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PROCEDURAL RIGHTS OF SUSPECTS AND ACCUSED PERSONS IN CROATIAN CRIMINAL PROCEEDINGS IN THE LIGHT OF THE EPPO REGULATION**

This paper analyses the procedural rights of suspects and accused persons in EPPO proceedings in the Republic of Croatia. Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office does not elaborate defence rights in detail, but leaves this matter to national law which has to comply with the EU Charter of Fundamental Rights and with the adopted directives on the procedural rights of suspects and accused persons. Following the wording of Articles 41 and 42 of the Regulation which address procedural safeguards in the EPPO proceedings, the author will give an overview of the procedural rights guaranteed in the directives on procedural rights, on their transposition into Croatian criminal procedure law, and will indicate the shortcomings and potential obstacles which could arise in EPPO proceedings. After some introductory remarks on the tendencies in Croatian criminal procedure law, an analysis will be made of the right to interpretation and translation, the right to information, the right of access to a lawyer and to legal aid, the right to remain silent and to be presumed innocent, as well as the right to gather evidence. Finally, the judicial review of procedural acts of the EPPO under the Croatian criminal procedure law will be examined.

Keywords: European Public Prosecutor, judicial review, procedural rights in criminal proceedings, defence

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1. INTRODUCTION

The integration of the European Public Prosecutor's Office (hereinafter: EPPO) as a new EU body of prosecution of criminal offences affecting the financial interests of the European Union in national legal systems of EU Member States raises some important questions regarding the efficient exercise and protection of procedural rights of the defendant in criminal proceedings conducted by the EPPO. However, Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter: Regulation)[1] does not provide adequate and thorough answers to all potential problems which may arise for the defence. Procedural safeguards for suspects and accused persons are regulated in Chapter VI of the Regulation which consists of only two articles. Article 41 lays down the scope of the rights of the suspects and accused persons and Article 42 regulates judicial review of the EPPO's acts. The rights of suspects and accused persons in the Regulation are set up at three levels: the first level is EU primary law, i.e., the rights guaranteed by the Charter of Fundamental Rights of the European Union;[2] at the second level the Regulation evokes the rights guaranteed by the directives on the procedural rights of suspects and accused persons in criminal proceedings; finally, the third level is the national level, that is, rights guaranteed under applicable national law.[3]

Hence, the Regulation does not provide for specific procedural guarantees that would correspond to the particularities of the criminal proceedings conducted by the EPPO, i.e. which would adequately oppose the powers of the EPPO and the specific features of such criminal proceedings. Such a way of prescribing the rights of the defence is in disparity (not only in scope, quantitatively, but also in its content, qualitatively) with the regulation of EPPO powers. Although EU minimum standards on the procedural rights of suspects and accused persons apply and, though these standards undoubtedly strengthen the position of suspects and defendants in criminal proceedings and consequently in the EPPO's proceedings[4] (in relation to the right to interpretation and translation, the right to information and access to the case files, the right of access to a lawyer and to legal aid, the right to be presumed innocent), these legal instruments are not created for the purpose of EPPO proceedings. Conse-

[1] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L 283/1.

[2] Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

[3] V. Mitsilegas, F. Giuffrida, "The European Public Prosecutor's Office and Human Rights" in W. Geelhoed, L.H. Erkelens, A.W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office* (Asser Press, 2018) p 66.

[4] Mitsilegas and Giuffrida (n 3) pp 68–70.

quently, they do not foresee specific situations that may arise in proceedings conducted by the EPPO, the complexity of such proceedings, in particular with regard to cross-border investigations, and the admissibility of evidence.

Furthermore, the complex organisational decentralised structure of the EPPO, which consists of the European Chief Prosecutor, the College, the European Prosecutor, the Permanent Chamber and European Delegated Prosecutors, poses a challenge for the procedural rights of suspected and accused persons in EPPO proceedings.[5] Differences which exist between the criminal procedures of EU Member States regardless of the process of harmonisation can encourage forum shopping given that the Regulation allows the Permanent Chamber to reallocate the case in another Member State, even more than once.

So, the integration of the EPPO in national law poses a number of challenges: institutional, procedural, cooperative.[6] It is therefore important to analyse the national framework in which the EPPO will act and the relation between the Regulation and national criminal procedure law. This paper aims to analyse one aspect of the mentioned challenges, that is, the integration of the European Public Prosecutor's Office in the Croatian national criminal justice system from the aspect of defence rights. Hence, an overview will be given of the procedural rights of defence specified in the Regulation and guaranteed in Croatian criminal procedure law, with an indication of the potential problems for the defence in the EPPO proceedings.

2. PROCEDURAL RIGHTS OF SUSPECTS AND ACCUSED PERSONS IN CROATIAN CRIMINAL PROCEDURE LAW IN THE CONTEXT OF THE EPPO REGULATION

2.1. Introductory remarks

In recent years, the procedural rights of suspects and accused persons in Croatian criminal proceedings have been to a large extent affected by the process of harmonisation with EU law. However, even before the EU legislator intensified its activity in the field of criminal procedure,[7] and at the same time

[5] See G. Illuminati, "Protection of Fundamental Rights of the Suspects or Accused in Transnational Proceedings Under the EPPO" in L Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature, 2018) p 182.

[6] These issues were addressed at the international scientific conference "Integration of the EPPO in the National Criminal Justice Systems: Institutional, Procedural and Cooperative challenges" held on 11 and 12 April 2019 in Zagreb.

[7] The activity included the adoption of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings in 2009, and afterwards in 2010 the adoption of the first legislative measure (the Directive on the right to interpretation

in that process, Croatian criminal procedure began to undergo significant changes which started with the epochal reform of criminal procedure and the adoption of a new Criminal Procedure Act in 2008 which abandoned the traditional model of criminal proceedings with judicial investigation and accepted a new model of public prosecutor investigation.[8] The shortcomings and deficiencies of this reform soon came to light and led to the abrogation of a number of provision of the CPA by the Constitutional Court of the Republic of Croatia which required the comprehensive reconstruction of the structure, form and principles of the newly established procedure.[9] In addition, further amendments were necessitated by the jurisprudence of the ECtHR and the already mentioned obligation of harmonisation with EU law.

Though the amendments of the CPA of 2017 were primarily motivated by the need to transpose the Directive on access to a lawyer, the legislator went beyond the requirements of the Directive and made some changes which, although not required by EU law, were a necessary precondition to strengthen the procedural rights of suspects from the earliest stages of the proceedings.[10] The recent CPA of December 2019, besides the primary task of transposing the Directive on legal aid, aimed to strengthen the principle of efficiency and economy, speeding up criminal proceedings and eliminating some deficiencies arising from the existing legal text.[11] However, these aims have not been accomplished completely and successfully, while some new legal solutions appear not to be in balance with the requirements of fundamental procedural principles.[12]

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and translation) under the Roadmap. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.

[8] For details on the new model of prosecutorial investigation, see D. Novosel, M. Pajčić, "Državni odvjetnik kao gospodar novog prethodnog kaznenog postupka" (2009) 16(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 427-429.

[9] Decison of the Constitutional Court of Republic of Croatia, U-I-448/2009, 19 July 2012, NN 91/2012. For more details, see Z. Đurđević, "Rekonstrukcija, juducijalizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V. novelom ZKP/08: prvi dio?" (2013) 20(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 316–317.

[10] Konačni prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku (Hrvatski Sabor, 2017) pp 46-54 available at *edoc.sabor.hr/DocumentView.aspx?entid=2004803*.

[11] See Konačni prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku, Zagreb (Hrvatski Sabor, 2019) p 12 available at *https://www.sabor.hr/hr/konacni-prijedlog-zakona-o-izmjenama-i-dopunama-zakona-o-kaznenom-postupku-drugo-citanje-pze-br-776*.

[12] For details, see E. Ivičević Karas, Z. Burić, "Na putu prema transponiranju Direktive o besplatnoj pravnoj pomoći u hrvatski kazneni postupak? Osvrt na prijedlog osme novele ZKP-a" (2019) 26(2) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 443–444.

Nevertheless, the processes of the constitutionalisation and Europeanisation of criminal procedure have contributed greatly to strengthening the position of suspected and accused persons in Croatian criminal proceedings,[13] but the adoption of the Regulation brings now new challenges for both the legislator and criminal justice authorities. One of the most important of the aspects in the implementation of the Regulation is the requirement for the protection of the defendant's rights faced with the strong role of the EPPO. Considering that the Regulation leaves this issue to the applicable national law, it is important to analyse whether the Croatian criminal justice system provides for an adequate framework and what the potential obstacles for the defence in the EPPO's proceedings might be.

Following the wording of the provisions of the Regulation on the procedural safeguards (Art 41), the rights of suspects and accused persons in Republic of Croatia will be analysed in the following sections.

2.2. The right to interpretation and translation

The first procedural right guaranteed in Article 41 of the Regulation is the right to interpretation and translation. This right was the subject of the first adopted measure under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, that is, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.[14]

Directive 2010/64/EU was implemented in Croatian criminal procedure law with the Act on Amendments to the Criminal Procedure Act in 2013.[15] The Directive requires a written translation of all documents which are essential to ensure that defendants are able to exercise their right of defence and to safeguard the fairness of the proceedings. Pursuant to the CPA, these documents include the letter of rights, the decision on the deprivation of liberty, the ruling on investigation, the order for evidentiary actions, the indictment, the private charge, the summons, and court decisions after the indictment until the final termination of the proceedings and in proceedings upon extraordinary legal remedies. The authority conducting the proceedings may *ex officio* or upon a reasoned written request of the defendant order the written translation of the evidence or part of it if this is necessary for the right of defence to be exercised, and, as an exception, an oral translation or oral summary of the evidence may

[13] Ibid., pp 317–318.

[14] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

[15] Narodne novine 56/2013.

be provided instead.[16] As regards the latter possibility, the Croatian legislator went beyond the requirements of the Directive by prescribing mandatory defence in the case of the oral translation of evidence.[17] Furthermore, the defendant has, upon his request, the right to the interpretation of communication between him and his legal counsel necessary for the preparation of the defence, for lodging an appeal or for undertaking other procedural actions if it is necessary for the exercise of the right of defence. By providing linguistic assistance for meetings between the accused and the accused's defence, the Directive strengthened the standards established in ECtHR case law.[18]

The new Act on Amendments to the Criminal Procedure Act[19] transposed entirely Directive 2010/64/EU by introducing in Article 8(6) a new legal remedy in order to ensure the protection of the defendant's right to translation throughout the proceedings. Hence, the defendant received the right to appeal against a decision rejecting the defendant's request for a written translation of the evidence or a part of it.[20] Furthermore, in line with Directive 2012/29/EU,[21] the legislator introduced the possibility of translation and interpretation through a telephone connection or audio – video device.[22] In accordance with the Directive and in order to fully protect defence rights, the costs of oral and written translation for the defendant, irrespective of the outcome of the proceedings, are not to be charged to the persons who are obliged to reimburse the costs of the criminal proceedings according to the provisions of the CPA, i.e., these costs are borne by the state (Article 145(6) CPA).

An empirical study on the procedural rights of the defence at different stages of the Croatian criminal procedure, conducted in 2016, indicated that

[16] On the condition that such an oral translation or oral summary does not prejudice the fairness of the proceedings and provided that the defendant has a defence attorney. Article 8(6) CPA.

[17] Prijedlog Zakona o izmjeni i dopunama Zakona o kaznenom postupku s konačnim prijedlogom Zakona (Vlada RH, travanj 2013) p 2.

[18] Cf. M. Gialuz, "The Implementation of the Directive on Linguistic Assistance in Italy, BetweenChanges to the Code of Criminal Procedure and Case-Law Resistance" in T. Rafaraci, R. Belfiore, *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer Nature, 2019) p 31.

[19] Narodne novine 70/2017.

[20] Beforehand, the defendant could challenge the decision of the authority conducting the proceedings only in the appeal against the judgment, on the ground of the substantive violation of the provisions of the criminal procedure.

Konačni prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku (Hrvatski Sabor, 2017) p 55.

[21] 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 [2012] OJ L 315/57..

[22] Article 8(11) CPA

the right to interpretation and translation is exercised in practice in a relatively satisfactory way.[23] The perceived shortcomings referred mostly to the right to interpretation of communication between the defendants and the defence attorneys, that is, the need for wider regulation of that right. Difficulties also sometimes arise in the search for interpreters for some exotic languages. The good practice of state attorney offices and courts to translate all the documents requested by the defendant, and sometimes the entire case file, which goes beyond the minimum guaranteed by the Directive, should be emphasised.[24] There was no situation in practice of the refusal of requests for translation.[25]

The right to interpretation and translation is of particular importance in the context of EPPO proceedings, especially those with transnational elements (in cross-border investigations) where linguistic assistance is one of the essential elements for the efficient exercise of defence rights. The results of the study on existing practice in the Republic of Croatia regarding the procedural rights of the defendant as well as the amendment which fully implemented the Directive in national law give good reason to believe that these rights will be respected and that there should be no obstacles in exercising these rights in EPPO proceedings. However, further attention should be given to the manner and extent to which these rights are provided during meetings between the defendant and the lawyer. Besides, a problem may arise in the allocation of a case in EU Member States that have not fully implemented the Directive and that have a lower level of protection of this right which means for the defendant a lower standard than that established in national law.

2.3. The right to information

According to Article 41 of the Regulation, defendants have the right to information and access to the case materials, as provided for in Directive 2012/13/EU. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[26]

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[23] E. Ivičević Karas, Z. Burić, M. Bonačić, "Prava obrane u različitim stadijima hrvatskog kaznenog postupka: rezultati istraživanja i prakse" (2016) 23(2) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 509-545.

[24] The idea behind Article 3 of the Directive is that the accused must know what the charges against him are and this does not mean the right to have all the writings of the accused translated. See A. Klip, "Fair Trial Rights in the European Union: Reconciling Accused and Victim's Rights" in T. Rafaraci, R. Belfiore, *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer Nature, 2019) p 16.

[25] Ivičević Karas, Burić, Bonačić (n 23) pp 509-545.

[26] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

as the second measure in the Roadmap on procedural rights ensures that suspected and accused persons are informed about their rights in criminal proceedings, a right which is not explicitly stated but can be inferred from the ECtHR case law.[27] However, the Directive goes beyond the ECtHR case law by introducing a provision on the written letter of rights upon arrest.[28] The Directive furthermore addresses the right to information about the accusation and the right of access to the materials of the case.

Timely and accurate information about the defendant's rights and about charges is a precondition for the efficient preparation of the defence and for the exercise of all the other rights in the proceedings.[29] Giving the complexity of criminal offences which fall under the competence of the EPPO, its investigative powers and the very often transnational elements of investigation, providing proper information on the charges and on defence rights will be of special importance in EPPO proceedings.

However, the Regulation lacks a provision which would define the moment the suspect should be notified that they are under investigation by the EPPO and this moment is important as it challenges a number of procedural rights of the defence.[30] Hence, it is the duty of the EPPO to deliver such a notice, as well as a deadline. The form of the notice depends entirely on the applicable national law. Besides this, the Regulation does not refer to the moment the person assumes the status of suspect and consequently all the procedural rights which pertain to the suspect at that moment.[31]

Directive 2012/13/EU was transposed into Croatian national law in 2013 through the Act on Amendments to the CPA.[32] These amendments introduced in Article 108(a) the written letter of rights for arrested persons which consists of a notice of the reasons for the arrest, the right to remain silent, the right of

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[27] S. Cras, L. De Matteis, "The Directive on the Rights to Information (2013) 1 *eucrim,* p 24.

[28] Ibid, p 27.

[29] For details see S. Allegrezza, A. Covolo, "Directive 2012/13/EU on the Right to Information in Criminal Proceedings: Status Quo Or Step Forward?" in Z. Đurđević, E. Ivičević Karas, (eds), *European Criminal Procedure Law in the Service of the Protection of the Union Financial Interests: State of Play and Challenges* (Croatian Association of European Criminal Law, 2016) p 42.

[30] See A. Novokmet, "The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution" (2017) 8(3) *New Journal of European Criminal Law*, p 398.

[31] Illuminati (n 5) p 191. See also S. Ruggeri, "Criminal Investigations, Interference with Fundamental Rights and Fair Trial Safeguards in the Proceedings of the European Public Prosecutor's Office: A Human Rights Law Perspective" in l. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature, 2018) pp 207-208.

[32] Act on Amendments to the CPA, NN 145/2013. For details on the transposition of this Directive, see E. Ivičević Karas, Z. Burić, Z, M. Bonačić, "Unapređenje procesnih prava osumnjičenika i okrivljenika u kaznenom postupku: pogled kroz prizmu europskih pravnih standarda" (2016) 23(1) *Hrvatski ljetopis za kaznene znanosti i praksu*, pp 36–39.

access to a lawyer, access to the case materials, the right to have a third person and consular authorities informed of the arrest, the right of access to urgent medical assistance, and the maximum number of hours or days that suspected or accused persons may be deprived of liberty before being brought before a judicial authority. This provision was amended in 2017 in accordance with Article 6(2) of the Directive on the right to information,[33] and now it is explicitly stated that the letter of rights for the arrestee contains both information on the reasons for the arrest and information on the grounds for the suspicion of having committed criminal offence. In addition, the legislator amended the provision on the information for suspects forcefully brought in and for suspects who appear voluntarily. Previously, the police could gather information from the latter category of suspects without any procedural guarantees, and in relation to the former category of suspects, the amendments of 2013 prescribed the duty to provide information on procedural rights but not in written form.[34]

Considering that the Regulation does not regulate this issue adequately, it is of utmost importance for national law to provide for the guarantee of the right to information in accordance with the Directive. In this sense, a good starting point for the EPPO's proceedings is the fact that there were no perceived obstacles in practice in relation to the exercise of the right to information in proceedings before the state attorney.[35] As regards the moment when the suspect should be notified that he or she is under investigation by the EPPO, in accordance with the CPA, the ruling on the conducting of investigation has to be delivered to the suspect within eight days from the date of its issue, and for criminal offences for which preliminary inquiries are conducted, the EDP will be obliged to inform the suspect about evidentiary actions within three days from the taking of the first evidentiary action.[36] Furthermore, the defendant receives the letter of rights which contains information on the charges and reasons for the reasonable suspicion, as well as information on his or her rights together with the summon for the first interrogation and with the order for undertaking certain evidentiary actions (Article 239 CPA).

The effectiveness of the proclaimed right to information can be questioned in the EPPO's proceedings in relation to the possibility of the redistribution of the case. Considering that the case can be allocated and, consequently, the applicable law can be changed in the course of the investigation once or even

[33] Konačni prijedlog Zakona o izmjenama i dopunama Zakona o kaznenom postupku (Hrvatski Sabor, 2017) p 71

[34] See Ivičević Karas, Burić, Bonačić (n 32) p 39.

[35] Ivičević Karas, Burić, Bonačić (n 23) pp 528-530.

[36] Unlike the Croatian CPA, the German StPO does not provide for the obligation of the public prosecutor to inform the suspect about the beginning of the investigation. Novokmet (n 30) p 392.

more than once, information on the charges and on the defence rights given in proceedings in one Member State can become insufficient and irrelevant. Such legal uncertainty poses a problem from a human rights perspective and prevents effective defence in pre-trial investigations.[37] A problem may arise when the defendant gains some procedural rights in accordance with the law of one Member State, and the law of the other Member State where the case is allocated does not guarantee that right to the same extent and from the same moment as the former. In order to ease the negative consequences of this situation, it is necessary for the defendant to be informed adequately and in a timely manner about the allocation of the case and about the new applicable law. As a minimum, national law should provide that the letter of rights for the suspected and accused person in EPPO proceedings also contain information that the case can be reallocated to an EDP in another Member State in accordance with Article 26, and also that once the investigation is closed, the case can be brought for prosecution in another Member State in accordance with Article 36.

According to the Regulation (Art 45(2)), access to the case file by suspected and accused persons as well as other persons involved in the proceedings should be granted by the handling European Delegated Prosecutor in accordance with the national law of that Prosecutor's Member State.[38] Considering that the Directive did not explicitly state that right of access to the case file should be granted during the pre-trial stage of criminal proceedings,[39] there could be discrepancies among EU MSs in relation to the moment from which suspected and accused persons in EPPO proceedings acquire the right of access to the EPPO case file.

The provisions of the Croatian CPA on the right of access to a case file were amended due to the need to transpose Directive 2012/13/EU as well as to implement the Decision of the Constitutional Court of the Republic of Croatia which derogated the provisions of the CPA/2008. The CPA allows for the defendant to access the case files from the moment of the interrogation, and

[37] See Mitsilegas and Giuffrida (n 3) p 73.

[38] The potential problems with the wording of Article 45(2) were recognised by the Meijers Committee which emphasised that the effective exercise of this right may not be possible in some situations in the EPPO's cross-border investigations when the defendant is detained, for it is much more difficult for the defendant to submit a request to access the case file to the handling European Delegated Prosecutor than to the authorities of the Member State where he is detained. The Meijers Committee standing committee of experts on international immigration, refugee and criminal law, "Note on the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Judicial Review, Forum Choice, Access to the Case File and Data Protection', p 2, https://www.commissie-meijers.nl/sites/all/files/cm1612_note_on_the_proposal_for_a_regulation_on_the_establishment_of_the_european_public_prosecutors_office_3110.pdf

[39] Allegrezza and Covolo (n 29) pp 47–48.

also from the moment of the official notification about the preliminary inquiries or investigation (depending on the criminal offence). The amendment also introduced the possibility to postpone the right of access to case files for a maximum of 30 days from the notification on the charge, and also to refuse access to certain case materials for particularly serious forms of criminal offences.[40] However, an empirical study indicates that the provisions on the restrictions do not apply in practice. Yet, some practical obstacles related to arranging the time for access to a case file and the costs of copying the file can occur.[41] As regards the costs of copying the file, although the amendment of 2013 clarified that these costs are not charged to the defence counsel appointed *ex officio,* it left open the possibility of charging these costs to the defendant which can be questioned from the aspect of Article 7(5) of the Directive which states that access to a case file should be provided free of charge.

These perceived practical obstacles could be more pronounced in the EPPO's proceedings and should be taken into consideration.

2.4. Right of access to a lawyer

Right of access to a lawyer is considered to be at the heart of the right to defence as a fundamental right,[42] whereas it facilitates the exercise of other defence rights, ensures a fair trial and strengthens the protection of the defendant from torture, inhuman and degrading treatment and punishment.[43] Consequently, the right of access to a lawyer should be the backbone of the effective exercise of defence rights in EPPO proceedings. However, the Regulation does not regulate this right in more detail but only refers to Directive 2013/48/EU[44] as implemented by national law.

[40] Article 184(a) CPA.

[41] Ivičević Karas, Burić and Bonačić (n 23) p 531.

[42] M. Jimeno-Bulnes, "The Right of Access to a Lawyer in the European Union: Directive 2013/48/ EU and Its Implementation in Spain" in T. Rafaraci, R. Belfiore (eds), *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer Nature, 2019) p 58.

[43] See Z. Đurđević, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings Filling a Human Rights Gap in the European Union Legal Order" in Z. Đurđević, E. Ivičević Karas, (eds), *European Criminal Procedure Law in the Service of the Protection of the Union Financial Interests: State of Play and Challenges* (Croatian Association of European Criminal Law, 2016) p 19.

[44] 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 [2013] OJ L 294/1.

Directive 2013/48/EU on the right of access to a lawyer addresses the right to legal advice as a part of measure C which is the core measure of the Roadmap for strengthening procedural rights.[45] It also includes measure D which concerns the right to communicate with and have a third person informed in the event of detention. Though Directive 2013/48/EU, founded on the *Salduz* case law, is considered to be a milestone and a big step forward in strengthening procedural rights in EU Member States, its efficiency in the EPPO's proceedings can be questioned, i.e., whether the Directive is an adequate and sufficient mechanism for the practical and effective exercise of the rights of defence in relation to the EPPO's powers. The major drawback of the Directive in relation to the EPPO's proceedings is the fact that the Directive does not refer to the right of access to a lawyer in transnational proceeding, and the EPPO's investigations will very often have a cross-border character. Hence, when the handling EDP assigns an investigation measure to the EDP from another Member State, the right of access to a lawyer will depend on the national law.[46] As Bachmaier Winters concludes, the defendant may exercise his right of access to a lawyer in the executing State under this Directive only in relation to identity parades, confrontations, and reconstructions of the scene of a crime when these measures are foreseen both in the issuing and executing State and in both States the accused is allowed or required to be present.[47]

The Directive on the right of access to a lawyer was transposed in the Croatian criminal procedure law with the last Amendments to the CPA in 2017. This was not an easy task since it required amendments which, though not large in extent, presupposed a change in the perception of the traditional concept of pre-trial proceedings in Republic of Croatia.[48] The amendments aimed to strengthen the procedural rights of the suspect from the earliest phase of the preliminary procedure, that is, from the first interrogation before the police which required changes of the notion of the suspect and defining the suspect in

[45] S. Cras, "The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings" (2014) 1 *eucrim*, p 32. The Directive does not deal with the other part of measure C which relates to the right to legal aid. This right is the subject of the Directive on right to legal aid. For details, see *infra* 2.5.

[46] L. Bachmaier Winter, "Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature, 2018) p 133 – 134.

[47] Ibid, pp 133–134.

[48] For more details on the implementation of Directive 2013/48/EU, see A. Novokmet, "The Europeanization of the Criminal Proceedings in the Republic of Croatia through the Implementation of Directive 2013/48/EU" (2019) 27 *European Journal of Crime, Criminal Law and Criminal Justice*, p 9.

substantive terms.[49] In this sense, the Croatian legislator prescribed detailed procedural safeguards for suspects from the first contact with the police.[50]

In order to transpose Article 4 of the Directive on the confidentiality of communication between suspects or the accused and their lawyer, the legislator intervened in several provisions of the CPA. It explicitly prescribed right to free and confidential communication as one of the fundamental procedural rights guaranteed in Article 64 CPA and, in addition, specifically guaranteed this right to the arrestee and detainee (Articles 114 and 139 CPA). Consequently, deriving from the absolute character of this right, the provisions of Article 75 and 76 CPA which allowed certain limitations of this right were deleted. It should be noted, though, that Member States could not agree in full on the absolute character of this right which is why Recitals 33 and 34 of the Directive left some margin for exception in relation to the situation of the colluding lawyer and the lawful surveillance operation by competent authorities by national intelligence services to safeguard national security.[51] However, our legislator did not foresee any exceptions to this right.[52]

Furthermore, in accordance with Directive (Art. 3(3)(c)), the Amendments to the CPA introduced the lawyer's right to attend certain evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime, when the defendant participates in these acts (Art 67(2)). Pavlović states that this provision of the Directive has not been fully transposed whereas the Directive allows for the lawyer to attend these acts regardless of the presence of the defendant.[53] However, the Directive guarantees this right in situations where the suspected or accused person is required or permitted to attend the act concerned and, from Recital 26 of the Directive, it follows that the lawyer can exercise this right when the defendant is present during these acts. Yet, it

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[49] A suspect is a person in relation to whom there are grounds for suspicion of having committed a criminal offence and against whom the police or the public prosecutor acts to clarify this suspicion. Article 202(2)(1) CPA. For details see Novokmed (n 48) pp 105–109.

[50] The arrestee has to be provided with clear and sufficient information about his rights, about the right to a lawyer and the possible consequences of waiving it. He has the right to communicate with at least one third person of his own choice, which may be restricted only if necessary to protect the interests of the proceedings or other important interest. Suspected or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. Furthermore, the possibilities of the postponement of the duty to inform third person on deprivation of liberty of suspect are delimited.

[51] Cras (n 45) p 42.

[52] For the critique of this legislative solution, see Š Pavlović, *Zakon o kaznenom postupku* (Libertin naklada, 2017) p 281.

[53] Pavlović (n 52) p 264.

is true that the Directive sets up minimum standards and that the legislator could and should give higher guarantees regarding participatory rights.

The amendment also regulated the right of the lawyer to be present and participate effectively in the evidence gathering act of questioning of suspected and accused persons (Article 276(4) CPA). The Directive left a certain margin of appreciation to MSs to define the concrete scope of participation of the lawyer during questioning,[54] and detailed regulation of this right in Croatian law was required and necessary considering the perceived discrepancies in practice.[55] According to the CPA, the lawyer is allowed to pose questions to the defendant after the competent authority finishes with the questioning.[56] Before that, during the questioning by the authority, the lawyer may only suggest to the defendant not to answer a particular question.

2.5. Right to legal aid

The Regulation guarantees in Article 41 the right to legal aid as provided for in 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.[57] This Directive was the last legislative measure adopted under the Roadmap on procedural rights. Even though the right to legal aid was together with the right to legal advice the object of measure C under the Roadmap, due to the specificity of this subject and the difficulties in establishing the scope of this right (as it has significant financial implication for the Member States), these two issues were dealt with separately.[58] As a result of compromises dur-

[54] See L. Bachmaier Winter, "The EU Directive on the Right to Access to a Lawyer: A Critical Assessment" in S. Ruggeri (ed), *Human Rights in European Criminal Law, New Developments in European Legislation and Case Law after the Lisbon Treaty* (Springer International Publishing, 2015) p 121.

[55] Ivičević Karas, Burić, and Bonačić (n 23) p 523.

[56] When the defendant completes his testimony, the competent authority will pose him questions if it is necessary to present some evidence, fill in the blanks or eliminate the contradictions and ambiguities in his presentation. During this part of the interrogation, the defendant cannot consult with his defence counsel on how he will answer the particular question asked, but the defence attorney may suggest that the defendant not answer the particular question asked. Article 276(4) CPA

[57] 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 [2016] OJ L 297/1.

[58] For the genesis of the Directive, see S. Cras, "The Directive on the Right to Legal Aid in Criminal and EAW Proceedings: Genesis and Description of the Sixth Instrument of the 2009 Roadmap" (2017) 1 *eucrim*, pp 34–38.

ing the negotiations, the Directive has a somewhat limited scope of application; it does not apply to the same extent as the right of access to a lawyer, that is, it does not apply to all suspects and accused persons whether deprived of liberty or not. A compromise on the scope of the application has been found, so that in addition to situations of deprivation of liberty this right should also be guaranteed as a minimum when mandatory assistance is required by law, and when the suspect and accused persons are required or permitted to attend certain investigative or evidence gathering acts (identity parades, confrontations and reconstruction of the scene of crime).[59] However, the questioning of the suspect by the police is not listed among these actions, which means that the suspect will have the right to legal aid on being questioned only when deprived of liberty. Thus, questioning by the police of the suspect who is not arrested remains outside the scope of the Directive.

The right to legal aid should be ensured if the suspects and accused lack sufficient resources to pay for the assistance of a lawyer when the interests of justice so require. In the determination of whether legal aid is to be granted, Member States may apply a means test, a merits test, or both. The criteria set to determine whether these conditions are fulfilled (the means and merits test) derive from ECtHR case law.[60] Even though the Directive leaves a large margin of discretion to the Member States regarding these tests, in any event the merits test is deemed to have been met when a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive and during detention.[61] Furthermore, the Directive leaves the Member States free to decide whether their authorities may request compensation of the costs of legal aid provided in proceedings which result in conviction.[62]

As regards the EPPO's proceedings, taking into account a large margin of discretion left to the Member States and the somewhat lean text of the Directive,[63] Mitsilegas and Giuffrida question whether the regime provided for by the Directive is effective enough to protect the rights of suspects or accused persons in EPPO proceedings.[64] This especially concerns the question of the costs of defence in transnational investigations when a person is requested to exercise his right of defence with regard to investigation carried out in various countries.[65] In this direction, Bachmaier Winter emphasises that this directive

[59] Cras (n 58) p 40
[60] *Quaranta v. Switzerland*, Appl. no. 12744/87, 24 May 1991, § 32–34.
[61] Article 4(4) of the Directive.
[62] Cras (n 58) p 43.
[63] Ibid, p 44.
[64] Mitsilegas and Giuffrida (n 3) p 71
[65] Ibid, p 71

does not address the right to a lawyer in the procedure of evidence gathering nor in the assessment of the necessity and proportionality of the measure assigned to an EDP, and the validity of the evidence obtained by an EDP in another Member State.[66] Although the Directive on the right of access to a lawyer and the Directive on right to legal aid undoubtedly improved the standards of protection of procedural rights,[67] it is regrettable that the EU legislator, being aware that the directives do not ensure full protection in specific situations of transnational proceedings and subsequently of the EPPO's proceedings, did not elaborate further the right of access to a lawyer and the right to legal aid in the Regulation.

The Directive on the right to legal aid was transposed in Croatian law with the latest amendment of the CPA in 2019. Implementation of this Directive presupposed significant interventions in the existing concept of the right of access to a lawyer at the expense of budget funds.[68] This right was guaranteed only at later stages of proceedings, from the moment of the receipt of the ruling on the conduct of the investigation, and for criminal offences for which the investigation is not conducted only after the indictment was filed. This was not in line with the regulation of the right of access to a lawyer which has been, since the amendments of 2017, guaranteed from the earliest stages of the proceedings in accordance with the Directive on the right of access to a lawyer. Hence, defendants who lack resources could not effectively exercise their right of access to a lawyer from the earliest stages of proceedings which could bring them to an unequal position in relation to defendants with sufficient resources.[69]

Major changes brought in by the legislator relate to the extension of this right to the phase of preliminary inquiries, accepting lower standard of proof of the lack of sufficient resources,[70] and introducing the new institute of provisional legal aid.

As regards the first change, unjustified differentiation of the right to legal aid depending on whether the investigation or preliminary inquiries are conducted has been abolished and now the suspect has the right of access to a lawyer at the expense of budget funds from the moment of informing on the first evidentiary action in accordance with Article 213(2) CPA, that is, from the beginning of the preliminary inquiries.

[66] Bachmaier Winter (n 46) pp 134–135.

[67] Ibid, p 135.

[68] See E. Ivičević Karas, L. Valković, "Pravo na branitelja u policiji – pravna i stvarna ograničenja" (2017) 24(2) *Hrvatski ljetopis za kaznene znanosti i praksu*, p 432.

[69] Ivičević Karas and Valković (n 68) p 432.

[70] The procedure of determining whether the defendant lacks sufficient resources have been shown in practice as too complicated and bureaucratic See Đurđević (n 9) p 352.

The importance of granting emergency or provisional legal aid when the competent authorities are not able to grant legal aid without undue delay and at the latest before the questioning of the person concerned, or before the specific investigative or evidence-gathering acts referred to in this Directive are carried out, is outlined in Recital 19 of the Directive.[71] The need to introduce the right to provisional legal aid before the first questioning is emphasised in Croatian criminal procedure law especially in the light of the amendments of 2017 which allowed for the statement of the suspect given before the police to be used as evidence at the trial. Considering the scope of the Directive, the CPA foresees in one aspect a wider scope of this right than the Directive, since it provides for the right to a lawyer at the expense of the budget for suspects when being questioned by the police whether or not they are deprived of liberty. However, a major shortcoming is the limitation of the right to provisional legal aid only in proceedings for criminal offences for which imprisonment of more than five years is prescribed. In this way, the legislator narrowed the scope of the right to legal aid in relation to situations for which the Directive did not foresee this kind of restriction and set up very high criteria of the interests of justice.[72] Furthermore, the provisions of the CPA on the authority competent for deciding on granting legal aid are not harmonised with the Directive even after the latest amendment. According to the CPA, the competent authority for deciding on the request for legal aid is the state attorney or judge depending on the stage of the proceedings. However, Recital 24 of the Directive clarifies that the competent authority should be an independent authority that is competent to take decisions, or a court, including a judge sitting alone, and that the police and the prosecution can take this decision only in urgent situations, when it is necessary for granting legal aid in a timely manner.

As regards EPPO proceedings, the scope of this right guaranteed by the CPA will thus depend on the criminal offence in question, i.e. the prescribed sanction. It should be noted also that Croatian law foresees mandatory legal assistance in a relatively broad manner which partially overlap with the scope of the right on legal aid guaranteed under the Directive. This means that for certain criminal offences which fall under the material competence of the EPPO in accordance with the current legislation, such as subvention fraud,[73] mandatory legal assistance will be required from the first questioning.

Having in mind that the EPPO is being introduced in national system as a new supranational body of prosecution with significant investigative powers, and considering further its complex organisational structure and all the difficulties that arise for the defence from these features especially in trans-border

[71] Recital 19 of Directive.

[72] For the critique see Ivičević Karas and Burić (n 12) p 433.

[73] According to Art 19 CPA, county courts have trial jurisdiction for subvention fraud

investigations, EPPO proceedings should be defined by law as situations which fulfil the merits test, meaning that the interest of justice in these cases justify the right to legal aid if the defendant lacks sufficient resources.[74]

2.6. Right to remain silent and the right to be presumed innocent

The Regulation also guarantees suspected and accused persons in EPPO proceedings the right to remain silent and the right to be presumed innocent in accordance with 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.[75] It should be mentioned that the Regulation does not specifically mention the right not to incriminate oneself, though this right is guaranteed in Article 7 of Directive 2016/343 together with the right to remain silent as specific aspects of the presumption of innocence. Though closely related,[76] these two guarantees can be seen as two partly overlapping circles.[77] However, whereas the Regulation guarantees the right to be presumed innocence, and the privilege against self-incrimination is seen as one aspect of this presumption, it can be concluded that suspected and accused persons should have this right guaranteed in EPPO proceedings.

Directive 2016/343 as the fourth adopted measure under the Roadmap sets up higher standards of protection of the procedural rights of suspected and accused persons. Unlike the other directives, this one applies even before the moment the person is aware that he is suspected or accused of having committed a criminal offence.[78] Though the Directive presents a codification of the ECtHR standards, in some aspects it goes beyond these standards,[79] since it guarantees the right to remain silent and the right not to incriminate oneself as absolute rights.[80] The provisions of Directive 2016/343 differ from the other

[74] See Bachmaier Winter (n 46) p 134.

[75] 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, [2016] OJ L 65/1.

[76] Although this right is not explicitly guaranteed in the ECHR, the ECtHR recognised this right deriving from the right to a fair trial. *Funke v France*, App. no. 10828/84, 25 February 1993, § 44. For more details, see S. Trechsel, Human Rights in Criminal Proceedings (Oxford University Press, 2005) pp 340–359.

[77] Ibid., p 342

[78] For a detailed genesis of this Directive, see S. Cras and A. Erbežnik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial” (2016) 1 *Eucrim*, p 28ff.

[79] See John *Murray v UK*, App. no. 18731/91, 8 February 1996.

[80] However, the wording of Recital 28 opens space for different interpretation also. See Cras and Erbežnik (n 78) p 32.

directives since they set out general principles of law, instead of a procedural framework for the protection of the rights of the suspected or accused person which opens question of the adequate transposition and implementation of the Directive in national law.[81] Hence, the Croatian legislator did not make specific amendments to the law which aimed principally to transpose the provisions of the Directive but informed the Commission of the package of legislative measures in force which altogether comply with the Directive. However, the latest Amendment to the CPA introduced an explicit provision on the burden of proof and referred to Directive 2016/343.

As a constitutional principle, the presumption of innocence is proclaimed in Croatian law in Article 28 of the Constitution of Republic of Croatia and Article 3 of the CPA.[82] Furthermore, the right to remain silent is guaranteed in Article 64(1)(7).[83] The defendant has to be informed of the right to remain silent from the first moment of the arrest and this information is part of the Letter of Rights which has to be delivered to suspected and accused persons before certain evidentiary actions are taken, or upon delivering certain decisions which affect the procedural position of the defendant. The burden of proof for establishing the guilt of suspected and accused persons lies on the prosecution. With the latest amendment, this principle is explicitly prescribed in Article 2(2), but it is also enshrined in other provisions of the CPA (Art 38(2), Art 47(1), Art 217, 342-343 CPA).[84] The CPA contains provisions which preclude the prosecutor from lowering this burden by using the defendant as a source of evidence in situations where the prosecution lacks other strong evidence of guilt (Arts 417a(5), 418 (2) and (5) CPA).[85] However the Criminal Code foresees two exceptions to this rule, that is, situations in which the law places the burden of proof on the defendant: the first is related to the institute of extended confiscation of the pecuniary gain (Article 78(2) CC) and the other concerns the criminal offence of serious defamation. The application of extended confiscation is possible for criminal offences which fall under the competence of the State Attorney's Office for the Suppression of Organised Crime and Corruption (USKOK), and some of these offences fall under the

[81] EU Directive on the Presumption of Innocence: Implementation Toolkit, Fair Trials, https://www.fairtrials.org/wp-content/uploads/2017/06/Presumption-of-Innocence-Toolkit_2.pdf

[82] Article 3 CPA: A person is innocent and no one may hold him guilty of a criminal offence until the guilt is established by a final judgement.

[83] The defendant has the right to present a defence or not to, to refuse to answer a posed question or remain silent.

[84] Art 2(2) CPA: "Unless otherwise provided by law, the burden of proving the existence of facts forming the elements of the offence or on which the application of the criminal law depends, is on the prosecutor."

[85] D. Krapac, *Kazneno procesno pravo, Prva knjiga: Institucije* (Narodne novine, 2014) pp 422-423.

competence of the EPPO in accordance with the PIF Directive. However, these exceptions do not violate the principle of the presumption of innocence since they fall under the admissible use of presumptions of fact and law, which is also recognised in ECtHR case law.[86] Recital 22 of Directive 2016/343 also supports this stance.[87] The other consequence which derives from the presumption of innocence is the rule whereby the court has to render a judgement of acquittal when it has not been proven that the accused committed the offence he is charged with (Art. 453(3) and Art 6(2) of the Directive).

Article 5 of Directive 2016/343 addresses so-called "reputation related" aspects of the presumption of innocence.[88] These aspects include public references (statements) to guilt during proceedings as well as the presentation of suspected and accused persons in court or in public. As to the former aspect, in a ECtHR leading case, *Peša v. Croatia*, the Court found a breach of the applicant's right to be presumed innocent due to the statements by four high-ranking public officials (the State Attorney, the Head of the Police, the Prime Minister and the State President) given to the media in the days immediately following the arrest of the applicant amounted to a declaration of the applicant's guilt and prejudged the assessment of the facts by the competent judicial authority.[89]

According to Article 5, Member States have to take appropriate measures to ensure that suspected and accused persons are not presented as being guilty, in court or in the public, through the use of measures of physical restraint. As regards this aspect, the Directive goes further than the ECtHR which has found in its case law that such measures violate the right of the defendant to be free from degrading treatment under Article 3 ECHR, rather than the presumption

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[86] *Salabiaku v. France*, App. no. 10519/83, 7 October 1988.

[87] A provision on the reversal of the burden of proof by the use of these presumptions was the object of the negotiations and as a result of a compromise. They were deleted from the operative part of the Directive but they are mentioned in the recitals. Cras and Erbežnik (n 78) pp 30–31.

[88] Trechsel (n 76) pp 178-179

[89] *Peša v Croatia*, App. no. 40523/08, 8 April 2010, § 150. As to the measures which the government has taken in order to comply with the judgement, the Ministry of the Interior has adopted "Guidelines in relations with the media" which contain instructions for all police employees authorised to give information to the public on how to provide relevant information without jeopardising the rights of those involved in an incident or investigation (both the suspect and the victim). Additionally, the Guidelines predict coordination between police authorities and the prosecutors' office and/or USKOK (Office for the Prevention of Corruption and Organised Crime) in informing the public of investigations of public interest. Action Report on individual and general measures undertaken in the execution of the ECtHR judgment in the case of *Peša v. Croatia*, Application no. 40523/08, judgment of 8 April 2010, final on 8 July 2010.

of innocence under Article 6(2) ECHR.[90] Even though Croatian national law lays down principles of proportionality and legality when applying measures of coercion in criminal proceedings, in some situations the question can be raised of the appropriateness of using such coercive measure, that is, the question of proportionality between the method of use of force and the gravity of the criminal offence and the circumstances of the criminal proceedings.[91]

Furthermore, it should be noted that the terminology in certain provisions of the CPA is not in the line with the presumption of innocence, since the term of perpetrator is used instead of the terms suspected and accused persons (Art. 43(a), 206(i), 245(3), 332(7) of CPA) prejudicing in this way the guilt of the person against whom certain procedural actions are undertaken so amendments in the direction of enhancing the presumption of innocence should be considered.

2.7. Right of defence to gather evidence

The important element of the principle of equality of arms from the aspect of defence is the right to gather and present evidence. However, effective realisation of this right in the pre-trial phase especially in prosecutorial investigations is questionable. Even when efforts to strengthen the participatory rights of the defence exist, the involvement of the defence, as Ruggeri points out, will inevitably be secondary.[92]

The right of defence lawyers to gather evidence is not commonly accepted in national laws of EU Member States. Considering that there is no compliant stance on this question, this aspect of defence rights has not been harmonised at the EU level through directives, and neither does the Regulation bring harmonisation in this direction.[93] Article 41(3) of the Regulation states that suspects and accused persons should have all the procedural rights available to them under the applicable national law, including the possibility to present evidence and to request certain evidentiary actions (the appointment of experts or expert examination and hearing of witnesses and to request the EPPO to obtain such measures on behalf of the defence). Some authors state that this

[90] EU Directive on the Presumption of Innocence: Implementation Toolkit, Fair Trials, https://www.fairtrials.org/wp-content/uploads/2017/06/Presumption-of-Innocence-Toolkit_2.pdf, p 19.

[91] See M. Pleić, "Standardi izvršenja pritvora u kaznenom postupku", Doctoral Dissertation, 2014, p 271.

[92] S. Ruggeri, *Audi Alteram Partem in Criminal Proceedings: Towards a Participatory Understanding of Criminal Justice in Europe and Latin America* (Springer International Publishing, 2017) p 82.

[93] See Ruggeri (n 31) p 218–219.

part of the provision constitutes the specific right of the defence which should be guaranteed even if these measures are not available under national law.[94] However, from the wording of Recital 85 it is evident that suspected and accused persons should benefit from this right only when provided for in national law. This means that individuals will enjoy a different degree of protection according to the applicable national law.[95]

While some authors welcomed this provision of the Regulation as it at least envisages the proactive role of the defence,[96] others emphasise the limitations which make this right hypothetical[97] without providing for any specific investigative powers for defence lawyers.[98] In other words, this provision only provides for a right to request certain evidentiary actions, which implies the discretion of the EPPO not to grant it.[99] Hence, the Regulation itself does not provide for any higher guarantees for defendants in EPPO proceedings which could counterbalance the existing inequality of arms, nor does it bring added value or harmonisation of this aspect of procedural rights. The inherent imbalance between the prosecution and defence is even more accentuated in EPPO proceedings since specific investigative measures are available to EDPs under the Regulation, while at the same time the defence can only request them to the extent allowed by domestic law.[100] This imbalance, i.e. inequality of arms, will be particularly pronounced in trans-border cases.[101] Considering all the above, calls for the establishment of a "Eurodefensor"[102] or some kind of network of defence lawyers at the EU level[103] are quite justified and welcomed.

Since the right to gather evidence in EPPO proceedings is dependent on the applicable national law, it remains to see the defendant's role in evidence gathering in EPPO proceedings according to Croatian criminal procedure law. Though Croatian law does not foresee the right of defence to gather evidence

[94] P. Csonka, A. Juszczak, E. Sason, "The Establishment of the European Public Prosecutor's Office: The Road from Vision to Reality (2017) 3 *eucrim*, p 131.

[95] Mitsilegas and Giuffrida (n 3) p 76.

[96] S. Allegrezza, "Pubblico Ministero europeo e posizione della difesa: nuovi scenari per la tutela delle garanzie della persona sottoposta alle indagini. Le questioni in gioco" in G. Grasso, G. Illuminati, R. Sicurella, S. Allegrezza (eds), *Le sfide dell'attuazione di una Procura europea: definizione di regole comuni e loro impatto sugli ordinamenti interni* (Giuffrè, 2013) p 485; Mitsilegas and Giuffrida (n 3) p 76.

[97] S. Allegrezza, A. Mosna, "Cross-Border Criminal Evidence and the Future European Public Prosecutor. One Step Back on Mutual Recognition?" in L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead* (Springer Nature, 2018) p 149.

[98] Ruggeri (n 31) p 218.

[99] Mitsilegas and Giuffrida (n 3) p 75.

[100] See Ruggeri (n 31) p 218.

[101] Allegrezza and Mosna (n 97) p 158.

[102] Ruggeri (n 31) p 218.

[103] Allegrezza and Mosna (n 97) p 158.

during pre-trial proceedings, it provides for certain participatory rights in evidence-gathering which are in line with Art 41(31) of the Regulation, that is, the right to propose to the state attorney to conduct evidence collecting actions, the right to attend certain evidentiary actions, and the rather limited right to participate actively.

Although the CPA/2008 provided for the defence attorney's right to take certain investigative actions in the direction of collecting necessary information for the defence which could at first appear to be contributing to strengthening the principle of equality of arms,[104] these activities do not present an adequate counterpart to the investigative powers of the state attorney who becomes the "master" of the pre-trial proceedings and is authorised to conduct investigation and to collect evidence, and even less so to the investigative powers of the EPPO. According to Article 67 CPA, the defence counsel may, for the purposes of the preparation of defence, request a statement from citizens other than the victim or the injured person of the criminal offence.[105] The Amendment to the CPA of 2013[106] resolved doubts that had arisen as regards the legal effect of the notes of the defence by prescribing explicitly that these notes cannot serve as evidence at trial. Defence notes drawn up during the examination of citizens serve to explain the defence proposals of evidence and are attached to the case file.[107] Pavlović points out that this information from citizens has so far failed to serve its purpose, firstly because citizens are not willing to answer the summons or to give a statement to defence attorneys and, secondly, because these notes cannot serve as evidence in proceedings but only as information upon which the defendant can propose to the state attorney to conduct evidence-collecting actions or for the explanation of the defence proposals of evidence during the proceedings.[108]

The defendant may, in accordance with Art. 234 CPA, after the receipt of the ruling on conducting the investigation, propose to the state attorney and by analogy to the EDP, to conduct evidentiary actions. For criminal offences for which preliminary inquiries are conducted, the defendant has the right to propose evidentiary actions after he receives notification on the first evidentiary

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[104] L. Valković, "Procesna prava obrane prema V. noveli Zakona o kaznenom postupku" (2013) 20(2) *Hrvatski ljetopis za kazneno pravo i praksu*, p 544.

[105] When summoning a citizen for the purpose of requesting a statement, the reason for summoning must be clearly stated. The defence counsel must not threaten the citizen with consequences for failure to answer. A person who answers the summons but refuses to give a statement may not be summoned twice for the same reason. The form and the content of the summons is determined by the Croatian Bar Association with the prior approval of the minister responsible for justice. Article 67(4) CPA.

[106] Narodne novine 145/2013

[107] Article 67(6) CPA

[108] Pavlović (n 52) p 263–264.

action undertaken by the state attorney.[109] Hence, if the EDP accepts the proposal of the defendant, he shall conduct the relevant evidence-collecting action which includes an examination of witnesses and expert witness testimony, but the defendant can also propose any other evidence action. If the EDP does not agree with the proposal of the defendant, he should within eight days deliver the proposal to the investigating judge and notify the defendant thereof in writing. The investigating judge has to decide on the proposal of the defendant.

As a rule, the state attorney undertakes evidentiary actions in a non-contradictory manner whereas the defendant and the defence lawyer are allowed to attend only those evidentiary actions which they have proposed (Art 234(3), 213(4) CPA). Besides, their confrontational right to question witnesses when investigation is not conducted is limited only to evidentiary hearing conducted by a judge of investigation in situations prescribed by law.[110]

An empirical study on preliminary inquiries in Republic of Croatia pointed out the relatively low activity of defendants in evidence gathering, that is, a very small number of filed proposals for conducting certain evidence actions. On the other hand, almost all proposals of the defence were accepted which implies that the defence's proposals were procedurally justified.[111] This can indicate that the assessment of the state attorney in most cases is good and that defence attorneys consider that there is no need for further proposals.

The participatory rights of the defence were to a certain extent enhanced with the transposition of the Directive on access to a lawyer (Amendments to the CPA of 2017) as regards the right to attend certain evidentiary actions and to actively participate in the questioning of the defendant.[112]

Considering the already mentioned accentuated imbalance between the EPPO's investigative powers arising from the Regulation and the defendant whose participatory rights are limited by national law, it is justifiable to question whether the existing participatory rights will suffice to alleviate this imbalance and ensure equality of arms in EPPO proceedings.

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[109] Article 213(4) CPA.

[110] For details, see E. Ivičević Karas, "Dokazna snaga rezultata istrage prema Prijedlogu novele Zakona o kaznenom postupku" (2013) 2(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 704–708.

[111] Hence, in only 4% of cases of preliminary inquiries, the defendant filed a proposal for the conduct of the evidence-gathering action. Research is conducted in the Municipal State Attorney's Office in Split. For details, see M. Carić, "Istraživanje – zakonodavni okvir i praktična primjena" (2018 25(2) *Hrvatski ljetopis za kazneno pravo i praksu*, pp 527–528.

[112] For details *supra* 2.4.

3. JUDICIAL REVIEW OF PROCEDURAL ACTS OF THE EPPO IN CROATIAN CRIMINAL PROCEDURE LAW

Considering that the complex organisational structure of the EPPO, the supranational nature of this body and its broad investigative coercive powers can undoubtedly affect fundamental rights in criminal proceedings, the establishment of an effective mechanism of judicial control of the EPPO and its procedural acts appears to be an essential factor in ensuring the effective protection of defence rights and generally to support the rule of law in EPPO proceedings.[113] In this sense, the question of the competent judicial authority for the judicial review of the EPPO's acts, and more concretely, the question of the distribution of jurisdiction between national courts and the European Court of Justice is one of the key issues of the Regulation. Even though the EPPO is an EU body of prosecution, the Regulation did not provide for judicial review of all procedural acts of the EPPO at the EU level.[114] Deriving from the premise that the EPPO's procedural acts and investigative measures will mainly be based on national law and exercised in national criminal systems, and consequently that it can be considered as a national authority,[115] the Regulation entrusted the judicial review of procedural acts of investigation and prosecution to national courts, in accordance with applicable national law.[116] Nevertheless, the EU Court of Justice has jurisdiction in situations denominated in Art. 42(2-8), that is, it remains competent for the review of the EPPO's acts which derive directly from Union law.

Given that the law of EU Member States differs considerably regarding the judicial review of the pre-trial stage of criminal proceedings and that this aspect of criminal procedure is not harmonised at the EU level by the procedural rights directives,[117] control over the procedural actions of the EPPO and consequently the level of the protection of defence rights will depend almost entirely on the efficiency of the national system of judicial review. Consequently, differences in national law of EU Member States can lead to the phe-

[113] On the function and scope of judicial control, see M. Böse, "Judicial Control of the European PublicProsecutor's Office" in T. Rafaraci, R. Belfiore, *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office* (Springer Nature, 2019) p 192. For details on judicial control, see Z. Đurđević, "Judicial Control in Pre- Trial Criminal Procedure Conducted by the European Public Prosecutor's Office" in K. Ligeti (ed), *Toward a Prosecutor for the European Union, Volume 1, A Comparative Analysis* (Hart Publishing, 2013) pp 986–1010.

[114] Mitsilegas and Giuffrida (n 3) p 78.

[115] See Böse (n 113) p 194.

[116] Ibid., p 194.

[117] For a comparative overview of judicial review of criminal prosecution, see Novokmet (n 28) p 381.

nomenon of forum shopping. The Permanent Chamber could decide to reallocate a case in accordance with Article 26 of the Regulation, from a Member State with a stringent system of judicial control to an EDP in another Member State with a more lenient system of judicial review of pre-trial proceedings in order to ensure more efficient investigation. Furthermore, problems arise regarding the judicial control of decisions of the Permanent Chamber on case allocation and on forum choice as these decisions are not subjected to judicial review at the EU level and the judicial review of these decisions by national courts raises considerable doubts. These doubts concern the question before which competent court the defendant should challenge the Permanent Chamber's decisions on allocation, what the criteria are that should govern this judicial review and how the Permanent Chamber's decision can be called into question by means of domestic law on the establishment of jurisdiction.[118] It is evident that these questions cannot be adequately resolved by leaving them entirely dependent on particular national law, since this would lead to inconsistencies. The Regulation should have prescribed a more detailed framework in this regard and at least set guidelines for national law with regard to the determination of the competent national court and to the establishment of special legal means under national law for challenging the mentioned decisions.

As previously stated, judicial control of the EPPO depends mostly on the applicable national law and in this sense Croatian criminal procedure law provides a relatively good basis for the judicial review of the EPPO's procedural acts at the national level where new mechanisms of judicial control of the state attorney's actions during the pre-trial proceedings have been established in recent years. Namely, in 2013 the legislator implemented, though not completely successfully, the decision of the Constitutional Court of Republic of Croatia which identified considerable and serious shortcomings of the new Criminal Procedure Act of 2008 and abrogated a number of provisions of the CPA as unconstitutional. Implementation of this decision necessitated changes in the structure of pre-trial proceedings by introducing an effective mechanism of judicial protection against unlawful criminal prosecution and investigation and, in order to comply with the requirements of effective investigation, by introducing legal remedies against delay and other obstructions in criminal proceedings.[119] Even though the decision of the Constitutional Court was not implemented comprehensively,[120] this legislative reform represents a significant step forward as it contributed to the balancing of the criminal procedure and undoubtedly strengthened the procedural rights of the defence.

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118 Ruggeri (n 31) p 214.

119 Decision of the Constitutional Court of Republic of Croatia U-I-448/2009 of 19 July 2012, paragraph 246, NN 91/2012.

120 See Đurđević (n 9) p 315–362.

Judicial review of the principle of the legality of criminal prosecution was introduced into the stage of investigation as well as during preliminary inquiries through the right of appeal against a ruling on investigation and through a complaint for a violation of procedural defence rights. Upon the defendant's appeal against the ruling on conducting investigation, the judge of investigation reviews the formal and substantive conditions required to conduct an investigation.[121] On the other hand, a complaint for the violation of procedural defence rights under Article 239a CPA servers as a mechanism of judicial control over the deprivation and violation of defence rights and it cannot be filed for the same reasons for which an appeal can be filed. As regards judicial review of preliminary inquiries, while there is no formal decision on the initiation of preliminary inquiries and therefore there is no right to appeal that decision, the legislator introduced one unique legal remedy. Hence, the judge of investigation can upon the defendant's complaint decide on the violation of defence rights as well as on the existence of legal preconditions for conducting preliminary inquiries.[122] Furthermore, the legislator introduced judicial review over a delay in criminal prosecution and proceedings from the moment of submission of a crime report through the investigation (or preliminary inquiries).[123]

Besides, the CPA prescribes time limits for the conducting and closing of the investigation and judicial control over the length of the investigation. Pursuant to Article 229(5) CPA, if the investigation is not concluded within the time limits prescribed by law,[124] the defendant has the right to file a complaint to the judge of investigation for a delay of the proceedings. If the judge of investigation finds that the complaint is founded, the judge will determine the time limit for the closing of the investigation and the state attorney has to inform the judge of investigation on the closing of the investigation. If the judge of investigation finds that the complaint is unfounded, he will notify the defendant.

[121] M. Munivrana Vajda, E. Ivičević Karas, "Croatia" in F. Verbruggen, V. Franssen, N.L. Alphen aan den Rijn (eds), *International Encyclopedia of Laws: Criminal Law* (Kluwer Law International, 2016) p 187.

[122] For details on the inconsistency of this legislative solution see Đurđević (n 9) p 330–331.

[123] According to Article 213b CPA if, within six months from the moment the crime report was logged in the crime report register or from the arrest, the state attorney does not decide on the crime report, the defendant has the right to file a complaint to a judge of investigation for the delay of the proceedings. If the investigating judge finds that the complaint is grounded, the judge shall determine the deadline for the state attorney to decide on the criminal report. The state attorney shall inform the judge of investigation of his decision. If the judge finds that the complaint is unfounded, he will notify the defendant.

[124] The regular time limit for investigation is 6 months, but for justified reasons the state attorney can prolonged it for a further 6 months and, exceptionally, it can be prolonged for a further 6 months by the State Attorney General (Art 229(2) and (3) CPA).

However, in the context of the EPPO's proceedings, the provision on the possible prolongation of investigation by the State Attorney General (Art 229(3) CPA) as well as the provision on the prolongation of the time limits for deciding on the outcome of the proceedings after the closing of the investigation (Art 230) can raise doubts. According to the CPA, these decisions are taken by the state attorney of a higher instance. According to Article 12(4) of the Regulation where the national law of a Member State provides for the internal review of certain acts within the structure of a national prosecutor's office, the review of such acts taken by the EDP shall fall under the supervisory powers of the supervising European Prosecutor in accordance with the internal rules of procedure of the EPPO without prejudice to the supervisory and monitoring powers of the Permanent Chamber. In addition, Recital 30 states that in such cases Member States should not be obliged to provide for review by national courts.

Furthermore, a problem may arise regarding the time limits prescribed by the CPA for the preferring of the indictment.[125] These time limits are preclusive, and their breach leads to a presumption that the state attorney desists from prosecution. However, according to the Regulation, the Permanent Chamber has to decide on the draft decision of the EDP proposing to bring a case to judgment within 21 days, so amendments of the CPA are needed in the direction of prolonging the time limits in EPPO proceedings.[126]

Notwithstanding the shortcomings in the current legislation regarding the established system of judicial control,[127] the fact is that Croatian law provides for a higher level of judicial protection of procedural rights of defence in pretrial proceedings in relation to some other EU Member States. In the context of EPPO proceedings, this can lead to the paradoxical situation of lowering existing standards established under national law in order to comply with the Regulation. Taking into account the complex mechanism of judicial control of the investigative and prosecution actions of the EPPO established under national law (CPA), the Permanent Chamber might be inclined to bypass national rules by reallocating the case to the EDP in another MS with a more lenient system of judicial control.

[125] One month from the day that the closing of the investigation had been logged in the criminal report register but for justified reasons state attorney of a higher instance can prolong that term for two more months.

[126] See Jelenić, D.: Europeizacija kaznenog progona – Ured europskog javnog tužitelja u Republici Hrvatskoj.in: Barbić, J. (ed): Europska budućnost hrvatkog kaznenog pravosuđa, HAZU, Zagreb, 2018, fn. 17, p 93

[127] See Đurđević (n 9) p 359 – 361.

4. CONCLUSION

The Regulation envisages the strong role of the EPPO with considerable powers in the investigation and prosecution of criminal offences affecting EU financial interests, but at the same time it does not provide for special procedural mechanisms on the defence side which could counterbalance the EPPO's powers.

Although strengthening defence rights at the national level is reflected in the defendant's position in EPPO proceedings, some deficiencies of the Regulation cannot be compensated for by national law. Besides, leaving open so many issues regarding procedural safeguards in EPPO proceedings, that is, entrusting their regulation to national law, does not contribute to the establishment of a uniform procedure and harmonisation of procedural rights in the EPPO's proceedings, and the EU legislator is the one who should provide for this. The defence will especially face problems and obstacles in transnational EPPO proceedings since the protection of defence rights in these proceedings is not equivalent to protection in non-transnational proceedings at the domestic level.[128] Until the EU legislator decides to make amendments in this direction, it is up to national legislators to find adequate solutions to reconcile the move to protect EU financial interests by introducing a new supranational prosecutorial body and the tendency to protect fundamental rights in criminal proceedings.

As can be seen from this analysis, the procedural rights of the defence in Croatian criminal procedure law have in recent years been improving and strengthening. The Croatian legislator follows the requirements for harmonisation with EU law, but the transposition of directives is not always comprehensive and timely, a requirement that is even more accentuated in EPPO proceedings.

As regards the right to legal aid, EPPO proceedings should be considered as situations which justify the right to legal aid if the defendant lacks sufficient resources. The right to provisional legal aid should be guaranteed from the earliest stages of the proceedings in accordance with the Directive without being limited to proceedings for more serious criminal offences. Furthermore, the provisions of the CPA on the authority competent for deciding on granting legal aid as well as the provisions on the procedure of determining whether the defendant lacks sufficient resources need to be harmonised with the Directive.

As regards the right to information, the letter of rights for the suspect and the accused person in the EPPO's proceedings should contain information that the case can be reallocated to an EDP in another Member State during investigation and also that once the investigation is closed it can be brought for

[128] Bachmaier Winter (n 46) p 134 – 135.

prosecution in another Member State. Furthermore, the wording of certain provisions of the CPA should be aligned with the right of the defendant to be presumed innocent.

The Regulation did not contribute in its provisions on procedural safeguards and judicial review to the harmonisation of EPPO proceedings conducted in different EU Member States. On the contrary, the perceived differences in the national law of EU Member States can lead to forum shopping and to the lowering of the established standards of judicial review in national law.

It is evident that all the existing shortcomings of national criminal procedure will be particularly accentuated in EPPO proceedings. It remains to be seen how all the actors of criminal procedure and the Croatian criminal justice system on the whole will embrace this supranational body of prosecution, how the relationship between the particular bodies within the EPPO will function, and whether there will be uncertainty and a lack of confidence. All of this may affect the position of the defence in criminal proceedings.

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Sažetak

PROCESNA PRAVA OSUMNJIČENIKA I OPTUŽENIKA U KAZNENOM POSTUPKU U SVJETLU UREDBE O UREDU EUROPSKOG JAVNOG TUŽITELJA

U radu se analiziraju procesna prava osumnjičenika i optuženika u kaznenim postupcima koje pokreće europski javni tužitelj (EJT) u Republici Hrvatskoj. Uredba Vijeća (EU) 2017/1939 od 12. listopada 2017. o provedbi pojačane suradnje u vezi s osnivanjem Ureda europskog javnog tužitelja ne uređuje detaljno prava obrane, već prepušta nacionalnim zakonodavstvima reguliranje te materije u skladu s Poveljom EU-a o temeljnim pravima i direktivama EU-a o procesnim pravima osumnjičenika i optuženika. Slijedeći sadržaj čl. 41. i 42. Uredbe, autorica daje pregled procesnih prava zajamčenih u direktivama o procesnim pravima osumnjičenika i optuženika, zatim način njihova prenošenja u hrvatsko kazneno procesno pravo s naznakama nedostataka i potencijalnih prepreka koji bi mogli nastati u postupcima koje pokreće EJT. Nakon uvodnih napomena o tendencijama u hrvatskom kaznenom procesnom pravu analiziraju se pojedina procesna prava u kontekstu Uredbe: pravo na tumačenje i prijevod, pravo na informaciju, pravo na pristup odvjetniku i na pravnu pomoć, pravo na šutnju i na pretpostavku nevinosti, kao i pravo na prikupljanje dokaza. Konačno, daje se i kratki osvrt na sudsku kontrolu postupovnih radnji EJT-a prema hrvatskom kaznenom procesnom pravu uz isticanje mogućih problema. Naposljetku se zaključuje da će postojeći nedostaci hrvatskog kaznenog postupka posebno doći do izražaja u postupcima koje pokreće EJT s obzirom na snažne ovlasti novog supranacionalnog tijela kaznenog progona, što može utjecati na položaj obrane u kaznenom postupku.

Ključne riječi: europski javni tužitelj, obrana, procesna prava u kaznenom postupku, sudska kontrola postupovnih radnji