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DEVELOPMENTS OF CERTAIN EU FAIR TRIAL MEASURES AS PART OF THE STOCKHOLM PROGRAMME

Abstract: *The principal of mutual recognition in criminal cases is present in EU criminal law since the Framework Decision on the European Evidence Warrant was accepted in 2008. Although the instrument failed to achieve its purpose, the goal of harmonizing cross-border criminal investigations still remains. For the European Investigation Order to succeed a minimum rules in guarantees of fair trials are needed. The European Union recognized this need and the Stockholm Programme was launched in 2009 aiming to realize that. Directives regarding certain suspect rights were accepted since then, including a directive on the right to information and the presumption of innocence. The minimum rules regarding these suspect rights can have a serious impact on national criminal justice systems and their implementation will result in a more harmonised criminal law. These documents were drafted in accordance with the ECHR and the relevant case law of the ECtHR which promises a more enhanced integration of the two major European systems of legislation.*

Keywords: *fair trial measures, Stockholm Programme, the right to information, the presumption of innocence.*

Criminal law became the most rapidly developing area of EU cooperation since the Lisbon Treaty, which abolished the highly ineffective third pillar, came

into effect in December 2009.[1] As the result of complex institutional changes, mainly the introduction of co-decision procedure, the ratification of the Treaty brought more significant changes to the area of criminal cooperation than to any other areas.[2] Several policy and legislative changes were needed to properly address the new situation of the post-Lisbon Treaty era.

On a political level the Council of the European Union drafted a Roadmap set out to strengthen the rights of suspects and accused persons throughout the EU in November 2009.[3] In December the European Council accepted the Stockholm Programme, which was the third multiannual programme on the European Union's Area of Freedom, Security and Justice (AFSJ) and incorporated the Roadmap as a part of the new programme. It was meant to highlight the priorities for the EU institutions on AFSJ cooperation between 2009 and 2014.[4] In April 2010 an Action Plan to implement the changes was released by the Commission in the form of a communication.[5] Amongst many things, one of the scopes of the designated period was to create a "Europe of rights" by providing better protection of fundamental rights of suspected and accused people. In June 2014, the Stockholm Programme was joined by a set of strategic guidelines.[6]

Although the significance of EU criminal law in the post-Lisbon system improved greatly, legislation in the area must be made very cautiously. All member states view criminal law as "the last bastion of their sovereignty" which results in a very slow-paced harmonization process. One of the solutions for this problem is to find the similarities in the national legislations and create minimum rules based on that.

The Stockholm Programme decided that EU should accept minimum rules in the area of suspect's rights. As part of this process five Directives were accepted regarding different measures. These were the Translation and Interpretation Directive (measure A), the Right to Information Directive (measure B), the Access to a Lawyer Directive (measure C1), the Presumption of Innocence Directive

[1] Damian Chalmers – Gareth Davies – Giorgio Motti: *EU Criminal Law*. New York: Cambridge University Press, 2014. p. 583.

[2] Steve Peers: *EU Justice and Home Affairs Law*. In: The Evolution of EU Law (ed. Paul Craig – Gráinne de Búrca). New York: Oxford University Press, 2011. p. 269.

[3] Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings, RESOLUTION OF THE COUNCIL, of 30 November 2009, (2009/C 295/01)

[4] Sergio Carrera – Elspeth Guild: *Does the Stockholm Programme matter? The Struggles over Ownership of AFSJ Multiannual Programming.* In: CEPS Papers in Liberty and Security in Europe. CEPS, 2012, ISBN 978-94-6138-253-5 https://www.ceps.eu/system/files/No%2051%20Carrera%20and%20Guild%20on%20Stockholm%20Programme.pdf [30.04.2017]

[5] European Commission, Communication, Delivering an area of freedom, security and justice for Europe's citizens: Action Plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20.4.2010.

[6] Conclusions – 26/27 June 2014, http://eujusticia.net/images/uploads/pdf/future-justice-2014-06-27-council-strategic-guidelines.pdf [30.04.2017.]

(measure C2) and lastly the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

In this paper we would like to focus on two of these EU legal instruments: the Right to Information Directive and the Presumption of Influence Directive. Our main goal is to determine how these affect the protection of the rights of suspects and their relationship with existing European fundamental rights protection measures (mainly the European Charter and the ECHR).

1. THE RIGHT TO INFORMATION IN DIRECTIVE (EU) 2012/13/EU

The Directive (EU) 2012/13/EU on right to information in criminal proceedings was the second legal instrument accepted as part of the Stockholm Progamme's agenda of better protection of suspected and accused people's procedural rights on 22 May 2012. It was to be transposed into domestic law by 2 June 2014.

This measure governs the suspect's right to be informed about his procedural rights, about the charges against him and to have access to the case file and materials in the case. The issue of the right to information has received less attention in case law and practitioner training than the previous Directive's scope of right to access to a lawyer, and the Right to Information Directive clarifies these important protections.

The Directive builds heavily on rights protected by Articles 6, 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). During the adoption of the Directive EU institutions relied heavily on the case law of the European Court of Human Rights (ECtHR), and therefor there is an opinion that its main function is to articulate those standards as codified norms.[7]

1.1. Main contents of the Directive

The right to information is considered to be a crucial aspect of the overall right to defend oneself. While authorities in some member states provide clear information to suspects about their rights whilst in police custody, others provide little or nothing at all.[8]

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[7] Libby McVeigh – Alex Tinsley: *Roadmap Practitioner Tools: Right to Information Directive*. p. 6.
https://www.fairtrials.org/wp-content/uploads/Right-to-Info-Toolkit-FINAL1.pdf [30. 04. 2017.]

[8] Jacqueline S. Hodgson: *Safeguarding Suspects' Rights in Europe A Comparative Perspective*. New Criminal Law Review: An International and Interdisciplinary Journal, Vol. 14, No. 4 (Fall 2011), p. 649.

Many other problems were identified by professionals regarding right to information in the past few years. Notifications of procedural rights are often written in a very technical language with excessive use of legal terminology which can prove too difficult to be understood by many accused persons. The notification regarding right to silence is often worded in a manner to make it sound unattractive and is some cases draws attention to negative consequences of invoking them. In many cases the suspects are first questioned as a witness and therefore not informed of their rights. Lastly these can result in a waiver of rights without the suspect's proper understanding of the decision's consequences and can seriously harm the fairness of trial.[9]

It must also be noted that before the Directive was drafted, many aspects of the right to information was not established by national laws. For instance the right to remain silent was not statutory in France and Belgium, while the right to have access to the file was not provided for on behalf of the suspect in legislation in Estonia, France, Germany and Spain.[10]

Article 1: Subject

This Article lays down minimum rules concerning the right to information of suspects and accused persons in relation to their rights in criminal proceedings and to the accusation against them. These rules also apply to persons who are subject to a European Arrest Warrant.

Article 2: Scope

The rules specified in the Directive must be applied in criminal proceedings from the time when a person is made aware of the competent authorities that he is suspected or accused of having committed a criminal offence until the conclusion of the proceeding. The Article defines the conclusion as the determination of guilt and also sentencing and the resolution of any appeal. As stated in Recital 16 states, the Directive should be applied to every suspected and accused person irrespective of their legal status, citizenship or nationality.

In member states where minor offences are sanctioned administratively, such as in case of large scale traffic offenses, and only the appeal takes place before a court, the Article provides that the Directive should only be applied to the proceedings before the court.

The ECtHR found it a violation of Chapter 6 of ECHR to hear a person as a witness when objectively they are suspected to be involved in committing the crime because in this case an incriminating statement can be produced without the person being informed about their rights (*Brusco v. France*, App. no. 1466/07

[9] *Ibid*. p. 14.

[10] Laurens van Puyenbroeck and Gert Vermeulen: *Toward Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU*. The International and Comparative Law Quarterly, Vol. 60, No. 4 (October 2011) p. 1032.

(Judgment of 14 October 2010). Although the Directive fails to address this situation and Recitals 19 and 28 make it clear that it is intended to be applied "at the latest before their first official interview by the police or another competent authority" as other authors state, the Directive is to be interpreted in line with the ECHR.[11] This is also enforced by the non-regression clause stated in Article 10.

Article 3: Right to information about rights

Article 6 (1) and (3)c of the ECHR protects the suspected people's right to silence and legal assistance and in many cases the ECtHR ruled in its judgments that proper information should be provided for these persons regarding their procedural rights. In Aleksandr Zaichenko v. Russia (Judgment of 18 February 2010) the ECtHR ruled that "charge" may be described as official notification of an individual by the competent authority that they have allegedly committed a criminal offence. The case law of the Court also gives protection in cases when the person is not formally accused but is first questioned as a witness by the authorities despite their suspicions.[12]

If the suspects can't invoke their rights due to lack of information by competent national authorities, the criminal proceeding against them can't be seen as fair. In one case, the Court addressed that a waiver of right can be accepted if it is made voluntarily but it is also required to be a "knowing and intelligent relinquishment of a right" (*Saman v. Turkey*, App. no. 35292/05 (Judgment of 5 April 2011), para. 32.).

However if the waiver is a result of lacking information of the suspect, it can't be seen as effective. The factors that have to be taken in account when deciding that such conduct is a breach of fairness or not, can vary greatly. Some of the criteria in the current ECtHR case law is objective, while others are subjective.[13] It is important that the caution be given in a language that the suspect understands (*Saman v. Turkey*, para. 35). The circumstances of the caution must also be taken in account when deciding the effectiveness of a relinquishment. In a case the Court ruled that "it was unlikely that a mere caution in the words provided for in the domestic law would be enough to enable him to sufficiently comprehend the nature of his rights" (*Panovits v. Cyprus*, para. 74.).

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[11] Libby McVeigh – Alex Tinsley p.

[12] Alexandros Tsagkalidis: Directive 2012/13/EU on the Right to Information in Criminal Proceedings. Online: http://www.era-comm.eu/procedural_safeguards/kiosk/pdf/2017/Article_Right_to_Information.pdf [30.09.2017.]

[13] The weight of subjective factors must be determined for each case individually. The young age of the suspect, his lack of literacy or drug dependency can affect whether the caution fulfils the requirements for waiver of right or not. See for example *Panovits v. Cyprus*, App. no. 4268/04 (Judgement of 11 December 2008) para. 67; *Kaciu and Kotorri v. Albania*, Apps. nos. 33192/07 and 33194/07 (Judgment of 25 June 2013), para. 120; and *Pishchalnikov v. Russia*, App. no. 7025/04 (Judgment of 24 September 2009), para. 80.

Article 3(1) of the Directive provides that suspected and accused people are to be provided promptly orally or written information about certain procedural rights specified by the Article. These are:

(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;

(d) the right to interpretation and translation;

(e) the right to remain silent.

The next paragraph determines that the aforementioned information should be given in simple and accessible language and that the authorities should take into account any particular needs of vulnerable suspects or accused persons. The latter instruction can be seen as a general provision on subjective criteria which, as we could see, already is present in the case law of ECtHR.

Article 4-5: Letter of Rights on arrest

As the Commission stated in its press release in relation to the Directive, 8 million criminal proceedings takes place in the EU annually. The chance that suspects will be ill-informed about their defence rights is varying across the Member States and in many cases the suspects are only informed about their rights orally, in a technical and incomprehensible language, or not at all.[14]

Due to these tendencies, the Directive provides that suspects and accused that are arrested or detained shall be provided with a Letter of Rights, a written information sheet about their rights already determined in Article 3. This solution is not a new one, as its use was already suggested to Member States by the European Commission's Green Paper in 2003.[15]

The Letter of Rights should also contain information about other rights' application under the national law such as:

(a) the right of access to the materials of the case;

(b) the right to have consular authorities and one person informed;

(c) the right of access to urgent medical assistance;

(d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

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[14] Fair trial rights: EU governments endorse law ensuring suspects' right to information in criminal proceedings. Brussels, 3 December 2010. http://europa.eu/rapid/press-release_IP-10-1652_en.htm?locale=en [30.04.2017.]

[15] European Commission, Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003)75 final, Brussels, 19 February 2003, section 8.1.

The paper should also contain some basic information about challenging the lawfulness of the arrest, obtaining a review of the detention and making a request for provisional release.

The factors determined by previous ECtHR case law about the proper form and conditions of information should also apply for this information paper. One such aspect specified by the Article that the Letter of Rights shall be drafted in simple and accessible language. It is also provided in the Article that Member States authorities must ensure that the suspect receives the Letter of Rights written in a language that they understand.

Article 5 provides that if the suspect is arrested because of a European Arrest Warrant against him, the Letter of Rights should contain information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing member state.

The Commission stated that it hopes, the Letter of Rights will help to avoid miscarriages of justice and reduce the number of appeals, while hoping that the efficiency of judicial systems will improve.[16]

Article 6: Right to information about the accusation

The requirement for notification of the accusation has a strong connection with the notification of rights as being accused is one of the cases after which the provisions of the Directive must be applied. This is also that phase of the criminal proceedings when persons can decide their defence and whether they want to invoke certain rights, such as the right to remain silent, or they wish to waiver them.

Articles 5(2), 6(3)a and b of the ECHR already addresses this topic. The former provides that arrested persons shall be informed about the reasons for arrest and the criminal charges against them. The latter is about minimum rights for every accused person, which is being informed about the nature and cause of the accusation against him and having adequate time and the facilities for the preparation of defence.

The ECtHR already has many decisions on the conformity of information about the accusation. Over the years the Court has adopted a principle regarding Article 6(3)a which is aimed at guaranteeing a right of information for the defendants at all stages of the criminal process. This specifies that the accused should be informed about both the factual and legal basis for the procedure as particulars of an offense play a crucial rule (*Pélissier and Sassi v. France*, App. no. 25444/94 (Judgment of 25 March 1999), para. 51-52.). This also includes the legal classification of the facts.[17] It was also clearly stated that is not enough for the relevant

[16] *Ibid*.

[17] McVeigh – Tinsley, p. 26.

authorities to provide information when requested to do so (*Mattoccia v. Italy*, App. Judgment of no. 23969/94 (5 July 2000), para. 65.).

Even if the written order properly addresses the relevant legal provisions, it can violate the ECHR without containing any factual circumstances (*Fox and others v. United Kingdom*, App. no. 12244/86 (Judgment of 30 August 1990), para. 40.). Subjective factors must also be taken in account, as in one case it was ruled to be a violation of the Article to question a deaf, mute and illiterate suspect using an official sign language interpreter as he was not familiar with that form of sign language (*Z.H. v. Hungary*, App. no 28973/11 (Judgment of 8 November 2012), para. 42-43.).

The Directive's provisions heavily resemble the factors laid down by the case law of the ECtHR. According to Article 6 suspected and accused persons shall be provided promptly with information about the criminal act they are suspected or accused of having committed. Paragraph 1 of the Article states that the information shall be detailed enough which is given a more detailed explanation is Recital 27. It states that the person shall be given all necessary information to prepare their defence. According to Recital 28 the information given should contain the time and place of the criminal act. Obligation under Paragraph (2) is similar to that of the Article 5 (2) of the ECHR. One big difference however is that the latter requires that the suspected and arrested person be provided information "promptly" which is omitted from the Directive.[18]

As provided by Paragraph (3) not only factual information but also the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person. Paragraph 4 also reflects existing ECtHR case law (*Juha Nuutinen v. Finland*, App. no. 45830/99 (Judgment of 24 April 2007), para. 30-32.) in provisioning that authorities have to provide information about reclassifications of the offence so that the suspected or accused person can plan his defence accordingly.

Article 7: Right of access to the materials of the case

At the time of the first questioning of the suspect it is not uncommon that neither the suspected nor his lawyer has no access to case files which could affect his decision about certain rights. In some member states access to the files can be restricted by law or by exceptional power of prosecutors which can violate the equality of arms principle.[19]

Articles 6(3)(a), (b) and (c) of the ECHR has connections with this issue although not explicitly but the ECtHR was vocal about in a number of judgments.

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[18] Ed Cape: *Transposing the EU Directive on the Right to Information: A Firecracker or a Damp Squib?* Criminal Law Review. No. 1 (2015), p. 53.

[19] McVeigh – Tinsley, p. 32.

There is an ongoing debate about the Court's opinion about the counsel's ability to obtain case files before the first questioning of his defendant. There are some vague expressions in these judgements which can be interpreted to support this claim but this is an opinion not shared by other courts.[20]

The ECtHR also addressed that in accordance with the provisions of Article 6(3)(b) access to case files have to be provided for the accused person in a timely manner before trial (*Beraru v. Romania*, App. no. 40107/04 (Judgement of 18 March 2014), para. 69-70). If the inspection of these files is restricted to the lawyer of the defendant it is not considered as a violation of the Article (*Kremzow v. Austria*, App. no. 12350/86 (Judgment of 21 September 1993), para. 52). It was also determined by the Court that the time frame for the counsel to review the files should be determined according to the number of pages it consists of (*Öcalan v. Turkey*, App. no. 46221/99 (Judgment of 12 May 2005), para. 142).

Article 7 of the Directive also addresses many of these concerns. Paragraph 1 provides that in case of arresting a person, the documents which are essential to challenge the decision are made available for him. The next Paragraph is about the availability of material evidence in possession of the competent authority. As stated in Paragraph 3 access to the aforementioned materials have to be granted in a due time to allow the effective exercise of the rights of the defence. Paragraph 4 of the Article determines when a request to access certain files can be refused by authorities. A request can be refused if:

- it would lead to a serious threat t life or fundamental rights of another person
- if such refusal is strictly necessary to safeguard an important public interest (could prejudice an ongoing investigation or could harm the national security)

A decision to refuse a request must be made by a judicial authority or be subject to judicial review. This Paragraph is also in line with existing ECtHR case law as it also accepted a public interest immunity principle similar to that of the Directive's.[21]

Lastly it is provided n Paragraph 5 that access to files must be free of charge. Although technically free, defendants can only hold copies of the documents and in case of large files, the cost of photocopying can be significant. In our opinion one effective solution to reducing cost is to allow electronic copies to be given to the defendant. Paragraph 70/B. (11) of the Criminal Procedure Code of Hungary (Act XIX of 1998) allows for accused person or their legal counselor to request an electronic copy of case files. It also provides that if the files are available in electronic formation the copies must be presented on electronic data carriers. The only downside of electronic formation is that the Code does not accept it as authentic.

[20] For more detailed information see McVeigh – Tinsley, p. 33–34.
[21] Laurens van Puyenbroeck and Gert Vermeulen: p. 1024.

2. THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS IN DIRECTIVE (EU) 2016/343

On 9 March 2016, the European Parliament and the Council adopted Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.

The Directive is the fourth legislative measure that has been passed since the adoption of the Council's Roadmap on procedural rights for suspects and accused persons in 2009.

The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter, Article 6 of the ECHR, Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights.

After the Directives regarding the three previous measures, this new Directive tries to enhance the right to a fair trial through the adoption of common minimum rules on certain points of the presumption of innocence and the right to be present at trial. This should result an increased trust between the Member States (MS) in the field of criminal justice and thereby it facilitate mutual recognition.

The first three measures on the basis of the Roadmap were adopted within a rather short time frame: Directive 2010/64/EU on the right to interpretation and translation (measure A) was adopted on 20 October 2010; Directive 2012/13/EU on the right to information (measure B) was adopted on 22 May 2012; and Directive 2013/48/EU on the right of access to a lawyer (measure C1) was adopted on 22 October 2013.

The European Commission has been examining the presumption of innocence for a long time. A Green paper on the presumption of innocence[22] from 2006 already indicated that the Commission was willing to include the presumption of innocence in a legislative instrument, if there was a need to do so. Although the presumption of innocence was not one of the measures covered by the 2009 Roadmap, Point 2 of this Roadmap made clear that proposals on other topics could be launched. Therefore in November 2013, the Commission presented a package of three further measures to complete the rollout of the Roadmap, as integrated in the Stockholm programme: a proposal for a Directive on provisional legal aid (measure C2), a proposal for a Directive on procedural safeguards for children (measure E),and a proposal for a Directive on the presumption of innocence (the "example" of the Stockholm programme). Article 6(3) of the Treaty on European

[22] Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings Brussels, 27.11.2013 COM(2013) 821 final 2013/0407 (COD)

Union (TEU) provides that fundamental rights, as guaranteed by ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.

2.1. Description of the main contents of the Directive

The approach of the new Directive is rather broad as it addresses not only the presumption of innocence and the connected rights such as the right to remain silent, but it equally addresses the right to be present at one's trial. The new rules apply to all people suspected or accused in criminal proceedings.

Article 1: Subject

Article 1 confirms that the Directive is intended to lay down minimum rules on "certain aspects of the right to the presumption of innocence in criminal proceeding" and the right to be present at the trial in criminal proceedings. The Directive is not intended, therefore, to be an exhaustive study of the principle and the ECHR will still be the main guide to those aspects which are not included in the text.

Article 2: Scope

The Directive applies to suspects or accused persons in criminal proceedings from the very start of the criminal proceedings, even before the time when the suspects are made aware by the competent authorities of the fact that they are suspected or accused of having committed a criminal offence. It applies until the conclusion of such proceedings, until the final judgement is delivered.

The right to be presumed innocent encompasses different needs and degrees of protection regarding natural persons and legal persons, as recognized in the case law of the Court of Justice on the right not to incriminate one-self. This Directive takes into account these differences and therefore only applies to natural persons.

Article 3: Presumption of innocence

Article 3 basically repeats Article 6(2) ECHR and Article 48(1) of the EU-Charter: suspects and accused persons should be presumed innocent until proven guilty according to law.

Article 3 is a simple restatement of the principle. It sets out that "Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty according to law". There is no attempt to articulate the nature of the provision further or set out the core aspects of the presumption for the purposes of the Directive.

Article 4: Public references to guilt

The ECtHR established as one of the basic aspects of the principle of presumption of innocence the fact that a court or public official may not publicly present the suspects or accused persons as if they were guilty of an offence if they have not been tried and convicted of it by a final judgment (*Minelli v. Switzerland*, App. no. 8660/79 (Judgment of 17 December 1980)). According to the case law of the ECtHR this principle should furthermore apply to all public authorities (*Allenet de Ribemont v. France*, App. no. 15175/89 (Judgment of 10 February 1995)).

Article 4(3) explained a general exception: the obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings, if this is strictly necessary for reasons relating to the criminal investigation. This could be the case, for example, when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence.[23]

Article 5: Presentation of suspects and accused persons

According this article, "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."

It means that the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so they are required to avoid giving the impression that those persons are guilty.

Article 6: Burden of proof

Article 6 deals with the burden of proof. It requires Member States to "ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution". This is an important issue. The burden of proof refers to the fact that it is the prosecution who must prove the case against the accused. The initial draft of Article 6 initially contained an article permitting the burden of proof to be shifted to the defence. The European Parliament's Civil Liberties Committee successfully proposed an amendment deleting this provision on the shift of the burden of proof . This Article reflects the ECtHR principle[24] which is considered as a correct balance between the protection of public interests (the needs of prosecution) and the right of the defence.

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[23] Steven Cras and Anze Erbeznik: *The Directive on the Presumption of Innocence and the Right to Be Present at Trial,* Eucrim 1/2016, p. 29.

[24] See, *inter alia*, ECtHR cases *Salabiaku v. France*, App. no. 10519/83 (Judgment of 7 October 1988), *Barberà, Messegué and Jabardo v. Spain, Telfner v. Austria*, App. no. 33501/96 (Judgment of 20 March 2001)

Article 7: Right to remain silent and right not to incriminate oneself

Article 7 provides that the suspect has the right to remain silent "in relation to the offence that they are suspected or accused of having committed". This should surely have been extended to the right to silence in relation to the commission of any offence.

The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the ECHR, but the ECtHR has derived these rights from the right to a fair procedure under Article 6 of ECHR (*Funke v. France*, para. 44).

The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, which means that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights.[25]

Suspects or accused persons should be promptly informed of their right to remain silent according to Directive 2012/13/EU. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing to it and of invoking it.

Article 7(3) notes that "the exercise of the right to remain silent and of the right not to incriminate oneself shall not be used against a suspect or accused person and shall not be considered as evidence that the person concerned has committed the offence which he or she is suspected or accused of having committed". This has to be welcomed and appears to go further than the ECtHR which has found that an accused's decision to remain silent throughout criminal proceedings may carry consequences, such as 'adverse inferences' being draw from the silence.

Artice 8 and 9: Relating to the right to be present at the trial and the right to a new trial

The provisions regarding trials in absentia, which the Commission had proposed in paragraphs 2 and 3 of Article 8, were more problematic. Here, the Commission had almost copy-pasted provisions from Framework Decision 2009/299/JHA on trials in absentia.

The ECtHR has confirmed that this is implicit in the right to a fair trial by way of a public hearing (*Jacobsson v. Sweden,* App. no. 16970/90 (Judgment of 19 February 1998)) and that it is difficult to see how anyone can exercise their defence rights without being present at their own trial.[26]

The Directive has brought clarity on an important point. In fact, in the Framework Decision it was not clear whether in respect of suspects or accused persons whose location is unknown a trial in absentia could be held and whether the resulting

[25] Steven Cras and Anze Erbeznik: p. 31.

[26] Debbie Sayers: The new Directive on the presumption of innocence: protecting the 'golden thread' http://eulawanalysis.blogspot.de/2015/11/the-new-directive-on-presumption-of.html [30.04.2017.]

decision, including a custodial sentence, could be enforced immediately, in particular if the person concerned has been apprehended.

However important conditions have to be applied. Firstly, Member States may only use the possibility to hold a trial in absentia if they have undertaken "*reasonable efforts*" to locate the suspects or accused persons. Secondly, the Member States must inform those persons, in particular upon being apprehended, of the decision taken in absentia as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.[27]

Article 9 establishes a remedy (established by the ECtHR) in cases where the right to be present at trial has not been observed. In this case it is an obligation to provide for a re-trial (*Colozza v. Italy*, App. no. 9024/80 (Judgment of 12 February 1985)).

3. CONCLUSION

The Stockholm Programme was right when determining that fair trial and the right to defence does not only mean the right to access lawyer but has many other dimensions to it, covered by the measures of the programme. To create an efficient system of suspect's rights, it is important to have a balance and appropriate timing to them. Presumption of innocence is a crucial principle to allow a fair trial but it needs other measures to be realized in practice. Without the access to interpretation and translation, the right to information can be meaningless. Even if the suspected or accused person is informed about their rights, they probably can't decide a proper defence strategy without a help from a legal counsel.

As we could see, both Directives build heavily on existing ECHR regulations and ECtHR case law regarding that. The system created by the Convention and the Court has serious limitations in their mechanism as it is not generally observed in all cases. EU level action can force the Member States to adopt the same level of protection for every proceeding.[28] The realisation of EU legislation on this basis is certainly a move towards enhancing integration between the two major European systems of human rights protection. Continuing this process could create a more complete and effective European human rights protection system, which is realised especially in terms of guarantees and of judicial protection.[29]

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[27] Steven Cras and Anze Erbeznik: p. 33.

[28] T.N.B.M Spronken and D.L.F. de Vochtf: *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step"*. 37 North Carolina Journal of International Law and Commercial Regulation (2011-2012), p. 483.

[29] Stefania Negri: *Realising a European Area of Justice through Harmonised Protection of Procedural Rights and Enhanced Integration between the EU and the ECHR Legal Systems*. 2014, Conf. Int'l Dr. p. 103.

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Развој одређених мера везаних за правично суђење у Европској унији као део Стокхолмског програма

Сажетак: *Принципи заједничке сарадње у кривичним поступцима присутни су у кривичном праву Европске уније од оквирне одлуке Европског доказног налога прихваћене 2008. године. Иако инструмент није успео постићи своју сврху, и даље остаје циљ хармонизација прекограничних кривичних истрага. Да би Европски истражни орган успео да постигне минимална правила у гаранцијама правичних суђења су потребна су правила. Европска унија је препознала ову потребу и Стокхолмски програм је покренут 2009. године, са циљем да то схвати. Од тада су усвојене директиве које се тичу одређених права осумњичених, укључујући директиву о праву на информације и претпоставку невиности. Минимална правила која се тичу ових претпостављених права могу имати озбиљан утицај на националне системе кривичног правосуђа и њихова примена резултираће усклађеним кривичним правом. Ови документи су израђени у складу са ЕЦХР-ом и релевантном судском праксом Европског суда за људска права која обећава већу интеграцију два главна европска система законодавства.*

Кључне речи: *мере правичног суђења, Стокхолмски програм, право на информисање, претпоставка невиности.*

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