

Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards

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Keywords:

effective remedies,
standardisation,
Directive 2013/48,
Directive 2016/343,
implementation

Abstract: In order to secure rights and guarantees provided by the legal system of the European Union, legal acts in the field of the criminal cooperation refer to the right to an effective remedy. Given that, two instruments are particularly important as they were the first to aim to set the standard and frame for the effective remedy conceptual framework: the Directive 2013/48/EU and the Directive (EU) 2016/343. The Authors analyse the legislation process within that context, the approach of Member States, (non)existing standards and related consequences, such as the possibilities of proper implementation of the right to the effective remedy into the national legal systems, verification of that process as well as the chances to achieve the harmonisation of minimal standards of the protection of fundamental rights in the area of criminal proceedings in the EU.

The text was written as a part of the implementation of the National Science Centre research grant No. 2018/29/B/HS5/00185 entitled *The right to an effective remedy against the abuse of power by the prosecutor and the court in criminal proceedings. Constitutional and European perspective.*

1. Introduction

The discussion of the European criminal procedure is still more of a dialogue involving disconnected respective procedure-related institutions than a description of a coherent system. The strategy of the approximation of procedural standards adopted and accepted by Member States means the mutual recognition of judgements and other decisions, the recognition and development of common standards, the creation of simplified procedures for surrendering persons¹ (like the European Arrest Warrant²) and evidence (like the European Evidence Warrant), and so on. It is a lot about mutual trust in legal systems and their recognition.³ It also demands the introduction of numerous further simplifications of legal cooperation.⁴

Among other legal acts of the European Union in the field of criminal procedure, guarantee instruments attract special attention.⁵ They serve the purpose of recognising and protecting the procedural guarantees of an individual. They aim at standardising the level of legal protection afforded to participants in the criminal process,⁶ especially those who are ex-

¹ See: Montaldo Stefano, “Intersections among EU Judicial Cooperation Instruments and the Quest for an Advanced and Consistent European Judicial Space: The Case of the Transfer and Surrender of Convicts in the EU” *New Journal of European Criminal Law* 13, no. 3 (2022): 252–269.

² Asif Efrat, Assessing Mutual Trust among EU Members: Evidence from European Arrest Warrant,” *Journal of European Public Policy*, no. 26 (2019): 656 and next.

³ More: Willems Auke, *The Principle of Mutual Trust in EU Criminal Law* (Oxford et al.: Hart 2021), 312.

⁴ See: Élodie Sellier and Anne Weyembergh, eds., *Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice. Together but Apart?* (Bruxelles: Éditions de l’Université de Bruxelles, 2020), 459; also: Jannemieke Ouwerkerk et al., eds., *The Future of EU Criminal Justice Policy and Practice. Legal and Criminological Perspectives* (Brill: Nijhoff, 2019), 261.

⁵ And have an additional value in the era of the rule of law breakdown noticed in some EU Member States, i.a. in Poland, Hungary, see: Anna Gora and Pieter de Wilde, “The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law,” *Journal of European Public Policy* 29, no. 3 (2022): 342 and next.

⁶ It seems to be even more demanding in relation to ex EU Member States, see: Wolfgang Schomburg, Anna Oehmichen, and Kays Katrin, “Human Rights and the Rule of Law in Judicial Cooperation in Criminal Matters under the EU-UK Trade and Cooperation Agreement,” *New Journal of European Criminal Law* 12, no. 2 (2021): 246–256.

posed to a particular degree of restriction on their freedoms and rights,⁷ such as victims, suspects, and witnesses.⁸ Therefore, the selection of those legal measures is not, or at least should not be, accidental. It is based on common values and standards,⁹ which arise from the overarching legal acts binding the Member States of the European Union that are enshrined in the European Convention on Human Rights (ECHR)¹⁰ and the Charter of Fundamental Rights (CFR).¹¹

The effective implementation of this EU legislation into national legal systems is the responsibility of the Member States. Countries are also directly responsible for the effectiveness of their national instruments and the way they are ultimately governed. The freedom of states, however, primarily concerns the form of governing those issues, and not the result itself. Indeed, Member States are obliged to ensure the effectiveness of each of those legal instruments.

The obligation to ensure the effectiveness of the direct and independent implementation of the European instruments is, in fact, a relic of the international law principles derived from the conceptual framework of state independence. Member States fulfill their obligations through the properly relevant implementation of the European instruments in such a way that will preserve the integrity of their internal legal systems.¹² However, from this perspective, the quality of implementation becomes critical to

⁷ See: Tony Marguery, “European Union Fundamental Rights and Member States Action in EU Criminal Law,” *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 283 and next.

⁸ See, i.a.: Anna Pivaty et. al., “Strengthening the Protection of the Right to Remain Silent at the Investigative Stage: What Role for the EU Legislator?,” *New Journal of European Criminal Law* 12, no. 3 (2021): 427–448.

⁹ See more: Irene Wiecek, *The Legitimacy of EU Criminal Law* (Oxford et al.: Hart, 2020), 243.

¹⁰ The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, from November 4, 1950. See: Pieter van Dijk et al., eds., *Theory and Practice of the European Convention of Human Rights* (Cambridge-Antwerp-Portland: Intersentia, 2018), 1–78, 331–352.

¹¹ The Charter of Fundamental Rights of the European Union, proclaimed by EU in 2000, came into force in Dec. 2009 together with the Treaty of Lisbon.

¹² See also: Cristina Sáenz Pérez, “What about Fundamental Rights? Security and Fundamental Rights in the Midst of a Rule of Law Breakdown,” *New Journal of European Criminal Law* 13, no. 4 (2022): 526–545.

the integrity of the common European system, and the foundation and pre-condition for achieving a common standard. For all those reasons, it is of particular importance for the European Union and all its Member States that this commitment carries real content – all common instruments must be implemented in full and not purely for the sake of appearances.

The mere commitment of the EU Member State and its assurance of the implementation of those guarantees do not mean that the guarantees will always be implemented in the right way.¹³ Sometimes a Member State does not intend to implement new dedicated solutions but instead tries to demonstrate that the guarantees are already provided by the existing procedural institutions, even when they are insufficient or changes are in fact necessary. At other times, the regulations that seem to exist do not provide real procedural protection. As a result, the practice of criminal proceedings deviates from the expected standard.

In this context, attention should be drawn to a special procedural instrument, the aim of which is to respond to the ineffective implementation of guarantees available to an individual. This is the “right to an effective legal remedy” for the violation of the guarantees provided by the EU law.¹⁴ The provisions on effective legal remedies are set forth in the EU directives concerning criminal proceedings. However, neither the definition nor the clear standard of those provisions is governed in the EU legal acts or public discourse. As a consequence, open questions remain in this area:

- 1) how did the Member States assess that their national legal systems met the EU standards and the requirements of the Directives in the context of the right to an effective legal remedy,

¹³ See: Wendy De Bondt and Gert Vermeulen, “The Procedural Debate. A Bridge Too Far or Still Not Far Enough?,” *Eucrim*, no. 4 (2010): 163–167; Robin Lööf, “Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU,” *European Law Journal* 12, no. 3 (2006): 421–430; Laurens van Puyenbroeck and Gert Vermeulen, “Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU,” *International and Comparative Law Quarterly* 60, no. 4 (2011): 1017–1038.

¹⁴ Herwig Hofmann, “The Right to an Effective Remedy and to a Fair Trial – Article 47 of the Charter and the Member States,” in *The Charter of Fundamental Rights of the European Union*, eds. Steve Peers and Tamara Harvey (Oxford: Hart Bloomsberg, 2019), p. 33; Kathleen Gutman, “The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?,” *German Law Journal* 20, no. 6 (2019): 886–889.

- 2) how are the Member States supposed to implement the Directives correctly in this regard,
- 3) how can the Commission assess the completeness and correctness of the transposition of the EU law into national laws.¹⁵

Without standardising the conceptual framework of effective legal remedies, those questions remain rhetorical, and so does the question about the real status of the harmonisation of laws amongst Member States. In this contribution, Authors present the legislative and implementation process (as exemplified by the Polish legal system) in respect of the right to an effective remedy set forth in the Directive 2013/48/EU¹⁶ and Directive (EU) 2016/343¹⁷ in order to confirm the presented thesis, raise awareness of the consequences of the status quo, and look for a practicable arrangement.

2. Effective Legal Remedy Conceptual Framework

The effective legal remedy conceptual framework is not a new construction. It is not even an original instrument for the EU cooperation but was derived from a common law concept adopted by the ECHR.¹⁸ According to Article 13 of the ECHR, “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” The jurisprudence of the European Court

¹⁵ See: Karolina Kiejnich, “Harmonisation of EU Criminal Law – Issues of Implementing EU Directives,” in *European Union and Its Values: Freedom, Solidarity, Democracy*, eds. Agnieszka Klos et al. (Warsaw: CeDeWu, 2020), 37.

¹⁶ The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

¹⁷ The Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, pp. 1–11.

¹⁸ See the complex analysis pp. Tom Barkhuysen and Michiel L. van Emmerik, “Chapter 32: Right to an Effective Remedy” in *Theory and Practice of the European Convention of Human Rights*, eds. Pieter Van Dijk et al. (Cambridge-Antwerp-Portland: Intersentia, 2018), 1035–1061.

of Human Rights (ECtHR) has developed the concept of an effective legal remedy, clarifying its essence, mostly by considering its meaning and scope of influence.¹⁹

The provisions of the CFR are, undoubtedly, modelled on this regulation. According to Article 47 of the CFR (the right to an effective remedy and to a fair trial):

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. 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. 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.²⁰

¹⁹ Among others: ECtHR Judgement of 25 June 1997, 20605/92, *Halford v. The United Kingdom*, HUDOC, p. 64; ECtHR Judgement of 16 November 1996, 22414/93, *Chahal v. The United Kingdom*, HUDOC, p. 145; ECtHR Judgement 10 September 2010, 31333/06, *McFarlane v. Ireland*, HUDOC, p. 108; ECtHR Judgement of 31 July 2003, 50389/99, *Doran v. Ireland*, HUDOC, p. 55; ECtHR Judgement of 28 October 1998, 24760/94, *Asenov and Others v. Bulgaria*, HUDOC, p. 117; ECtHR Judgement of 4 July 2006, 59450/00, *Ramirez Sanchez v. France*, HUDOC, p. 157; ECtHR Judgement of 27 April 1988, 9659/82, 9658/82, *Boyle and Rice v. The United Kingdom*, HUDOC, p. 52; ECtHR Judgement of 20 March 2008, 15339/02 et al, *Budayeva v. Russia*, HUDOC, p. 191; ECtHR Judgement of 30 October 1991, 3163/87, 13164/87, 13165/87, 13447/87, 13448/87, *Vilvarajah and Others v. The United Kingdom*, HUDOC, p. 122; ECtHR Judgement of 21 September 2000, 35394/97, *Khan v. The United Kingdom*, HUDOC, p. 44; ECtHR Judgement of 28 March 2000, 22535/93, *Mahmut Kaya v. Turkey*, HUDOC, p. 124; ECtHR Judgement of 14 March 2002, 46477/99, *Paul and Audrey Edwards v. The United Kingdom*, HUDOC, p. 96; ECtHR Judgement of 24 April 2003, 24351/94, *Aktaş v. Turkey*, HUDOC, p. 328; ECtHR Judgement of 21 February 1986, 8793/79, *James and Others v. The United Kingdom*, HUDOC, p. 84; ECtHR Judgement of 21 January, 0696/09, *M.S.S. v. Belgium and Greece*, HUDOC, p. 288; ECtHR Judgement of 8 June 2006, 75529/01, *Sürmeli v. Germany*, HUDOC, p. 98.

²⁰ Among others: Case C-268/06, *Impact v. Minister for Agriculture and Food and ot.*, 15 April 2008, p. 42; Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of EU and others*, 3 September 2008, p. 335; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. German Federal Republic*, 11 December 2010, p. 48; Cases C-317/08, C-318/08, C-319/08 i C-320/08, *Rosalba Al-assini v. Telecom Italia SpA and Filomena Califano v. Wind SpA and Lucia Anna Gior-gia Iacono pv. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA*, 18 March

The legal system of the European Union in the field of the criminal cooperation has already referred to this right several times. The right to an effective remedy has been granted to individuals in several acts (as referred to below). At the same time, however, this right has been governed in an extremely vague manner, without the practicable elements that seem necessary for its operational effectiveness (in terms of the procedural effectiveness).²¹ This accounts for the need for further elaboration upon the importance of effective legal remedies.

As mentioned above, the requirement for an effective legal remedy currently exists in the following EU legislation concerning criminal proceedings:

- 1) The Council Framework Decision 2003/577/JHA of 22 July 2003,²²
- 2) The Council Framework Decision 2006/783/JHA,²³
- 3) The Directive 2012/29/EU,²⁴
- 4) The Directive 2012/13/EU,²⁵

2010, p. 47; Case C-199/11, *Europese Gemeenschap v. Otis NV et al.*, 6 November 2012, p. 49; Case C-175/11, *H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, 31 January 2013, p. 102; Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, 27 February 2018, p. 34; Case C-619/18, *European Commission v. Poland*, 24 June 2019, p. 52, 54; Case C-556/17, *Alekszj Torubarov v Bevándorlási és Menekültügyi Hivatal*, 29 July 2019, p. 56,.

²¹ See i.a.: Michele Caianiello and Giulia Lasagni, “Comparative Remarks,” in *Effective Protection of the Rights of the Accused in the EU Directives*, eds. G. Contissa et al. (Leiden: Brill Nijhof, 2022), 234–235; Martyna Kusak, *Mutual Admissibility of Evidence in Criminal Matters in the EU. A Study of Telephone Tapping and House Search* (Antwerpen: Maklu Publishers, 2016), 23 and 147.

²² The Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 02.08.2003, p. 45.

²³ The Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59.

²⁴ The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.

²⁵ The Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1–10.

- 5) The Directive 2013/48/EU,²⁶
- 6) The Directive 2014/41/EU,²⁷
- 7) The Directive 2014/42/EU,²⁸
- 8) The Directive (EU) 2016/343,²⁹
- 9) The Directive (EU) 2016/680,³⁰
- 10) The Directive (EU) 2016/800,³¹
- 11) The Directive (EU) 2016/1919.³²

Among the legal acts mentioned above, two instruments are particularly important in terms of the analyzed issues as they have been the first of those EU legal acts to aim to set the standard and frame for the effective remedy conceptual framework: the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of

²⁶ The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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 while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

²⁷ The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, pp. 1–36.

²⁸ The Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, pp. 39–50.

²⁹ The Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, pp. 1–11.

³⁰ The Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of crime prevention, investigation, detection and prosecution of criminal offences and the execution of penalties, on the free movement of such data and repealing Council Framework Decision 2008/977/JHA3, OJ L 119, 4.5.2016; pp. 89–131.

³¹ The Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, pp. 1–20.

³² The Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, pp. 1–8.

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 while deprived of liberty, and the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The comments below will mostly focus on those two Directives and on the implications of the implementation of this procedure into practice.

3. Conceptual Framework of Effective Legal Remedy in Terms of the Directive 2013/48/EU

The draft proposal of the Directive 2013/48/EU was adopted by the Commission on 8 June 2011. Initially, the issue of an effective remedy was governed in Article 13 of the Directive, and its purpose was declared as follows:

This Article reflects ECHR jurisprudence that the most appropriate form of redress for breaching the ECHR right to a fair trial is to ensure that a suspect or accused person is put, as far as possible, in the position in which he would have been had his rights not been so breached (*Salduz v Turkey*, judgement of 27 November 2008, application no. 36391/02, § 72). The ECHR has ruled that even where compelling reasons may 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 ECHR and such rights will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. Therefore, this Article bans, in principle, the use of evidence obtained where access to a lawyer was denied save in those exceptional cases where the use of such evidence will not prejudice the rights of the defence.³³

That purpose was subsequently supplemented in the Preamble (Paras. 25–27) referencing the jurisprudence of the ECHR as far as the result was

³³ The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 9, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN>.

concerned in terms of an effective remedy that should have placed a person in the same position he or she would have found herself or himself had the breach not occurred. Examples of possible remedies were named, including a retrial or equivalent measures. The prohibition on the use of any statements given in breach of the right of access to a lawyer was indicated as a proper remedy if irretrievable damage to the rights of the defense was made.³⁴

The wording of Article 13 of the Directive 2013/48/EU in the version proposed by the Commission was as follows:

1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer has been breached.
2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.³⁵

The European Economic and Social Committee, in its opinion of 7 December 2011, made no reference to the regulation of remedial measures.³⁶ However, the European Parliament made several amendments to

³⁴ The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 15, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN>.

³⁵ The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 20, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN>.

³⁶ The Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest’ COM (2011) 326 final – 2011/0154 (COD), accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011AE1856&from=EN>.

the Commission's proposal. In amendments to the Preamble, Paragraph 26 was deleted and Paragraphs 25 and 27 were rewritten. Clear examples of the possible remedies were removed. The reference to the jurisprudence of the ECHR remained but in a different wording. Legislators banished the idea of raising the expected realms of remedies as well as a clear indication on the prohibition of evidence in certain circumstances. Instead, the door to the exceptions to this rule was widely opened.³⁷

Consequently, the different wording for Article 13 was eventually proposed:

1. Member States shall ensure that suspects or accused persons in criminal proceedings as well as requested persons in European Arrest Warrant proceedings have an effective remedy under national law in instances where their rights under this Directive have been breached.

3. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.³⁸

Those provisions, with changes into the numbering, entered into force as worded above. Consequently, they have given rise to two powers:

- the right to an effective remedy in the case of a breach of the rights provided for in the Directive; and
- the right to a judicial review of evidence obtained in breach of the right of access to a lawyer or in cases where a derogation from that right has

³⁷ The Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), accessed September 25, 2023, accessed September 25, 2023, [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A\(2013\)0228_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A(2013)0228_EN.pdf).

³⁸ The Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A\(2013\)0228_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A(2013)0228_EN.pdf).

been allowed in accordance with the Directive, in compliance with the standards of the right to defense and the right to a fair trial.

However, those provisions do not oblige Member States to exclude evidence. More importantly, they do not provide any explanation of the effective remedy conceptual framework, its aims or its expected results.³⁹

Following the implementation of the amendments, the reluctance of the Member States to interfere with the EU law in domestic systems for the admissibility of evidence in criminal proceedings can also be clearly seen.⁴⁰ The Legal Affairs Committee also took the view during the legislative phase that “this Directive should not seek to impose a choice between a legalistic approach to the admissibility of evidence and a more flexible approach in which courts have the right to evaluate evidence based on how it was obtained,”⁴¹ suggesting the change into the wording of Article 13(3) of the Directive proposed by the Commission.

The proposal for the Directive 2013/48/EU contained bold draft regulations in the field of effective remedies, specifying them significantly. That specification was supposed to give detail in two areas:

- 1) the draft contained a reference to one of the definitions of an effective remedy available in the European space, emphasising the restoration of the situation as it was before the infringement. This could have been of great importance for the issue of effective remedies in the EU law. Up to now, neither this definition nor even a clear standard has been formulated in the EU criminal law system.
- 2) a specific remedy was indicated: evidence obtained in breach of the right of access to a lawyer or in situations where a derogation from this

³⁹ Anneli Soo, “(Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study,” *Utrecht Law Review* 14, no. 1 (2018): i. 1, 53–54.

⁴⁰ Karolina Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego w postępowaniu dowodowym* (Warsaw: Wolters Kluwer, 2023), 89.

⁴¹ The REPORT on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), accessed September 25, 2023, [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_depotes/rapports/2013/0228/P7_A\(2013\)0228_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_depotes/rapports/2013/0228/P7_A(2013)0228_EN.pdf).

right was allowed was inadmissible unless its use would not infringe the right of the defense.

During the legislative procedure, the obligation of Member States to implement regulations to exclude evidence from a criminal procedure was abandoned. It was made clear that the requirement for an effective remedy did not interfere with the national system for the admissibility of evidence. As a result, the text of the Directive that was adopted has reflected the conservative position of the Member States. It is vague and does not lead to the actual practicability to invoke a right to an effective remedy in the event of an infringement of the Directive.⁴² The Directive grants the accused the right to an effective remedy but it is impossible to understand from the content of the Directive what such a remedy might be, and what would be its functions, objectives and results. We must assess this legal arrangement negatively.

The Commission's proposal here was further-reaching and clearer, and it set higher standards for the rights of the defense by specifying the right to an effective remedy. However, as the legislative work on the draft proved, the Member States were not ready for its adoption or to accept an undertaking referring to the exclusion of evidence and the definition of an effective remedy.⁴³

4. Conceptual Framework of Effective Legal Remedy in Terms of the Directive 2016/343/EU

The European Commission adopted the proposal for the Directive 2016/343 on 27 November 2013. In the recitals regarding the establishment of the right to an effective remedy in the Directive 2016/343, it was clearly pointed out that:

The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded (see *Teteriny v Russia* (Judgement of 30.6.2005, Application 11931/03, Paragraph 56), *Jeličić v Bosnia and Herzegovina* (Judgement of 31.10.2006, Application 41183/02,

⁴² Caianiello and Lasagni, "Comparative Remarks," 234.

⁴³ Cf. Hofmann, "The Right to an Effective Remedy and to a Fair Trial," 27–28.

Paragraph 53), and Mehmet and Suna Yiğit v Turkey (Judgement of 17.7.2007, Application 52658/99, Paragraph 47), Salduz v Turkey, Paragraph 72)).⁴⁴

Once again, therefore, the Commission referred to the case law of the ECtHR as a source for the conceptual framework of an effective remedy. More importantly, the Commission referred to the specific purpose of the remedy, which was to place a subject of violation in a situation as close as possible to the one which would have existed if the violation had not occurred.

Recital 26 of the Commission's proposal states as follows:

The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy available in the event of a breach of any of the principles laid down in this Directive should have, as far as possible, the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred.⁴⁵

The expected outcome and purpose of the effective remedies was therefore indicated again. For the third time, that statement was included in the body of the provision (Article 10 of the Directive), reading as follows:

1. Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this Directive are breached.
2. The remedy shall have, as far as possible, the effect of placing suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to preserving the right to a fair trial and the right to defence.⁴⁶

⁴⁴ The 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, pp. 9–10, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN>.

⁴⁵ The 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, p. 14, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN>.

⁴⁶ The 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

This time, the Commission did not explicitly suggest the form that a remedy should take. However, this did not save Article 10 from being amended at the legislative stage. The Economic and Social Committee, as was its tradition, did not address the issue of remedies in its opinion.⁴⁷ Both the Council and the Parliament adopted the text of the Directive with amendments at first reading. On 9 March 2016 the text of the Directive was approved by the President of the Council and the President of the European Parliament. Finally, the recitals on remedies were included in the Preamble in Paragraphs 44 and 45. It was raised that an effective remedy should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view of protecting the right to a fair trial and the rights of the defense. The reference to the ECHR case law was also maintained, including the need for the exclusion of personal evidence obtained in breach of Article 3 of the ECHR. This time, the Commission's proposal to include a reference in the text of the Directive into one of the accepted definitions of an effective remedy (understood as a remedy that would, as far as possible, put the suspect or accused person in the position in which they would have found themselves had the breach not occurred) was accepted. At the legislative stage, some changes were made to the wording of the recitals but in principle the understanding of the concept of a legal remedy, the desired result of its application and the purposes for which it should be applied was accepted.

The above wording does not mean that the text of the Preamble and the Directive allows for a complete decoding of the concept of an effective remedy and possible implementing instruments. It should, nevertheless, be regarded as an important step forward.⁴⁸ What is particularly interesting is that, despite the lack of clear demands in the Commission's proposal, the final text of the Directive addresses the issue of the admissibility of

trial in criminal proceedings, p. 18, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN>.

⁴⁷ The Opinion of the European Economic and Social Committee, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014AE0347>.

⁴⁸ Cf. Anna Pivaty et al., "Opening Pandora's Box: The Right to Silence in Police Interrogations and the Directive 2016/343/EU," *New Journal of European Criminal Law* 12, no. 3 (2021): 340–341.

evidence obtained in breach of the rights under the Directive and the assessment of evidence by the courts. The reference is made to the case law of the ECtHR and UN law, from which the standard of the inadmissibility of evidence obtained by torture or inhuman or degrading treatment for the purpose of establishing facts in criminal proceedings derives. As a result of that, Article 10 of the Directive reads as follows:

- (1) Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
- (2) Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.

It is therefore emphasised, once again, that the Union legislature is not interfering with national systems for the admissibility of evidence, and nor does the Directive require Member States to govern the exclusion of certain evidence from a trial. The unanswered question is therefore how else a Member State can achieve the objective of putting the subject of infringement in the position he or she would have been in if the infringement had not occurred, and ensure that the rights of the defense and the standard of due process are respected when evaluating evidence obtained in violation of the right not to incriminate oneself.⁴⁹

The authors of the Directive unequivocally endorse the *acquis* of the European Court of Human Rights but at the same time set lower standards for Member States in terms of protecting the rights of defendants and suspects. This is particularly relevant in the context of Article 13 of the Directive, which stipulates that nothing in the Directive shall be construed as limiting or diminishing the rights and procedural guarantees afforded under the Charter, the ECHR or other relevant provisions of international law or the law of any Member State, that may provide a higher level of protection.

⁴⁹ Steven Cras and Anže Erbežnik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial,” *Eucrim*, no. 1 (2016): 34; Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego*, 96; Stefano Ruggeri, “*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU,” *Eucrim*, no. 1 (2016): 47.

5. Lack of Standards Consequences

Twenty-five Member States notified the Commission of the complete implementation of the Directive 2013/48/EU,⁵⁰ and twenty-three Member States gave notice of the complete implementation of the Directive 2016/343/EU.⁵¹ Considering the fact that, in respect of the effective remedy provisions, neither a definition nor clear standards or guidelines exist, it must be stated that the Member States cannot properly assess if their national legal systems have met the EU standards and the requirements of the Directives in this regard. As a consequence, it is not possible to implement the Directives correctly and the Commission is incapable of assessing the completeness and correctness of the transposition of the EU law into national laws exhaustively.⁵²

Countries' declarations and explanations of their assessment of the implementation could not be easily verified because of the lack of clear standards.⁵³ This hinders the proper implementation of the Directives and, consequently, the real harmonisation of laws amongst Member States.⁵⁴ This is one of the silent reasons why, in fact, Member States do not implement Directives or implement them incorrectly.⁵⁵

The Commission made an effort to indicate a (partial) definition and desirable forms of an effective remedy, putting forward the proposal for the Directive 2013/48. At the legislative stage, however, both the relevant subsection of the Preamble and the provision were removed from the draft.

⁵⁰ National transposition measures communicated by the Member States, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32013L0048>.

⁵¹ National transposition measures communicated by the Member States, accessed September 25, 2023, <https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0343>.

⁵² See: Kiejnich, "Harmonisation of EU Criminal Law," 37.

⁵³ Costas Paraskeva, Nikitas Hatzimihail, and Eleni Meleagrou, "General Report: Comparative Analysis of the Legal Treatment of the Right to be Present and the Presumption of Innocence in the PRESENT partner States in the light of Directive 2016/343," *Lex Localis*, (2020): 157–158; M. Biral et al., *The Italian Implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings*, 74–76, accessed September 25, 2023, https://sistemapenale.it/pdf_contenuti/1669131660_report-italiano-crossjustice.pdf.

⁵⁴ Cornelia Riehle and Allison Clozel, "10 Years after the Roadmap: Procedural Rights in Criminal Proceedings in the EU Today," *ERA Forum* 20, (2020): 323; cf. Paraskeva, Hatzimihail, and Meleagrou, "General Report: Comparative Analysis," 157–158.

⁵⁵ Sacha Prechal, *Directives in EC Law* (New York: OUP Oxford, 2005), 7–8.

The desirable standard and the results of an effective remedy are indicated in the Preamble of the Directive 2016/343, which should be considered as a step forward. However, there is still a strong need to develop this area. The definition and the standard of an effective remedy should be universal in the field of the criminal law in the EU, and should not be limited to individual acts of law. What is more, the functions, objectives, and desirable results of an effective legal remedy should be clearly stated for the purpose of the Member States.

6. Conclusions

The above analysis of the implementation of the Directives with regard to an effective legal remedy only gives an impression of the real scale of the outstanding issue to be addressed in order to ensure the effective implementation of common standards. A great reluctance of the Member States can be observed regarding the unification of the understanding of the conceptual framework of the right to an effective remedy. The declared unification remains largely in the realm of theory rather than practice.

Member States should strive to achieve common standards and should consider this to be a great opportunity and not a threat to their sovereignty. Otherwise, declarations on the need for common minimum standards may be seen as superficial and empty. Above all, this would be a real threat to the protection of fundamental rights as well as a threat of arbitrary assessments as to whether or not national legal systems meet the EU requirements.

Before the EU develops independent standards in this area, we should use the standards that have already been put forward, at least in part, by other bodies. As all the EU Member States are members of the Council of Europe, they are obliged to meet the requirements of the European Convention on Human Rights, including Article 13 thereof. Therefore, the transposition of the ECHR standards on effective remedies should be considered and used as a natural and desirable step in the area of the integration of the criminal law in the EU.

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