i>Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</i></p> <p><i>Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.</i></p> <p><i>Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.</i></p>

¹ The **European Union** (hereinafter also referred to as ‘the EU’ or ‘the Union’) is an international organisation currently composed of 27 Member States. It was established in 1952 in the form of European Coal and Steel Community by 6 founding Member States, namely Germany, France, Belgium, Netherlands, Luxembourg, and Italy; it was later transformed into the European Economic Community in 1958, the European Communities in 1967, and the European Union in 1993. The most important institutions of the EU are the European Commission which resembles a government and enjoys a monopoly over legislative initiative in the EU, the Council of Ministers which plays a crucial role in the legislative procedure and where national interests are represented, the European Parliament which also participates in the legislative procedure and whose members are directly elected by EU citizens, and the **Court of Justice of the European Union (in Luxembourg)** which has the authority over the final interpretation of the EU Treaties, as follows from Article 19 of the Treaty on the European Union.

² The **Council of Europe** is an international organisation currently composed of 47 Member States, including all 27 Member States of the European Union, as well as other countries such as Switzerland, Liechtenstein, Russia, Turkey, countries of the former Yugoslavia and countries at the crossroads of Eastern Europe and Western Asia. It was established in London in 1949 with the purpose of maintaining peace on the European continent. Its most important institutions include the Committee of Ministers composed of members of the national executives, the Parliamentary Assembly composed of members of the national parliaments, and the **European Court of Human Rights (in Strasbourg)** which oversees the states’ compliance with the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter ‘the European Convention on Human Rights’ or ‘the Convention’).

This publication focuses on the various ways in which national criminal procedural rules have been **influenced ‘from above’**, i.e. by the Council of Europe and by the European Union. As for the former, the most significant influence has come from the case law of the European Court of Human Rights, mostly in relation to Article 6 of the Convention. As for the latter, the EU legislator has adopted a number of legislative instruments (see below) which harmonise national legal orders in order to provide for the same minimum level of procedural guarantees. Interestingly, these legal instruments have been strongly inspired by the case law of the ECtHR; they could even be considered as a codification of the ECtHR’s case law in the area of procedural safeguards.

Before implementation of the Lisbon Treaty in December 2009, EU legal instruments in this field were adopted in the form of **framework decisions**. The **European Arrest Warrant**³ is probably the most significant framework decision in the field of criminal justice.

European Arrest Warrant (FWD 2002/584/JHA)

Extracts from the Preamble

(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. [...] Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

(6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation.

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. [...]

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. [...]

Without a doubt, an EU legal instrument such as the European Arrest Warrant significantly affects national legal orders. It is therefore important to ask whether the Union is at all **competent** to adopt such an instrument. Matters of EU competence are regulated by three fundamental principles: 1/ the **principle of conferral**, according to which the EU can only act in fields that the Member States have entrusted to it (i.e. conferred to it); 2/ the **principle of subsidiarity**, which requires that the EU can act only if the Member States would not be able to achieve the aim themselves; and 3/ the **principle of proportionality**, which requires that the EU chooses the least onerous means of regulating the field.

³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18. 7. 2002, p. 1-26).

Article 5 TEU

(2) Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

(3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. [...]

(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. [...]

As for the principle of conferral, the Member States significantly broadened the Union's competence in the area of criminal law at the end of the previous century. The **Treaty of Amsterdam** (signed on 2 October 1997, in force since 1 May 1999) strengthened the Union's powers in the **area of freedom, security and justice** ('AFSJ').

During the Finnish Presidency of the Council in the second half of 1999, the European Council adopted the **Tampere European Council Conclusions** of the 15 and 16 October 1999; these set out a clear goal to develop the area of freedom, security and justice. Furthermore, on 29 November 2000, the Council adopted a programme of EU instruments with the aim to implement the principle of mutual recognition of judicial decisions in criminal matters (OJ C 12, 15. 1. 2001, p. 10). On 30 November 2009, the Council adopted a **Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings**, and on 10 December 2009, the European Council adopted the so-called **Stockholm programme** which welcomed the Roadmap and invited the Commission to examine further elements of minimum rights in criminal procedure.

Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (30 November 2009)

Measure A: Translation and Interpretation

Measure B: Information on Rights and Information about the Charges

Measure C: Legal Aid and Legal Advice

Measure D: Communication with Relatives, Employers and Consular Authorities

Measure E: Special Safeguards for Vulnerable Persons

Measure F: A Green Paper on the Right to Review of the Grounds for Detention

The EU has already adopted a significant number of legislative instruments in the area of criminal procedure; some of these will be analysed below. Therefore, while substantive criminal law remains regulated (mostly⁴) at the national level, legal rules governing **criminal procedure** have now been widely harmonised by the Union, in line with the well-established case law of the ECtHR. As for the form, the EU has chosen **directives** as the most appropriate legal instrument for the harmonisation of criminal procedural rules, as follows clearly from Article 82 TFEU (see below). Unlike EU regulations, directives do not apply directly, at least not until the end of the transposition period; rather, the EU asks the Member States to achieve certain results and leaves them some time and some discretion to adapt the national legal orders to the requirements of the directives. Only after the expiry of the transposition period can directives be applied directly.

Article 288 TFEU

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The form of directives is also required by **Article 82(2)(b) TFEU**, which is the legal basis on which all the EU instruments have been adopted so far. Therefore, rights of individuals in criminal procedure cannot be unified by EU regulations; they may only be harmonised by means of EU directives which establish minimum rules. The Member States can provide for a higher level of protection than required by the directives.

Article 82 TFEU

(2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the [EU] may, by means of directives [...] establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- a) mutual admissibility of evidence between Member States;*
- b) the rights of individuals in criminal procedure;*
- c) the rights of victims of crime;*
- d) any other specific aspects of criminal procedure; [...]*

⁴ There are some exceptions, e.g. in the area of the financial interests of the Union. According to Article 325 TFEU, paragraph 2, 'Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.'

As has been stated above, the Union legislator has already adopted a number of legislative instruments that set out the minimum standards of individuals' rights in criminal procedure. The most important of these instruments are listed in the chart below. Among the various subjective rights guaranteed to individuals by the EU legal order, one can find the right to interpretation and translation (DIR 2010/64/EU), right to information in criminal proceedings (DIR 2012/13/EU), access to a lawyer (DIR 2013/48/EU), presumption of innocence (DIR 2016/343), children's rights in criminal proceedings (DIR 2016/800) or right to legal aid (DIR 2016/1919).

	Directive No.	Subject Area	Transposition Deadline	Report
	<i>FWD 2002/584/JHA</i>	<i>European Arrest Warrant</i>	<i>31 Dec 2003</i>	<i>31 Dec 2004</i>
1	DIR 2010/64/EU	interpretation & translation	27 Oct 2013	27 Oct 2014
2	DIR 2012/13/EU	information in crim. proc.	2 Jun 2014	2 Jun 2015
3	DIR 2013/48/EU	access to a lawyer	27 Nov 2016	28 Nov 2019
4	DIR (EU) 2016/343	presumption of innocence	1 Apr 2018	1 Apr 2021
5	DIR (EU) 2016/800	children's rights	11 Jun 2019	11 Jun 2022
6	DIR (EU) 2016/1919	legal aid	25 May 2019	25 May 2022

Before commenting on the individual directives, with emphasis on the third and fourth directive, we will first introduce the standards established in the case law of the European Court of Human Rights, since the Court's interpretation of Article 6 of the Convention has undoubtedly inspired the content of the abovementioned EU directives.

European Court of Human Rights (ECHR) Standards as Basis for European Union Directives

The European Convention on Human Rights⁵ was adopted on 4 November 1950 (entered into force on 3 September 1953) and represents an international agreement of the Council of Europe that binds its members to ensure protection of fundamental civil and political rights and freedoms on their territory. In respect to the Republic of Croatia, the Convention came into force on 5 November 1997; the Czech and Slovak Federal Republic signed the Convention on 21 February 1991, and the Convention entered into force on its territory on 18 March 1992. After the dissolution of Czechoslovakia, both succession states immediately became parties to the Convention and have been legally bound by it from 1 January 1993 until the present day.

⁵ The full text of the Convention can be found online at https://www.echr.coe.int/Documents/Convention_ENG.pdf

Apart from proclaiming the fundamental human rights and freedoms, the Convention has also set up mechanisms to examine potential violations of those rights. The Strasbourg-based European Court for Human Rights (hereinafter 'ECtHR' or 'Court') was established in 1959. The Court acts on the basis of individual applications to consider whether the state against which the application was lodged complied with the rights enshrined in the Convention. On 1 November 1998, the ECtHR became a permanent institution entrusted with protection of human rights in Europe (Protocol 11).

By interpreting the Convention in its case law, the Court considers it a "living instrument",⁶ keeping it up to date contemporarily, notwithstanding the unchanged nature of its text. The ECtHR thus guarantees protection of human rights and fundamental freedoms in line with the challenges posed by the modern times and the necessary level of protection. In addition, when introducing new rights, the Convention Protocols may also be perceived as a form of further developing the Convention text itself.

According to the figures, the majority of violations found by the ECtHR concerned the rights guaranteed by Article 6 of the Convention, i.e. the right to a fair trial.⁷

European Convention on Human Rights
(Council of Europe, 1950)

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 6, paragraph 1 of the Convention makes explicit reference to the right to a fair trial and, as such, covers the following safeguards: right of access to an independent and impartial tribunal established by law, right to a public hearing and right to trial within a reasonable time. This core principle of criminal proceedings includes the defendant's right to be presumed innocent (paragraph 2) and specific minimum defence rights (paragraph 3).

With respect to the right to a fair trial, general elements of the fair proceedings applicable to all parties in all court proceedings shall be applied: **a)** the adversarial principle, i.e. the parties' rights to be present during all procedural actions and to express their position before the decision is made, as well as the confrontational clause (the defendants' right to examine the witnesses against him or her at least once), **b)** the principle of equality of arms, **c)** the right to a reasoned judgement and the ban of use of unlawful evidence.

⁶ See *Tyler v United Kingdom* (1978) 2 EHRR 1.

⁷ See 'Overview ECHR 1959-2017'. Strasbourg: European Court of Human Rights, 2018, available online at https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf

By rendering judgements, the ECtHR has tried to harmonise national procedural rules. By encouraging member states to introduce the necessary changes, the Court has endeavoured to build trust among member states by regulating fundamental rights of the defence and harmonised legal standards. On the other hand, this process takes time, especially because ECtHR judgements leave a certain amount of leeway to member states. Also, the supervision of execution of judgements has not been effective enough because it failed to force the states to raise the guarantees of rights to the satisfactory level. This has brought about the initiative to regulate minimum rights of the defence through EU directives.

EU directives are expected to bring about higher levels of harmonisation than ECtHR case law since the member states are given a transposition deadline after which the provisions of the directives become directly applicable, on condition that they clearly confer rights on individuals and that they are applied in vertical relationships, i.e. against the state.⁸ Upon the fulfilment of the three conditions (vertical relationship, past transposition deadline, conferring rights on individuals), all the bodies taking part in the criminal proceedings must apply the directives directly, even if they have not been transposed into the national legal order. When appearing before these bodies, each individual is entitled to refer to the rights enshrined by the relevant directive. Such a mechanism should ensure effective exercise of rights of individuals.

**Preamble to Directive 2013/48/EU
on the right of access to a lawyer in criminal proceedings**

(5) Although the Member States are party to the ECHR and to the ICCPR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(6) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied. Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR.

(7) Article 82(2) TFEU provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers to 'the rights of individuals in criminal procedure' as one of the areas in which minimum rules may be established.

(8) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. [...]

⁸ These conditions have been defined in the well-established case law of the European Court of Justice; see for example Case 41/74 *Van Duyn* [1974] or Case 148/78 *Ratti* [1979].

Each of the EU directives analysed in the text below aims to ensure the exercise of common minimum rights. The term “minimum” is used as these rights represent a threshold or a minimum of safeguards in terms of defendants’ rights in a dispute against the state that must not be lowered so as not to put in question the balance between the defendant and the law enforcement bodies. These minimum legal standards should be interpreted and applied in member states’ different legal systems in a harmonised manner.

In their recitals, these directives always emphasise that they amount to **minimum harmonisation**, i.e. that the member states may extend the rights set out therein in order to provide to individuals a higher level of protection. It does not work the other way, though: the level of protection may not be lower, and may certainly not fall below the standards laid down in the Convention. Directives governing standards of criminal procedure are mostly based on the case-law of the ECtHR. In addition, these directives’ recitals explicitly state that the provisions of these directives that correspond to rights guaranteed by the Convention should be interpreted and implemented consistently with the case-law of the ECtHR. This also corresponds to Article 53 of the Charter of Fundamental Rights of the European Union.

**Preamble to Directive 2013/48/EU
on the right of access to a lawyer in criminal proceedings**

(53) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case-law of the European Court of Human Rights.

(54) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights.

**Charter of Fundamental Rights of the European Union
Article 53
Level of protection**

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

The scope of the Directives: 'criminal proceedings'

The Directives analysed below apply to “suspects” and “defendants” in “criminal proceedings”. However, it is noteworthy that the Directives do not define these notions. Formally speaking, the term “defendant” has different meanings in different national legal systems. In the ECtHR case-law, the terms “suspect” and “defendant” within their substantial meanings, as well as the accompanying rights, are defined by the term “accusation” within the meaning of the Convention and the relevant deadline.

The ECtHR interprets the term “criminal charge” (Article 6 of the Convention) as the expression with autonomous meaning, independent of the categorisations employed by the national legal systems of the member states (*Adolf v. Austria*, § 30). That being said, the term “criminal charge” should be interpreted in line with the interpretation provided by the ECtHR case law. The Convention does not make reference to the term “criminal proceedings”, but instead uses the term “charged with a criminal offence” within the meaning of rights of persons charged with a criminal offence.

In its decisions, the ECtHR has defined the term “charge” in the following way: “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” and any act if “the situation of the suspect has been substantially affected”, regardless of the formal charges (*Deweert v. Belgium*, 6903/75, 27 February 1980, §§ 42 and 46.; *Eckle v. Germany*, § 73; *Brusco v. France*, §§ 46-50). A person is charged if he and his conduct are subject to criminal proceedings (*Imbrioscia v. Switzerland*, 13972/88, 24 November 1993).

These interpretations gave way to implementation of Article 6 of the Convention in the pre-trial stages of the proceedings, so the ECtHR held that safeguards set out in this Article also applied to pre-trial stages and that rights of suspects and defendants under Article 6 had to be guaranteed even during the preliminary stages of police examination (*Foti and others v. Italy*, 7604/76, 7719/76, 7781/77 and 7913/77, 10 December 1982; *Salduz v. Turkey* 36391/02, 27 November 2008, § 50). These conclusions served as a basis for the concept of “criminal proceedings” used in the Directives. In other words, the Directives apply not only to arrested persons or detainees, but also, in the case of a suspect who has not yet been arrested or detained, to early stages of the proceedings (see below).

In this respect, it should be pointed out that national legal systems of each member state reserve the discretionary right to provide for the relevant criminal proceedings or other types of proceedings for certain forms of conduct, but when exercising these duties the competent national authorities may not unjustly rule out the Convention’s effect. There are numerous cases involving proceedings that were not considered indicative of a “criminal” charge, although they included certain issues regarding possible elements of criminal proceedings. The common feature of all of these cases is that they exclude the elements that make up a criminal offence described by the ECHR as a “customary distinguishing feature of criminal penalties” (*Öztürk v. Germany*, § 49).

If the penalty has a punitive and deterrent purpose, the proceedings will probably be considered “criminal” in light of the Convention. In case of sufficiently severe penalties (long imprisonment), Article 6 of the Convention shall apply as if referring to “criminal” proceedings, irrespective of the definition of the relevant proceedings in the member states’ national legal systems. The ECtHR has found that three criteria should be taken into account when assessing whether a person is subject to a criminal charge: 1/ classification in domestic law, 2/ the nature of the offence, and 3/ the severity of the penalty that the person concerned risks incurring (*Engels v Netherlands* (1979-80) §§ 82-83).

In line with the ECtHR case-law, provisions of Article 6 of the Convention may also apply to certain administrative proceedings (administrative, disciplinary, tax, customs): road-traffic offences punishable by fines or restrictions (*Lutz v. Germany*, *Schmutzer v. Austria*; *Malige v. France*); offences against social security legislation (*Hüseyin Turan v. Turkey*), etc.

1. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [\(link\)](#)

The first of the six EU directives was adopted with the aim to lay down rules concerning the right to interpretation and translation in criminal proceedings, as well as proceedings for the execution of a European arrest warrant (see Article 1 of the Directive). It is interesting to note that the EU has guaranteed these rights not only in proceedings that concern the European arrest warrant, but in **all criminal proceedings** on the territory of the Union, including purely internal cases.

As for the delimitation of the beginning and the end of ‘criminal proceedings’, the Directive provides the following:

Article 1

(2) The right [to interpretation and translation] shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

The Directive provides for two separate rights: the right to interpretation (Article 2) and the right to translation of essential documents (Article 3). As for the notion of ‘essential documents’, these shall include any decision depriving a person of his or her liberty, any charge or indictment, and any judgment (Article 3(2)). It is for the competent authorities of the Member States to decide whether any other document is essential (Article 3(3)). The costs of interpretation and translation shall be covered by the Member States, irrespective of the outcome of the proceedings (Article 4).

<p style="text-align: center;">Article 2 Right to interpretation</p>	<p style="text-align: center;">Article 3 Right to translation of essential documents</p>
<p><i>(1) Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.</i></p>	<p><i>(1) Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.</i></p>

As has been stated above, the Directive establishes minimum standards. Therefore, if the Convention, the EU Charter, or any other instrument of international or national law provides a higher level of protection, the Directive shall not limit or derogate from any of the rights and procedural safeguards ensured therein (Article 8).

2. Directive 2012/13/EU on the right to information in criminal proceedings [\(link\)](#)

The objective of this Directive is to establish common minimum rights of defence applicable in terms of information about individuals' rights and accusations against persons suspected or accused of having committed a criminal offence.

<p style="text-align: center;">Article 1</p>
<p><i>This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.</i></p>

In other words, the Directive applies both to suspects and defendants and guarantees them the right to information about their procedural rights (Articles 3 to 5) and about the accusation (Article 6). The right of access to the case file represents a special element of the defendant's right to information about the accusation (Article 7).

The right to information on the nature and cause of the accusation represents one of the minimum rights of the defence laid out in Article 6, paragraph 3 of the Convention. In that sense, in its case-law, the ECtHR has interpreted that right in the light of the right to a fair trial guaranteed by Article 6, paragraph 1 of the Convention (*Sejdovic v. Italy*, 56581/00, 1 March

2006) or the right to have adequate time and the facilities for the preparation of defence set out in Article 6, paragraph 3, point (b) of the Convention (*Dallos v. Hungary*, 29082/95, 1 March 2001).

In that respect, special attention has to be paid to the right to information. The rights of the defence play an important role in criminal proceedings from the moment that the defendant is formally notified that he has been charged with a criminal offence by stating the factual and legal basis of the charges against him (*Kamasinski v. Austria*, § 79; *Pélissier and Sassi v. France*, § 51). The ECtHR has found that the right enshrined in Article 6 imposes an obligation to inform the suspect or defendant not only of the cause of the accusation, that is, the material facts alleged against him which serve as the basis of the accusation, but also of the nature of the accusation, namely, the legal qualification of these material facts (*Mattochia v. Italy*, § 59; *Penev v. Bulgaria*, §§ 33 and 42, 7 January 2010). The information need not necessarily mention the evidence on which the charge is based (*X. v. Belgium; Collozza and Rubinat v. Italy*).⁹

Furthermore, the ECtHR has found that the responsibility to inform the suspect or defendant rests entirely with the prosecution. This obligation may not be complied with by making information available without bringing it to the attention of the defence (*Mattochia v. Italy*, 23969/94, 25 July 2000, *Chichlian and Ekindjian v. France*, § 71). In terms of vulnerable defendants, the national authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him (in case of persons with mental difficulties *Vaudelle v. France*, 35683/97, 30 January 2001, § 65).

In respect to the provision of information to suspects or defendants, the term “promptly” has been used in the Directive. The ECtHR has found that the information must be submitted to the accused in adequate time for the preparation of his defence. This principle points out the purpose of Article 6, paragraph 3 of the Convention (*C. v. Italy* (dec.)).¹⁰

Article 3

(1) Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- a) the right of access to a lawyer;
- b) any entitlement to free legal advice and the conditions for obtaining such advice;
- c) the right to be informed of the accusation, in accordance with Article 6 [of the Directive];

⁹ In its case-law, the ECtHR has not developed binding standards regarding the method in which the national authorities should inform the suspect or defendant about the nature and cause of the accusation. (*Pélissier and Sassi v. France*, 25444/94, 25 March 1999, § 53, *Drassich v. Italy*, § 34; *Giosakis v. Greece*, § 29). For this reason, the Directive provides the indicative Letter of Rights as a model only (recital, point 22, attached as an Annex).

¹⁰ Four months before the trial is deemed acceptable. On the other hand (judgement in the *Borisova v. Bulgaria* case, §§ 43-45), the ECtHR has found that it was not acceptable to afford the suspect with only a couple of hours to prepare her defence and not to provide her with an opportunity to be defended by a lawyer.

- d) *the right to interpretation and translation;*
- e) *the right to remain silent.*

(2) *Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.*

As for the form in which this information should be communicated to the suspect or defendant, the Directive requires that the Member States provide a written Letter of Rights drafted in simple and accessible language, and that the suspect/defendant is allowed to read this letter and to keep it in their possession throughout the time that they are deprived of liberty (Article 4). This letter should also contain information about the right of access to the materials of the case, the right to have consular authorities and one person informed, the right of access to urgent medical assistance, and the maximum number of hours/days suspects or accused persons may be deprived of liberty before being brought before a judicial authority. In addition to the information about rights, Member States are also obliged by the directive to provide the suspect or defendant with information about the accusation, i.e. about the criminal act they are suspected or accused of having committed (Article 6). Furthermore, Member States shall also ensure that arrested persons (or their lawyers) have access to documents related to the specific case that is essential to effectively challenging the lawfulness of the arrest or detention (Article 7).

In its case-law, the ECtHR has developed different standards regarding the suspect's or defendant's (or their lawyer's) right of access to the case file. The right depends on whether it applies to "any" suspect or defendant or a suspect or defendant deprived of liberty for the purpose of criminal proceedings. Deprivation of the right of access to the case file may lead to a breach of the principle of equality of arms (*Kuopila v. Finland*, § 38). In addition, equality of arms may also be breached if the suspect or defendant has limited access to his or her case file on the grounds of public interest (*Matyjek v. Poland*, § 65).

According to the jurisprudence of the European Commission on Human Rights, "the opportunity to prepare defence" laid down in Article 6, paragraph 3b of the Convention, also includes the defendant's "opportunity to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out". This is one of the aspects of the adversarial principle: to be able to react to the accusation, the defence must not only be acquainted with the accusation but must also be familiar with the grounds which serve as the basis of the accusation (*Guy Jaspers v. Belgium* (8404/78) para. 56; *Foucher v. France* § 27; *Jasper v. UK*, §§ 55-57 and *Rowe v. Davis v UK*, §§ 46-50). This right is often described as an element of "the equality of arms" principle. The section of the Directive titled "Right of access to the materials of the case" (Article 7) makes it clear that the ECtHR case-law served as a basis to provide solutions laid down in the Directive.

In the Annex, the Directive includes a model letter of rights which can assist national authorities in drawing up their Letter of Rights at a national level; Member States are obviously not bound to use this model.

3. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities [\(link\)](#)

This Directive sets minimum standards of the suspects' and defendants' rights in terms of three elements of the rights of the defence: 1) the right of access to a lawyer; 2) the right to have a third party informed upon deprivation of liberty; and 3) the right to communicate with third persons and with consular authorities during deprivation of liberty (see Article 1).

The Directive requires the authorities to ensure suspects and defendants the right of access to a lawyer who would enable effective exercise of that right. The rights of the defence may not be theoretical and illusionary but rather "practical and effective" (*Imbrioscia v. Switzerland*, 13972/88, 24 November 1993, § 38; *Salduz v. Turkey*, 36391/02, 27 November 2008, § 55). In ECtHR case-law, the right of access to a lawyer whilst in police custody during the police interrogation represents a key element of the rights set down in Article 6, paragraph 3, point c) of the Convention. The ECtHR has limited this right to the cases in which the interrogation of the arrested persons was performed by the police (*John Murray v. the United Kingdom*, § 63; *Öcalan v. Turkey* [GC], § 131; *Salduz v. Turkey* [GC], § 54; *Averill v. the United Kingdom*, § 59; *Brennan v. the United Kingdom*, § 45; *Dayanan v. Turkey*, § 31).

The first decision of this kind was adopted in the *Salduz v. Turkey* case, so the new interpretation of Article 6, paragraph 3 (c) of the Convention, reiterated in a number of subsequent decision, is also called the "*Salduz doctrine*". According to the *Salduz doctrine*, in order for the right to a fair trial under Article 6, paragraph 1 to remain sufficiently "practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated, in light of the particular circumstances of each case, that there are *compelling reasons* to restrict this right.¹¹ Even when compelling reasons might exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 of the Convention. The rights of the defence would in principle be irretrievably prejudiced when incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction.

In another important judgement, the ECtHR found violation of Article 6 of the Convention because the suspect was deprived of access to a lawyer during the police interrogation even though he had remained silent and had not presented any evidence to the police (*Dayanan v. Turkey*, 7377/03, 13 October 2009, § 32). When reasoning its decision, apart from referring to the right of access to a lawyer, the ECtHR also made reference to the equality of arms principle.

¹¹ Neither in the *Salduz v. Turkey* case, nor in its post-*Salduz* jurisprudence, the ECtHR did not determine what constituted "very compelling reasons" that might lead to restriction of access to a lawyer in police custody. In effect, the issue regarding the criteria for potential restrictions of the right to a lawyer still remains unresolved.

Two other cases, *Mader* and *Šebalj* stand out as examples of ECtHR judgements in which the ECtHR made it clear that the *Salduz* doctrine required the suspect to be permitted to have a lawyer present both before and during police interrogation (*Mader v. Croatia*, 56185/07, 21 June 2011; *Šebalj v. Croatia*, 4429/09, 28 June 2011).

On the other hand, the ECtHR standard reached by application of the *Salduz* doctrine was subsequently lowered in two recent judgements in the *Ibrahim and others v. the United Kingdom* case, 50541/08, 50571/08, 50573/08 9 40351/09., 13 September 2016, and, in particular, in the *Simeonovi v. Bulgaria* case 21980/04, 12 May 2017.

In its judgement in the *Ibrahim and others v. the United Kingdom* case, the ECtHR examined the conditions that justify restrictions of access to a lawyer in police custody. The ECtHR has set the criteria to impose temporary restrictions on the right of access to a lawyer from the first police interrogation (although, only in exceptional circumstances and if temporary in nature, on the basis of an individual assessment of the particular circumstances of the case and in accordance with domestic law), provided that, despite the restrictions, the fairness of the proceedings as a whole was respected. In effect, this has opened up the possibility to restrict the right of access to a lawyer even in situations when no justified reasons have been found.

In its judgement in the *Simeonovi v. Bulgaria* case, the ECtHR went a step further. Although it did not find “very compelling reasons” that could justify restriction of access to a lawyer (denied in police custody), it carried out a “very stringent assessment” of the overall fairness of the proceedings. The ECtHR found that, due to the fact that the absence of a lawyer during the defendant’s time in police custody in no way prejudiced his right against self-incrimination, no violation of the fairness of criminal proceedings, considered as a whole, as guaranteed by Article 6 of the Convention was found.

The Directive is in line with the ECtHR case-law. For situations in which statements made by suspects or accused persons were obtained in breach of their right to a lawyer, it requires that the rights of the defence and the fairness of the proceedings as a whole are respected.

Article 3

(1) Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

(3) The right of access to a lawyer shall entail the following:

- a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
- b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned [...];

- c) *Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:*
- i. identity parades*
 - ii. confrontations*
 - iii. reconstructions of the scene of a crime.*

The ECtHR considered that defendant's right of access to a lawyer during any type of interrogation, including police questioning, amounted to a minimum safeguard, irrespective of whether he was deprived of liberty because deprivation of liberty in itself represented special grounds for exercise of the right of access to a lawyer. In that respect, the definition of police questioning laid down in domestic law or the conditions under which the results of such questioning may be used as evidence were irrelevant. So, the notion of interrogation (questioning) should be interpreted within its substantial meaning, analogous to terms "accusation" and "suspect". The Directive should be interpreted in the same way.

The Directive does not allow for any restrictions in terms of the right to confidentiality of communication. In line with the ECtHR case law, communication between a defendant and his lawyer is always confidential (*Bonzi v. Switzerland* (dec); *Can v. Austria*, § 52).

Article 4 Confidentiality

Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

Furthermore, in line with the ECtHR jurisprudence, the Directive allows for waiver of the right of access to a lawyer. A waiver may be explicit or tacit. Either way, it must be given voluntarily, established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition to the criterion regarding the voluntary nature of a waiver, it can only be valid if the consequences of the decision to waive could be foreseen by the suspect (*Pischalnikov v. Russia*, 7025/04, 24 September 2009, § 76).

In other words, in accordance with ECtHR case law, the waiver has to be based on a free will of the suspected or accused person "...established in unambiguous manner and accompanied by minimum guarantees proportional to its importance" (*Mader v. Croatia*).

In modern criminal proceedings, the templates are increasingly used. This requires more attention in assessing the validity of waiving of the right to access to lawyer, because “...printed X next to “no lawyer sought” on applicant’s statement form does not show validly waiving her right to a lawyer during custody. Moreover, as soon as she had access to a lawyer, she had retracted previous statement. Turkish courts had neither examined the validity of the waiver nor the statements she had made to the police in absence of lawyer. The lack of scrutiny had not been remedied by other procedural safeguards” (Ardaq v. Turkey).

After the defendant had been acquitted of the charges and, consequently, lost “victim status”, the application is inadmissible (Bouglame v. Belgium).

The defendant is entitled to free legal aid if he doesn't have sufficient funds to pay for it and in that purpose only burden of accused person is to show lack sufficient means to pay on level of indications. In that context sometimes the statement of defendant will suffice (Pakelli v. Germany). But, the interest of justice, as question of the fact in concrete case, must exist, too. Case Benham v. The Great Britain gives orientation criteria (deprivation of liberty, complexity of case, severity of penalty).

Article 9 Waiver

(1) Without prejudice to national law [...], Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10;

- a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and*
- b) the waiver is given voluntarily and unequivocally.*

Just like in the case of the previously discussed directives, this Directive also includes a non-regression clause (Article 14), which stipulates that any standards that provide a higher level of protection should be given preference over the provisions of the Directive.

4. Directive (EU) 2016/343 on strengthening certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [\(link\)](#)

Correct interpretation of the content and scope of presumption of a defendant’s innocence is extremely important in EU law; this principle is also recognised at the level of primary EU law, in Article 48 of the EU Charter.¹²

¹² The Charter became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. The presumption of innocence as interpreted in the Charter has the same definition and scope as the presumption of innocence guaranteed by Article 6, paragraph 2 of the Convention.

Article 48 of the EU Charter

- (1) Everyone who has been charged shall be presumed innocent until proven guilty according to law.*
- (2) Respect for the rights of the defence of anyone who has been charged shall be guaranteed.*

In April 2006, the European Commission published a Green Paper on the presumption of innocence; the purpose of this document was to establish potential common minimum legal standards shared among Member States in terms of defendants' presumption of innocence. This issue was analysed through the basic elements that constitute the presumption of innocence, namely: pre-trial pronouncement of guilt, ban on pre-trial detention (justifiable in exceptional circumstances only and only if the presumption of innocence is respected), the burden of proof being on the prosecution, the right of silence, the privilege against self-incrimination, the right to be present at the trial and justification of application of counter-terrorism measures in case of acts of terrorism.

The objective of this Directive is to lay down common minimum rules concerning certain aspects of suspects' or accused persons' rights to be presumed innocent until proven guilty in accordance with the final court decision, as well as their right to be present at the trial in criminal proceedings (Article 1). The Directive strives to impose the respect of presumption of innocence even before the person is made aware by the competent authorities, that he or she is suspected or accused of having committed a criminal offence and extend its application until the proceedings are completed / the final decision is taken (*Wemhoff v. Germany*, 21229/64, 27 June 1968).

Article 4 Public references to guilt

- (1) Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.*

Recital 17 of the Directive defines the term "public statement made by public authorities" as "any statement which refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials, it being understood that this is without prejudice to national law regarding immunity". In line with the ECtHR case-law, it also includes

statements about other, related proceedings that were concluded by acquitting the suspect or accused person, as well as court statements made before a person has been tried (*Allet de Ribemont v. France* 15175/89, 10 February 1995; *Daktaras v. Lithuania* 42095/98, 10 October 2010, §§ 41-42).

In several of its judgements, the ECtHR has established the context and scope of pre-trial pronouncement of guilt. According to the ECtHR, one of the key aspects of the presumption of innocence is the fact that a court or state official may not reflect an opinion that suspects or accused persons are guilty before being put on trial or if they have not been proved guilty in accordance with the final decision (*Minelli v. Switzerland*, 8660/79 of 25 March 1983).

The breach of the presumption of innocence with respect to pre-trial pronouncement of guilt also covers court decisions made during the pre-trial stage, in particular decisions concerning detention on remand that refer to or assume the defendant's guilt (*Lavents v. Latvia* 58442/00, 28 November 2002, § 125-127; *Matijašević v. Serbia*, 23037/04, 19 September 2006, § 40, 47).

According to the ECtHR, the principle of presumption of innocence does not prevent the authorities from informing the public about criminal investigations in progress (*Allet de Ribemont v. France*, § 38, *Karakaş and Yeşilirmak v. Turkey* 43925/985, 28 June 2005), but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (*Fatullayev v. Azerbaijan* 40984/07, 22 April 2010), § 159; *Allet de Ribemont v. France*, § 38; *Garycki v. Poland*, § 69).¹³

The definition of "public authorities" that may give a statement, provided in Recital 17 of the Directive, expands the scope of the presumption of defendant's innocence, covering all state officials, irrespective of public duties they perform. The ECHR case-law represents the basis for this interpretation, since it explicitly points out that other public authorities may, in their statements, breach the presumption of innocence (*Peša v. Croatia*, 40523/08, 8 April 2010).

In terms of what constitutes the presumption of innocence, the Directive relies on the ECHR case-law that established what constituted the term on a case-by-case basis. In that respect, the Directive addresses four important elements: pre-trial pronouncement of guilt, the burden of proof and required standard of proof, the right not to incriminate oneself and to refuse cooperation and right of silence.

¹³ The image of the accused person wearing a prison uniform had a sufficiently powerful effect to convince the public that he was guilty so the ECtHR found the violation of the defendant's presumption of innocence (*Samoila and Cionca v. Romania*, 33065/03, 4 March 2008, § 99-100).

<p style="text-align: center;">Article 5 Presentation of suspects and accused persons</p>	<p style="text-align: center;">Article 6 Burden of proof</p>	<p style="text-align: center;">Article 7 Right to remain silent and right not to incriminate oneself</p>
<p><i>(1) Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.</i></p>	<p><i>(1) Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.</i></p>	<p><i>(1) Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.</i></p> <p><i>(2) Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.</i></p>

A rule that the burden of proof for establishing guilt falls on the prosecution, as enshrined in the Directive, is common to all modern criminal proceedings, both in the Anglo-American and Continental European legal systems. Apart from the fact that the burden of proof lies with the prosecution, any doubt should benefit the suspect or accused person. It is for the prosecution to inform the accused of the accusation against them, so that they may prepare and present their defence accordingly (*Barberà, Messegué and Jabardo v. Spain*, § 77; *Janosevic v. Sweden*, § 97). The presumption of innocence shall be infringed where the burden of proof is shifted from the prosecution to the defence (*Telfner v. Austria*, § 15).

The burden of proof may be exceptionally shifted to the defendant, but in those situations the national legislator is required to find a right balance of importance of what is at stake and the rights of the defence. In other words, used means have to be reasonably proportionate to the legitimate aim seek to be achieved (principle of proportionality).

The Convention does not specifically set out the privilege against self-incrimination, but the ECHR has derived it from the principle of the right to a fair trial, under Article 6, paragraphs 1 and 2 of the Convention. The ECHR established the basic elements of the privilege against self-incrimination in *Funke v. France*, 10828/84, 25 February 1993, followed by *Saunders v. United Kingdom case*, 19187/91, 17 December 1996, § 68.

The right to silence and the privilege against self-incrimination are generally recognised international standards. The privilege against self-incrimination relies on the defendant's right to refuse to give a statement, i.e. not to present his defence, refuse to answer questions or to exercise his right to remain silent. The right not to be forced to give testimony against himself or admit guilt, as well as the right not to cooperate and the right to silence lie at the heart of the notion of a fair trial under Article 6 of the Convention (although not specifically mentioned in the Convention, they have been recognized in the ECHR jurisprudence) - *Heaney and McGuinness v. Ireland*, 34720/97, 21 December 2000, *Jalloh v. Germany*, 54810/00, 11 July 2006). In this case too, the Directive relies on the interpretation provided by the ECHR.

The ECtHR case law recognises some situations that don't represent violation of privilege against self-incrimination, such as material obtained from accused person, which has an existence independently of the will of the accused (e.g. blood or urine samples, bodily tissue for DNA testing).

It is important, in regard of respecting the presumption of innocence, to select words and expression, especially in court decision, other than those on guilt. In that order, "a fundamental distinction must be made between a statement that someone is merely suspect of having committed a crime and clear declaration, in the absence of a final conviction, that an individual has committed a crime in question..." (Peša v. Croatia). This also applies to the situation in which accused person was ultimately had been found quilt (Matijašević v. Serbia, § 49).

Article 8 Right to be present at the trial

(1) Member States shall ensure that suspects and accused persons have the right to be present at their trial.

(2) Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that

- a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or*
- b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. [...]*

The adversarial principle is presented in Chapter 3 of the Directive. It denotes the opportunity for the parties to be present during all procedural actions and express their position before the decision is made. In criminal proceedings, Article 6, paragraph 1 of the Convention often corresponds to the right to the defence enshrined in Article 6, paragraph 3 of the Convention (for example, right to examine witnesses).

The confrontational clause (defendants' right to examine witnesses against them at least once) covers not only witnesses, but also documents or all evidence presented by the prosecution. In that sense, the term "witness" has an autonomous (independent) meaning, regardless of classifications under member states' national laws (*Damir Sibgatullin v. Russia*, § 45; *S. N. v. Sweden*, § 45). In other words, the term "prosecution witness" covers all testimonies given by all persons (i.e. all evidence) against the defendant, including the co-defendant (*Isgro v. Italy*, 19 February 1991, 11339/85, *Vidal v. Belgium*, 22 April 1992, 12351/86, *Luca v. Italy*, 27 February 2001, 33354/96, *Mathisen v. Norway*, 9 November 2006, 18885/04 and 21166/04, , *Trofimov v. Russia*, § 37), victim (*Vladimir Romanov v. Russia*, § 97), expert witness (*Doorson v. the Netherlands*, §§ 81-82) and documentary evidence (*Mirilashvili v. Russia*, §§ 158-159). Exceptions to this must not infringe the rights of the defence (*Hümmer v. Germany*, § 38; *Lucà v. Italy*, § 39; *Solakov v. the Former Yugoslav Republic of Macedonia*, § 57).

The confrontational standard has been lowered in recent ECHR case-law with the *Schatschaschwili v. Germany* case, 9154/10, 15 December 2015. According to this judgement, followed by judgements in the *Seton v. United Kingdom* case, 55287/10, 31 March 2016, each situation calls for a test assessing whether the fairness of the proceedings as a whole was respected. Therefore, according to these decisions, if the proceedings as a whole are considered fair, a conviction could be based on a non-confronted (untested) statement given by a witness.

CONCLUSIONS

The legal instruments analysed above stem from the ECHR case law. In terms of their application, each legal instrument points out that interpretation of the right to a fair trial should be taken into consideration in accordance with the ECHR's established case law. On the other hand, this seems to be the case with interpretations provided before the standards were lowered (partial abandonment of the *Salduz* doctrine and lowering of the confrontational standard).

The analysed Directives apply from the earliest stages of criminal proceedings, in substantial meaning of the term, until the completion of the proceedings, including the subsequent remedies. The elements of the principle of fairness under Article 6 of the Convention are present in each of the analysed Directives. This applies to the elements specifically mentioned in the Convention or those stemming from the ECHR case-law, such as the defendant's right to be present at the hearing in the criminal proceedings – the principle of immediacy, the privilege against self-incrimination, the right to adversarial proceedings, the right to a reasoned decision, the right to legal assistance and the confrontational clause.

Some of the measures set out by the Directives do not individually meet the desired objective. Rather, the cumulative effect of the measures and directives aims to ensure that the right to a fair trial is guaranteed.

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