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Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October2013) and its Output in National Legislation

Abstract

The article searches for concrete remedies for violation of the right to counsel, which could be considered "effective" in the meaning of Article 12 of the Directive 2013/48/EU. Article 12 obliges the Member States of the EU to guarantee effective remedies for violation of the rights deriving from the Directive, including the right to counsel. Yet no further guidelines for remedies that could be considered "effective" are given in the Directive. This article argues that due to the prominent status of the right to counsel among the defence rights, there are only a number of remedies that effectively cure its violation. The article discusses these remedies and makes a conclusion that in order to honour the right to counsel of all suspects and accused persons within the EU the Member States should promptly launch discussion on what extent could these remedies be concerted among them.

I. Introduction

The right to counsel is one of the fundamental features of fair trial and, therefore, of the rule of law. The European Court of Human Rights (ECtHR) has repeatedly stressed not only that counsel be present, but also that it has both to fulfil and to be allowed to fulfil its duties. Therefore, the right to counsel, like any other defence right, has to be effective and practical. In the context of open borders within the EU and an increasing number of trans-border criminal cases, it is important that all EU Member States (MS) guarantee the right to counsel to suspects, accused persons and requested persons in European Arrest Warrant cases, at least on a minimum level. The Strasbourg system is not designed to achieve this goal. That is why the EU has taken the initiative via *Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and*

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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 (22 October 2013)[1] [hereinafter the "Directive"]. The Directive not only guarantees the right to counsel, but Article 12 also requires that in case of a breach of the right, the Member States ensure effective remedies. Compared to the initial proposal, which provided the obligation to put the person back in the position where he would have been if the violation had not occurred, the right to effective remedy is phrased in a very general manner in the Directive as its meaning is left to the Member States to decide. The US faces similar problems concerning the right to counsel. Long-standing case law of the US Supreme Court confirms that the defendants are entitled to an effective right to counsel in criminal proceedings. The principle *Ubi jus ibi remedium* demonstrates the constitutional promise that for every violation there should be a remedy. For many years, the US Supreme Court has endeavoured to find the proper remedies for violation of the right to counsel in criminal proceedings.

This article suggests that due to the vagueness of Article 12, the Member States should start discussing concrete remedies to be used by all Member States. In order to launch the discussion, this article proposes a number of remedies for consideration. In search for such remedies, the article analyses the experience of the US Supreme Court and ideas of US scholars on the consequences of a violation of the right to counsel given, as stated above, the US's long-standing experience in this field. Discussions on remedies in the area of international criminal proceedings are also considered. The courts have repeatedly faced the question of how the content of the right to counsel is internationally understood, and what the possible remedies for its violation could be. The aforementioned sources will be compared with the legislation of the EU, jurisprudence of the ECtHR and the European Court of Justice (ECJ), after which some initial ideas for remedies for violation of the right to counsel will be proposed.

The article is structured as follows. The second section explains the need to launch discussion on specific remedies for violation of the right to counsel within the EU. Here, it is argued that in order to promote the right to counsel, the remedies provided in breach of this right should be focused on a more concrete level than is provided in Article 12 of the Directive. Although the content of the right to counsel deriving from the Directive will be explained, the main focus will be on the importance of remedies. The content of legal assistance will be discussed only to the extent to which it illustrates the need for remedies. The third section explores potential remedies for violation of the right to counsel in criminal proceedings. Reference is made to scholarly discussions in Europe and the US, and US case law. It is argued that the right to counsel contained in the Directive acquires true meaning only when remedies for its violation aim, as far as is possible, to restore the person's previous status prior to the violation occur-

1 OCJ 2013 L 294/1. The implementation deadline of the Directive is 27 of November 2016. According to Recitals 58 and 59, the UK, Ireland and Denmark do not take part in adoption of the Directive.

ring, as the draft of Article 12 of the Directive initially required. In this section, it is indicated that when one follows this approach, applicable remedies depend on both the stage of criminal proceedings in which the right is violated and the 'product' of violation. Taking into account the case law of the ECtHR, the ECJ, the US Supreme Court, and approach to the remedies in the area of international criminal proceedings, a number of remedies are presented simultaneously. It is then discussed whether and to which extent they could be used within the EU. As this paper is written in the context of a wider project, the fourth section introduces the author's plan to accompany her initial proposals with empirical data. This has both the aim of supporting her desktop research findings and making relevant corrections if necessary.

II. The time for discussion: a need to search for specific remedies for violation of the right to counsel that could be used by all Member States

1. The right to counsel deriving from the Directive 2013/48/EU and its importance

It would be impossible to achieve a common practice of defence rights across all MSs via the Strasbourg system due to its peculiarities.[2] Although the ECtHR has designed minimum rules for defence rights, it cannot enforce these rules.[3] As a result, the number of complaints to the ECtHR is remarkable, with Article 6 guaranteeing the right to fair trial, including right to counsel, being one of the most cited articles.[4] To improve the situation, the EU has taken a number of steps to promote the protection of suspects' and accused persons' procedural rights in criminal proceedings, with the aim of enhancing mutual trust between the MSs. On 1 July 2009, the Roadmap, with a view to fostering protection of suspected and accused persons in criminal proceedings, was issued by the Council of the EU stating that "…there is room for further action of the European Union to ensure full implementation and respect of the Convention (i.e.

2 For a thorough overview of the reasons the EU needs to take action on defence rights, see: *M. Thunberg Schunke,* Whose responsibility? A Study on Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU, 2013, pp. 5-6.

3 *T. Spronken, D. de Vocht,* EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step", North Carolina Journal of International Law and Commercial Regulation (N.C.J. Int'l L. & Com. Reg) 2011-2012, p. 448.

4 For the last two years there has been decline in a number of applications to the ECtHR. In 2015 40,650 applications were filed in comparison to 56,200 in 2014 and 65,800 in 2013. See Analysis of Statistics 2015 at http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf, p 7. One of the reasons for the decrease is application of the revised Rule 47 of the Rules of Court, in force since 1 January 2014, which imposes stricter conditions on applicants before the Court examine an application. The Interlaken Process and the Court (2015 Report) at http://www.echr.coe.int/Documents/2015_Interlaken_Process_ENG.pdf, p. 3. However, this does not change the fact that from 1959-2015 the court has concluded the violation of the right to fair trial in over 4,000 judgments. This gives the right to fair trial the second position as the most violated right next to the right to proceedings within reasonable time with nearly 5,500 breaches concluded by the Court. See at Violations by Article and by State 1959-2015 at http://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf.

European Convention on Human Rights and Fundamental Freedoms (ECHR) – author's remark) standards, as well as, where appropriate, to expand existing standards or to make their application more uniform."[5] According to the Roadmap, the action taken by the EU aims at finding a balance between the measures of judicial and police cooperation and the defence rights of individuals.[6] Measure C in the Roadmap concerns legal advice and legal aid, and states that "[t]he right to legal advice for the suspected or accused person in criminal proceedings at the earliest appropriate stage is fundamental to safeguarding the fairness of the proceedings[.]" The Treaty on Functioning of the European Union empowers the EU to adopt minimum rules by the means of directives on the rights of individuals in criminal proceedings,[7] which enhances the role of the ECJ in relation to these procedural rights. As the EU enforcement system differs from the Strasbourg system, the Treaty of Lisbon opens up a whole new level to the protection of suspects' and accused persons' procedural rights in the following manner. After their transposition deadlines pass, directives become directly applicable in national law on a condition that the provision of the directive is sufficiently precise and unconditional.[8] In that case, if the national law is contrary to the directive, it has to be set aside.[9] This means that even if the MS refuses to implement the directive, the individuals can still invoke the rights it contains. Unlike substantive law, procedural rules can be applied to all proceedings pending at the time of their entry into force.[10] The possibility for national courts to make reference for preliminary rulings gives *ex ante* nature to the system opposed to the *ex post* nature of the Strasbourg system. In addition, the implementation of directives is subject to monitoring by the European Commission [hereinafter the "Commission"]. MSs not only have to report on the way in which they have implemented directives, but a MS that fails to implement a directive can be brought before the ECJ by the Commission. Therefore, the legislative action of the EU in the area of fair trial rights has been well-received by EU scholars, with one stating that "the directives will raise the standards of criminal justice in those member states where it is currently deficient".[11]

5 OJ 2009 C 295/1, p. 1.

6 "Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual. Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union." OJ 2009 C 295/1, p. 2.

7 OJ 2012 C 326/47, p. 80, Article 82 (2) b.

8 *European Court of Justice* (ECJ) 1.06.1999, case C-319/97 (*criminal proceedings against Antoine Kortas*), 1999 I-03143, margin no 21.

9 *A. Klip,* European Criminal Law. An Integrative Approach, 3rd Ed., 2016, p. 169.

10 *European Court of Justice* (ECJ) 28.6.2007, case C-467/05 (*criminal proceedings against Giovanni Dell'Orto*), 2007 I-05557, margin no 48.

11 *J.R Spencer,* EU Fair Trial Rights – Progress at Last, New Journal of European Criminal Law (New J. Eur. Crim. L) 2010, p. 457. Of course, it may also be claimed that the EU system, although potentially more effective than that of Strasbourg, is not flawless either. Directives

As there are a good number of articles providing an overview of the development of the draft of Directive 2013/48/EU, its creation will not be repeated here.[12] However, in order to understand the necessity and nature of remedies, an overview must be given regarding the content of the right to counsel deriving from the Directive. That said, it should be kept in mind that discussion of whether the directive provides the right itself on a satisfactory level or not, does not fall within the scope of this article. Comprehensive discussions on this question can be found in several sources.[13]

According to its Article 2, Directive 2013/48/EU applies to the following cases:

- to suspects or accused persons from the time they are made aware by the competent authorities of a MS that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings;[14]
- to persons subject to European Arrest Warrant proceedings (requested persons) from the time of their arrest;[15]
- to persons other than suspects or accused persons who, in the course of questioning by the competent authority, become suspects or accused persons;[16]
- to minor offences specified in Article 2 § 4 only during the court proceedings.[17]

The scope and content of the right to counsel provided by the Directive arise specifically from Article 3. As the content of basic provisions of the Directive is not very clear, it has been suggested that they should be interpreted by taking into account the structure of Article, the recitals and the non-regression clause of Article 14 of the Di-

still need to go through implementation, which means that concrete understanding in the MSs about the content of the directive finds its way to national law. The fact that the EU has 24 official languages does not make matters easier. *A. Klip* (fn. 9), p. 42. In addition, individuals do not have a right to make reference to the ECJ in breach of their right laid down in the directive, which means that they depend on national courts on this matter. *S. Peers, T. Hervey, J. Kenner, A. Ward (ed.),* The EU Charter of Fundamental Rights. A Commentary, 2014, comments 48.126B-48.127B at p. 1346.

12 See eg. *E. Symeonidou-Kastanidou,*The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation, European Criminal Law Review (EuCLR) 2015, p. 69 et seq.; *E. Cape, J. Hodgson,*The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice, New Journal of European Criminal Law (New J. Eur. Crim. L.) 2014, p. 450 et seq.; *J. Blackstock,* Procedural Safeguards in the European Union: a Road Well Travelled? European Criminal Law Review (EuCLR) 2012, p. 20 et seq.

13 See eg. *E. Symeonidou-Kastanidou*(fn. 12), p. 70 onwards; *S. Peers, T. Hervey, J. Kenner, A. Ward (ed.)* (fn. 11), comments 48.96B-48.119B at pp. 1334-1344; *I. Anagnostopoulos,* The Right of Access to a Lawyer in Europe: A Long Road Ahead? European Criminal Law Review (EuCLR) 2014, p. 10 et seq.

14 Article 2 § 1.

15 Article 2 § 2.

16 Article 2 § 3.

17 Article 2 § 4.

rective.[18] However, this could only be done if such interpretation does not limit or contradict the rights stipulated in actual provisions of the Directive.[19]

Pursuant to Article 3§ 1, it has to be ensured that "suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively." Paragraph 2 obliges the MSs to provide the suspects and accused persons with access to a lawyer without undue delay, and in any event, from the following point of the proceedings:

- before questioning by the competent authority;[20]
- upon carrying out by the competent authority of identity parade, confrontation, or reconstruction of the scene of a crime;[21]
- without undue delay after deprivation of liberty;[22]
- in due time before they appear before the criminal court.[23]

The right to counsel itself contains the following aspects. Firstly, suspects and accused persons have a right to meet in private and communicate with counsel, including prior to questioning by a competent authority.[24] Secondly, suspects and accused persons have a right for "their lawyer to be present and participate effectively when questioned."[25] During the questioning, the lawyer may, in accordance with procedural rules, ask questions, request clarification and make statements, which should be recorded in accordance with national law.[26] Recital 20 specifies that such "questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified." If a

18 *E. Symeonidou-Kastanidou*(fn. 12), p. 85.
19 *European Court of Justice* (ECJ) 24.11.2005, case C-136/04 (*Deutsches Milch-Kontor GmbH v. Hauptzollamt Hamburg-Jonas*), 2005 I-10095, margin no 32. See also *S. Steinborn,* The EU as a Role Model? – Innovative Maximum Standards for Suspects' and Defense Rights vs. International Minimum Standards, European Criminal Law Review (EuCLR) 2014 p. 203 et seq., discussing that the EU should adopt standards higher than those of the Strasbourg system as otherwise there is no point in EU standards at all.
20 Article 3 § 2 (a).
21 Article 3 § 2(b).
22 Article 3 § 2(c). In exceptional circumstances and only at the pre-trial stage, MS may temporarily derogate from the application of this clause where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty (Article 3 § 5).
23 Article 3 § 2(d).
24 Article 3 § 3(a). MSs have an obligation to respect confidentiality of this communication according to Article 4.
25 Article 3 § 3(b).
26 Recital 25.

person other than a suspect or accused becomes a suspect or accused in the course of questioning, questioning should be suspended immediately and continued only if that person has been made aware of his status and rights.[27] Third, suspects and accused persons have a right for their lawyer to attend at least to the identity parades, confrontations, and reconstructions of the scene of a crime.[28]

It is permitted to derogate from the right to access to counsel temporarily under exceptional circumstances. However, this may only be done to the extent justified in the light of the particular circumstances of the case and only at the pre-trial stage. The Directive gives two justifications for such derogation. Firstly, situations where there is an urgent need to avert serious adverse consequences for the life, liberty, or physical integrity of a person.[29] Secondly, the right can be derogated when immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.[30] Recitals 31 and 32 specify that in these cases, the competent authority should inform the suspect or the accused about the right to remain silent and they should be allowed to exercise that right. Temporary derogation from the right to access to counsel should always be proportionate, limited in time, not be based exclusively on the type or the seriousness of the alleged offence; and not prejudice the overall fairness of the proceedings.[31] According to Recital 38, the grounds and criteria for any temporary derogation should be clearly set out in national law of the MS.[32]

The Directive also provides the conditions under which a suspect or an accused person may waive the right to counsel. The waiver must be informed[33], voluntary, and unequivocal[34]. It is not compulsory to give the waiver in writing; however, it should be in accordance with recording procedure of the MS's law.[35] The waiver could be revoked any time by the suspect or accused person.[36]

A requested person in European Arrest Warrant proceedings has a right to access to counsel upon his arrest within such time and in such a manner as to allow him to exer-

27 Recital 21.
28 Article 3 § 3(c).
29 Article 3 § 6(a).
30 Article 3 § 6(b). Recital 32 states that in particular these are the cases in which it is necessary to derogate the right to access to counsel to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. However, because of the wording of the recital, this should be considered only as an indicative list.
31 Article 8 § 1.
32 From the Directive, it is apparent that the European Parliament and the Council acknowledged the sensitivity of this subject as Article 16 obliges the Commission to submit a report to the European Parliament and to the Council, assessing the extent to which the MS have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3 § (6) in conjunction with Article 8 §§ (1) and (2), accompanied, if necessary, by legislative proposals.
33 According to Article 9 § 1 (a): "the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it."
34 Article 9 § 1 (b).
35 Article 9 § 2.
36 Article 9 § 3.

cise his rights effectively and in any event without undue delay from deprivation of liberty.[37] Both the content of the right and temporary derogations provided for in the Directive that apply to suspects and accused persons are also applied to the requested persons' cases. However, requested persons must also be provided with the right to access to a lawyer in the issuing MS whose role "is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA."[38] Therefore, the Directive, unlike the Strasbourg system, provides for the right to counsel in extradition proceedings.[39]

2. The intrinsic relationship between rights and remedies

The right to counsel is a fundamental human right and an essential feature of a fair trial.[40] Hence, its content should be understood in accordance with the system of international norms, especially the ECHR and jurisprudence of the ECtHR.[41] In order to have true meaning, the right to counsel never goes without the connotation 'effective': a principle that is acknowledged both by the ECtHR[42] and the US Supreme Court[43], and provided for in law by the Directive 2013/48/EU. This not only means that the counsel has to be present in the proceedings, but his actions should meet minimum requirements. For the MSs of the EU these requirements are now contained in Directive 2013/48/EU. In the US, these precepts stem from long-standing case law of the Supreme Court accompanied with the rules laid down in the ABA Guidelines.[44] As a judge from the US has once stated: "Only if counsel becomes a 'counselor' is there any hope for making the system's goal humanistic rather than mechanistic."[45] Nevertheless, in case the counsel has forsaken his duties or the state authorities or even legislation itself has not allowed him to fulfil these obligations, a question about the remedies for a violation of the right to counsel arises.

There is a reciprocal relationship between the right and remedies. On the one hand, the content of the right determines the remedy. If the right to have counsel present

37 Article 10 § 2 (a).
38 Article 10 § 4.
39 *S. Steinborn* (fn. 19), p. 207.
40 See ECtHR judgment in *Poitrimol v. France.*Application no. 14032/88. Judgment 23 November 1993, margin no 34.
41 *J.B. Banach-Gutierrez,* Some Reflections on the Concept of Due Process: What Kind of Doing Justice Is Emerging in Contemporary Criminal Proceedings, New Journal of European Criminal Law Review (New J. Eur. Crim. L.) 2012, p. 84.
42 *Artico v. Italy.* Application no. 6694/74.Judgment 13 May 1980, margin no 33.
43 *McMann v. Richardson*, 397 U.S. 775, Fn. 14.
44 ABA Standards for Criminal Justice. Prosecution Function and Defense Function. Third Edition (1993).
45 *D.L Bazelon,* The Deffective Assistance of Counsel, The University of Cincinnati Law Review (U. Cin. L. Rev.) 1973, p. 45. It has been said by the US Supreme Court's Justice Black: "[L]awyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

during questioning is understood by the national law in a way that counsel has to be present, but is not allowed to act, no remedy follows. On contrary, if right to have counsel present during questioning is understood in a way that counsel has to be present and perform actively, and he does not do so, it leads to the application of a remedy. This principle could be summarised as *Ubi ius ibi remedium* – if there is a right, there also is a remedy.[46] On the other hand, the right exists only to the extent its violation is remedied: if the breach of a right is not followed by proper remedy, the right is not applicable in the proceedings in question. This principle could be described as *Ubi remedium ibi ius* – there is a right only if there is a corresponding remedy. In that sense, the fact that the legislation provides for the right does not automatically lead to a conclusion that this right is exercised in practice in a state. The right acquires true meaning only if there is an adequate remedy provided in case of its violation. In addition, remedies not only cure the violation in a case where the right has already been violated, but they also act as preventive measures: "[they] serve to remind law enforcement authorities that [certain defence rights] are fundamental safeguards which are vital to the process of obtaining a fair trial and must be maintained at all stages of criminal proceedings."[47] The provision of a proper remedy acts as a disciplinary tool against authorities, who will endeavour to refrain from violation of such rights in order to avoid the serious consequences that will potentially follow, such as the acquittal of the person. In the field of international criminal proceedings, it has been claimed, based on an example of the exclusionary rule, that these remedies pursue two objectives. On the one hand, they aim at imposing rules of behaviour to the parties.[48] On the other hand, they demonstrate a belief that there are certain types of evidence which are intrinsically unreliable and therefore unsuitable for the discovery of truth.[49] The ECtHR promotes respect for fair trial rights, including the right to counsel, in its proceedings. Therefore, not only should the right to counsel be respected when the evidence is gathered (e.g. during interrogation of a suspect), but it should be respected throughout the whole proceedings. Banach-Gutierrez has strikingly described this principle: "The *objective* of due process is a 'just result', in the sense of both substantive justice (normative) and procedural justice (factual). Substantive justice may be achieved through properly applied norms of criminal procedural law, while procedural justice may be achieved through the *rule of fairness*, in the sense of '*doing justice*'."[50] In this sense, there might not only be certain types of evidence, but certain types of procedural violations *per se* that lead to a conclusion that the process itself was unreliable

46 *Marbury v. Madison,*5 U.S. 137, 163 (1803).
47 Joint briefing on the Directive on the right of access to a lawyer in criminal proceedings and the right to inform a third party upon deprivation of liberty, Amnesty International, European Criminal Bar Association, Fair Trials International, Irish Council for Civil Liberties, JUSTICE and Open Society Justice Initiative, 15 April 2013. Available at http://www.ecba.org/extdocserv/20130415_jointNGObriefindMeasureC.pdf, p. 7.
48 The same applies to the authorities as discussed above.
49 *S. Zappalà,* Human rights in international criminal proceedings, 2003, pp. 149-150.
50 J.*B. Banach-Gutierrez* (fn. 41), p. 100.

and therefore unsuitable for the discovery of truth. This is an aspect of fair trial rights worth considering when one starts to search for remedies for violation of these rights.

Directive 2013/48/EU recognises the value of remedies in relation to the right to counsel as it specifically states the right to remedy. According to Article 12 § 1, it is the obligation of the MSs to "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 the event of a breach of the rights under this Directive." The second paragraph of the same Article states: "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 suspects or accused persons or of evidence obtained in breach of their 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."[51] The Directive thus leaves the MSs with a wide margin of appreciation as it does not mention the specific remedies for violation of the right to counsel the MSs should apply.

3. The wording of Directive 2013/48/EU as a starting point not a final solution

As discussed above, it is essential for the EU to take action in order to guarantee that every suspect and accused person within the EU enjoys the right to counsel in criminal proceedings. Although the Directive 2013/48/EU provides this right on a certain level, as noted earlier, it leaves the MSs with wide latitude when it comes to the specific remedies. The wording of Article 12 of the Directive not only omits reference to specific remedies, it is also silent on which conditions the remedy has to meet in order to be deemed 'effective'. This, however, potentially leads to a situation every MS reacts to similar violation of the right to counsel differently. Due to the aforementioned intrinsic relation between the right and the remedy, it in turn results in the exercise of the right to counsel itself on different levels in the MS. Therefore, in order to promote application of the right to counsel on the level provided for by the Directive 2013/48/EU, it is important that the MSs recognise the relationship between the rights and remedies, and search for common understanding of such remedies. Next, this article makes a number of initial proposals in order to enhance such a discussion among scholars. Further, such discussion would interest practitioners. For instance, in its 2016 report, Fair Trials International suggests that the EU should take an initiative that covers both the use of evidence obtained in breach of the defence directives and "the fruits of the poisoned tree."[52]

51 See also *A. Tinsley*, Protecting Criminal Defence Rights through EU Law: Opportunities and Challenges, 4 New J. Eur. Crim. L. 2013, p. 475 where Tinsley stresses importance of effective remedies in order for individuals to vindicate their rights guaranteed under EU law.

52 LEAP of Fair Trials International. Defence Rights in Europe: the road ahead, 2016 at https://www.fairtrials.org/wp-content/uploads/Defence-Rights-in-the-EU-full-report.pdf?platform=hootsuite, p. 124.

III. In search of potential remedies for violation of the right to counsel

1. The starting point: the criteria to be met for remedies to be deemed "effective"

In order to propose specific remedies, there should be a general understanding on what is considered to be an 'effective' remedy where the right to counsel has been violated. As was discussed above, Article 12 § 1 of the Directive does not provide further guidelines on this matter. Initially, Article 12 included a stipulation that a remedy has to 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.[53] This is omitted from the formulation of Article 12 in force. According to the ECtHR's finding in the *Salduz* case "the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded".[54] Therefore, with reference to the *Salduz* case and Article 14 of the Directive 2013/48/EU's position that the rights provided by the Directive cannot fall under the level of protection required by the ECtHR, it has been proposed that "a remedy could be characterised as 'efficient' only if it ensures the restoration to the previous situation or if it has a content of similar strength."[55]

As the Directive itself leaves open the question of what constitutes an effective remedy and the case law of the ECtHR is rather limited in this area, it is appropriate to look at how other jurisdictions address this question. Here, the position of the right to counsel among fair trial rights should first be determined as in principle this indicates the nature of remedies required when there is a violation of the right. The approach of other jurisdictions will be compared to the case law of the ECtHR to ensure that the proposals do not fall far from the European tradition.

In the US, it has been discussed that the right to counsel, although one of the features of fair trial, is still separate from due process.[56] In other words, when the right to counsel is violated, it should always lead to a conclusion that the right to a fair trial

53 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, 8.06.2011.

54 *Salduz v. Turkey*, Application no. 36391/02, Judgment 27 November 2008, margin no 72. This finding demonstrates an important shift in the Court's case law. For a long time it refused to issue any direction in cases where the right to fair trial had been violated. However, this has changed recently. *K. Reid,* A Practitioner's Guide to the European Convention on Human Rights, 5th ed., 2015, p. 1098.

55 *E. Symeonidou-Kastanidou* (fn. 12), p. 84.

56 *J.D. Grano*, The Right to Counsel: Collateral Issues Affecting Due Process, Minnesota Law Review (Minn. L. Rev.) 1969-1970, p. 1262; *S.K. Chhablani,* Disentangling the Right to Effective Assistance of Counsel, Syracuse Law Review (Syracuse L. Rev.) 2009-2010, p. 1 et seq.

was not guaranteed to the defendant as any other right cannot balance such violation.[57]There are two reasons why due process enjoys primacy in common law. Firstly, it is the only appropriate and decent way in which to treat individuals brought before the criminal justice system. Secondly, it aims at ensuring that innocent people are not convicted. Therefore, the rights of a person are not overridden even if this person is most likely guilty.[58] Similarly, the importance of a fair trial in the context of international criminal proceedings has been described by Zappalàvery strikingly: "Just as the trustworthiness of scientific discoveries is based on respect for the scientific method, the credibility of the outcome of a criminal trial is based on respect for the rules. Judges have to establish the truth by using a pre-determined method, which is outlined in the rules of procedure. If these rules are not considered as a useful way of attaining truth then they should be amended. It is not possible to decide on a case-by-case basis whether to apply them or not."[59]

The right to counsel is separated from due process in the US by reason of the central role counsel plays in adversarial proceedings. Here, he is not only an opponent to the prosecution, but also an independent check on legislative and executive power.[60] This central role of counsel is also considered to be an inherent weakness of the adversarial justice system as there is no real battle if one of the contestants does not meet his purpose.[61]The same argument could be applied to international criminal proceedings where an effective defence is most crucial for both promoting the presumption of innocence and equality of arms.[62] Although not all European criminal justice systems are by their nature adversarial like the US criminal procedure and international criminal proceedings, the ECtHR has increasingly interpreted the right to fair trial as a right to adversarial trial.[63] With the *Salduz* case, the ECtHR stressed the need for adversarial counsel not only during trial, but also in pre-trial proceedings. The Court explained

57 "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright* (fn. 45), 372 U. S. 344.

58 *R. Ekins,* Defence Counsel Incompetence and Post-Conviction Relief: An Analysis of How Adversarial Systems of Justice Assess Claims of Ineffective Assistance of Counsel, Auckland University Law Review (Auckland U. L. Rev.) 2000-2003, pp. 531-532.

59 *S. Zappalà* (fn. 49), p. 151.

60 *R. E. Myers,*Adversarial Counsel in an Inquisitorial System, North Carolina Journal of International Law and Commercial Regulation (N.C.J. Int'l L. & Com. Reg.) 2011-2012, p. 414.

61 *R. Ekins* (fn. 58), p 559; *K. Roach,* Wrongful Convictions: Adversarial and Inquisitorial Themes, North Carolina Journal of International Law and Commercial Regulation (N.C.J. Int'l L. & Com. Reg.) 2009-2010, p. 424; *W.W Schwarzer,* Dealing with Incompetent Counsel – The Trial Judge's Role, Harvard Law Review (Harv. L. Rev.) 1979-1980, p. 638.

62 *J.T. Tuinstra*, Defending the Defenders**.** The Role of Defence Counsel in InternationalCriminal Trials. Journal of International Criminal Justice (J. Int'l Crim. Just.) 2010, p. 466. International criminal proceedings also have very strong roots in the common law. *S. Zappalà* (fn. 49), p. 25.

63 *E. Cape, Z. Namoradze, R. Smith, T. Spronken,* Effective Criminal Defence in Europe, 2010, pp. 23-24.

that effective assistance of counsel in pre-trial proceedings serves both the presumption of innocence and the principle of equality of arms.[64] In that sense, it has been observed that in Europe the adversarial and inquisitorial systems are moving closer towards each other – they are beginning to share an idea of optimal truth-finding through fair trial.[65] Taking into account that evidence gathered during pre-trial is often decisive for the outcome of the case irrespective of whether the criminal justice system is inquisitorial or adversarial,[66] it is with utmost importance that fair trial guarantees, including the right to counsel, extend to the pre-trial stage. This principles acquires even greater importance within the EU given the fact that co-operation in criminal matters often takes place in the early stages of the proceedings.[67] Therefore, people, whether factually innocent or not, should enjoy the right to fair trial, including the right to counsel, from the very beginning of the proceedings across Europe irrespective of whether the proceedings themselves are adversarial or inquisitorial.[68] According to the case law of the ECtHR, this right has to meet the criteria of being 'practical and effective', not 'theoretical and illusory'.[69]

As the discussion above has shown thus far, the right to counsel plays a central role both in pre-trial proceedings and trial. Jackson and Summers have described the contemporary approach to the right to fair trial as follows: "[H]uman rights jurisprudence has been developing a theory of effective defence participation which not only allows for the participation of the accused in the criminal proceedings, but also gives institutional rights to the defence as a party entitled to be treated on an equal basis as the prosecution."[70] Therefore, in cases where the right to counsel is violated, the proceedings cannot be considered fair as they would have lost one of their essential features. The remedies applied in case of such violations should recognise the central role of the right to counsel to the fair trial and should aim at restoring the balance between the

64 The Court explained that the principle that the suspects have right to have counsel at the initial stages of police interrogation is "also in line with the generally recognised international human rights standards […] which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused." *Salduz v. Turkey* (fn. 54), margin no 53.

65 *W. Wu,* Interrogational Fairness under the European Convention on Human Rights, International Journal of Law, Crime and Justice (Int. J. Law Crime Just) 2011, pp. 41-42.

66 A study conducted in Austria, Croatia, Germany and Slovenia confirmed that the "outcome of pre-trial proceedings (including evidence gathered pre-trial) often predetermines the outcome of the criminal proceedings as a whole." *S. Schumann, K. Bruckmüller, R. Soyer (ed.),* Pre-Trial Emergency defence, 2012, p. 357.

67 *E. Cape, J. Hodgson* (fn. 12), p. 479.

68 "[P]eople facing charges in Europe must be confident they will be treated fairly, wherever they are charged." *C. Heard, R. Shaeffer*, Making Defence Rights Practical and Effective: Towards an EU Directive on the Right to Legal Advice, New Journal of European Criminal Law (New J. Eur. Crim. L.) 2011, p. 280.

69 *Artico v. Italy* (fn 42.), margin no 33.

70 *J.D. Jackson, S.J. Summers,* The Internationalisation of Criminal Evidence, Beyond the Common Law and Civil Law Traditions, 2012, p. 285.

prosecution and defence. In principle, remedy could only be effected by repeating the proceedings. Where this is not possible due to practical constraints (e.g. lapse of time or due to the fact that pre-trial proceedings cannot be repeated when the case is already at trial), the remedy should as far as possible aim at restoring the person's initial position back to where it would have been had the violation not occurred. For abovementioned reasons, in the context on the right to counsel, effectiveness of a remedy depends on whether it has a potential to affect the suspect's or accused's position in criminal proceedings. Any external remedy does not compensate such violation.[71] Given that Article 2 § 1 of the Directive 2013/48/EU states that the Directive applies "to suspects or accused persons in criminal proceedings[…] until the conclusion of the proceedings", it can also be argued that remedies provided in Article 12 must be applicable in the very same proceedings. Only if the remedy (e.g. exclusionary rule) applies to the same proceedings has a person had fair trial and has been protected from miscarriages of justice. In addition, the remedies of strong nature would influence the authorities to refrain from intentionally violating suspects' and accused persons' rights.[72] This article proposes that restoration of the suspect's or accused person's situation after violation of the right to counsel is how the notion "effective remedy" provided in the Directive should be interpreted. However, it must be acknowledged here that the Directive leaves this matter open to the MSs and to the ECJ to consider.

The Directive is also silent on whether the remedy provided in Article 12 depends on the nature of violation of the right to counsel. As discussed above, the Directive not only provides the right to have counsel present during questioning, but also the right to have counsel participating effectively in evidence gathering and confidentially confer with the counsel before that process. In addition, since suspects and accused persons have a right to access to a lawyer in a manner that allows to "exercise their rights of defence practically and effectively"[73] and that the waiver of the right to counsel is valid only if it is informed, voluntary and unequivocal[74], it could be concluded that suspects and accused persons have a right to choose their lawyer. This requirement also comes from the case law of the ECtHR.[75] From the wording of Article 12 § 1 it can be concluded that if any of these aspects of the right to counsel is violated, a remedy should follow. It requires further discussion on the level of EU whether the remedies in each case should have similar effect on the suspect's or accused person's position. This article suggests that due to the essential nature of the right to counsel to the fair trial, any violation of the right to counsel deriving from the directive that distorts the

71 See *W.W Schwarzer* (fn. 61), p. 649, making such claim on damages awarded for the defendant afterwards.

72 See *I. Anagnostopoulos* (fn 13), p. 17 making such a claim in relation to the exclusionary rule. Also *L.B. 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, 2015, p. 114.

73 Article 3 § 1.

74 Article 9 § 1 (a) and (b).

75 In recent cases see, e.g. *Dvorski v. Croatia.* Application no. 25703/11, Judgment 20 October 2015.

right itself to the point that it is not effective and practical, should be cured the same way as violation of the right to have counsel present, i.e. by application of the principle of restitution.

2. Does the remedy depend on the 'product' and the source of the violation?

For the abovementioned reasons, the principle of restitution is applied in this article in order to propose specific remedies for violation of the right to counsel. In that sense, two different scenarios can be identified. Firstly, cases where the violation of the right resulted in a concrete product, something that might be considered 'physical'. These are the cases in which violation of the right to counsel is directly related to the certain 'outcome'.[76] Secondly, in many cases the violation does not lead directly to a specific 'product'.[77] In the case of the first scenario, without violation there would not have been a product, which means that the violation could be cured by removing the 'product' from the proceedings. In the second scenario, the proper remedy is much more difficult to propose, as there is no pre-violation position to which the suspect or accused may be returned.

There are a number of reasons why both sets of scenarios may occur. These derive not only from competence of counsel. The authorities may prevent counsel from acting by interfering in his activities (e.g., they do not allow him to attend the interrogation or speak with his client in private) or they do not provide him with adequate time to prepare; or even general organisation of the legal system may impede counsels' activities (e.g., lack of adequate remuneration system).[78] Taking into account the essential nature of the right to counsel and the simple fact that the suspect and the accused can affect the activities and decisions of a counsel only to a certain extent, the remedy for violation of the right to counsel should not depend on the source of the violation. Although most cases before the ECtHR concerning violations of the right to counsel are cases in which the person has had legal aid counsel, the court has also held the state responsible for the violation when retained counsel was involved.[79] However, in *Tripodi v. Italy* the court did not hold the state responsible for a violation of the right to counsel when a retained lawyer failed to attend a cassation hearing due to illness and

76 For instance, retained counsel is not allowed to participate in interrogation while the suspect confesses or/and reveals the location of material evidence in the presence of appointed counsel; or access to a lawyer is denied to the suspect completely during such interrogation; or counsel's bad advice leads to conclusion of plea agreement; or counsel fails to call the witness to trial who would have provided the accused with alibi.

77 For instance, counsel fails to discuss the case with the suspect before interrogation or/and counsel is not allowed to the interrogation during which the suspect invokes his right to silence; or counsel fails to discuss the case with the accused before trial; or counsel fails to act properly at the trial because he does not know relevant facts of the case and the law.

78 *C. Buisman, B, Gumpert, M. Hallers*, Trial and Error – How Effective is Legal Representation in International Criminal Proceedings, International Criminal Law Review, 2005, p. 3.

79 *Güveç v. Turkey,* Application no.70337/01, Judgment 20 January 2009.

did not provide a replacement.[80] In the US, it has been stated that ineffective assistance is heavily prejudicial to the poor as most lawyers who fail to perform their duties are legal aid counsel.[81] As such, the state should be extra attentive. Yet, when mistakes of a retained counsel are attributed to the suspect or the accused, the system in turn becomes prejudicial to those who are able to hire a lawyer. It has to be noted that counsel is an independent person whose actions can be influenced by the person who hired him only to some extent (for instance, if there has been an agreement that counsel participates at the cassation proceedings, there is not anything else the accused could do in order to guarantee that the counsel is really there). In addition, the counsel, unlike the person he is defending, has legal education, which means that often the suspect or the accused does not even have knowledge to contest his decisions. This article, therefore suggests that the state's obligation to guarantee the right to counsel should not depend on whether counsel is retained or legal aid counsel.[82]

3. Does the remedy depend on the stage of proceedings at which the violation occurred?

a) The exclusionary rule as a remedy

If restoration of pre-violation position of the accused is the aim of the remedy, in situations where a piece of evidence is gathered as a result of violation of the right to counsel, this piece of evidence and any other evidence received as a result of this evidence should not be used for conviction.[83] Therefore, if such evidence was gathered in pre-trial proceedings, the exclusionary rule accompanied with the principle of the "fruit of poisonous tree" should be applied. It could also be that the right to counsel was violated during trial as a result of which a piece of evidence was received (e.g. the witness testified during trial). In that case, the remedy of restoring the pre-violation position would be the application of the exclusionary rule, and if possible according to the procedural rules, repetition of the evidence-gathering act. The exclusionary rule as a remedy for violation of the right to access to a lawyer was initially incorporated into Article 12 § 1 of the Directive 2013/48/EU, but then left out due to the objection of number of MSs who referred to the principle of free evaluation of evidence by the judges.[84] It should not mean, however, that this remedy should be left out from discussions on

80 Application no. 13743/88, Judgment 22 February 1994. However, there was little the accused could have done in order to prevent this from happening. Therefore, the mistake of a counsel should not have been attributed to the accused.
81 *R. Ekins* (fn. 58), pp. 550-551.
82 See also *K. Reid* (fn. 54), p. 241.
83 See also *E. Symeonidou-Kastanidou*(fn. 12), pp. 84-85 supporting this approach.
84 Progress report from Presidency to the Council on 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, 17159/11, 5.12.2011, p. 10.

specific remedies among the MSs as its application clearly aims at restoring the accused person's position to where he would have been if violation had not occurred.

Another issue to be considered is how the exclusionary rule should be applied in practice as in many criminal justice systems evidence that is formally inadmissible still finds its way into the case file and is therefore brought to the attention of the court. In his concurring opinion in *Dvorski v. Croatia,* Judge Zupančič points out that if the exclusionary rule is applied in such way, this may fail to amount to a proper remedy, because even if the judge cannot rely on such evidence, he still sees it, something which may affect his decision at least on a subconscious level.[85] In cases where the violation of the right to counsel occurs at the trial, the fact that the court sees tainted evidence is inevitable, whereas when it comes to pre-trial violations, this could be avoided. For instance, in 2012 the Finnish Supreme Court decided that in cases where the accused's right to counsel is violated, the only proper remedy in the context of the exclusionary rule is that the evidence is excluded from the dossier and could not be brought to trial at all.[86]

In any case, the exclusion of evidence should not depend on society's competing interests in cases where the right to counsel has been violated. It is indisputable that such interests are greater in relation to serious crimes, yet in these cases, the suspects and the accused persons who face very serious penalties are in desperate need for all of their fair trial rights to be respected.[87] As the ECtHR stated in a case where access to a lawyer was completely denied: "[A]ccess to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. 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 […]. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interroga-

85 "The German rule to the effect that the judge cannot rely on such evidence in his or her reasoning out, motivation of the judgment is, to say the least, naïve to the extent that this presupposes the ability of the judges to ignore the contaminated or otherwise inadmissible evidence." *Dvorski v. Croatia* (fn. 75), a concurring opinion Judge Zupančič, margin no 12.

86 KKO 2012:45, 9 May 2012, margin nos 45-46.

87 See also *M. Thommen, M. Samadi,* The Bigger the Crime, the Smaller the Chance of a Fair Trial? Evidence Exclusion in Serious Crime Cases under Swiss, Dutch and European Human Rights Law, European Journal of Crime, Criminal Law and Criminal Justice (Eur. J. Crime Cr. L. Cr. J.) 2016, p. 65 et seq. discussing that the application of a balancing test while deciding on the exclusion on evidence leads to a situation where illegally obtained evidence could be used in serious cases, which in turn leads to denial of fair trial rights in such cases. See also *D. Naymark,* Violation of Rights of the Accused at International Tribunals: The Problem of Remedy, Journal of International Law and International Relations (J. Int'l L & Int'l Rel.) 2008, p. 17 suggesting that because of the necessity of guaranteeing a fair trial, the international criminal courts should not refrain from application of remedies in cases where charges are more serious.

tion without access to a lawyer are used for a conviction."[88] Article 12 § 2 of the Directive 2013/48/EU, which states that MSs have to ensure that "in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their 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" does not provide clarification regarding as to whether the balancing test should be used. Recital 50 makes reference to the same findings of the ECtHR quoted above, and gives reason to believe that the nature of exclusionary rule under EU law is absolute. This not only means that the seriousness of the offence should *not* be considered, but also the fairness of following proceedings cannot cure the initial violation. However, it should be kept in mind that the ECtHR has applied this approach only to the right to have counsel present during interrogation. From the wording of Article 12 § 2 it is far from clear on what aspects of the right to counsel (participation, effective participation, prior consultation etc.), namely the principles laid down in the very same paragraph (and in Recital 50 accompanying it), actually apply.

When the exclusionary rule is applied, the question of what to do with evidence gathered as a result of the initial violation immediately arises. This is a question of the application of the "fruit of poisonous tree" doctrine. As the US Supreme Court has elaborated a much more specific approach to the application of this doctrine than the ECtHR, it makes sense to take a closer look at it from that perspective. Before doing so, a certain aspect of the US approach to the exclusionary rule should be explained here. According to *Massiah v. United States,*[89] the exclusionary rule applies to statements elicited from the accused in the absence of an attorney after the filing of formal charges. Here, it has to be taken into account that the right to counsel as provided for in the Sixth Amendment of the US Constitution[90] does not apply from the very beginning of criminal proceedings like it does in the EU, according to the Directive and *Salduz* case. Before formal indictment, the right to counsel arises from the Fifth Amendment only for those who have been arrested as a primary guarantee against self-discrimination. The right to counsel deriving from the Sixth Amendment, on the contrary, is designed to protect the accused in adversarial phase of the proceedings. Therefore, the right to counsel does not depend on whether the person has been detained or not as it extends much farther than the Fifth Amendment, asserting not only the privilege of self-discrimination, but also to the rights designed to guarantee the accused the right to fair trial. For European researchers and practitioners this kind of distinction seems

88 *Salduz v. Turkey* (fn. 54), margin no 55. It should be mentioned here that, unfortunately, the ECtHR has not been consistent in applying this rule, as it has repeatedly applied the proceedings as a whole test when deciding over whether the violation of the right to counsel also violated the right to fair trial. See the analysis of this matter by *K. Reid* (fn. 54), pp. 235-236.

89 377 U.S. 201 (1964). Yet, it seems that exclusionary rule only applies if the right to counsel was violated by the government's agencies, not by counsel himself. *J.M. Marceau*, Remedying Pretrial Ineffective Assistance, Texas Tech Law Review (Tex. Tech L. Rev.) 2012-2013, p. 291.

90 Available at: http://www.senate.gov/civics/constitution_item/constitution.htm.

unreasonable and unfounded, especially when one takes into account that in the *Salduz* case, the ECtHR stressed "the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial[.]"[91] Therefore, even at the initial stages of proceedings the right to counsel not only serves as a privilege against self-discrimination, but also contributes to the equality of arms. Taking into account that in the US the approach to remedies depends on the source of the right to counsel, in the European context it is appropriate to look mainly at the remedies that are provided for following a violation of the Sixth Amendment, not the Fifth Amendment right. According to common understanding of US case law, the "fruit of poisonous tree" doctrine does not apply to the latter.[92]

Although in the US, the "fruit of poisonous tree" doctrine applies to Sixth Amendment cases as was discussed above, there are number of limitations to it. The Supreme Court has elaborated upon these primarily in Fourth Amendment cases, although according to the findings in *Nix v. Williams* they are also applicable in cases where the right to counsel has been violated. The first is the independent source doctrine, which applies to cases in which the evidence is initially discovered unlawfully, but later obtained independently from activities untainted by the initial illegality.[93] The second is the "inevitable discovery" doctrine, which is applied if lawful investigation would have inevitably led to the discovery of the evidence.[94] The third is the "attenuation" doctrine, which provides that despite the illegality in obtaining evidence, such evidence may be admissible if the connection between the evidence and the illegal method is sufficiently remote or attenuated.[95] The fourth one is the "good faith exception", which is applied if state authorities had reason to believe their actions were legal.[96] The ECtHR has applied the "fruit of poisonous tree" in relation to an Article 3 violation in which it recognised the attenuation doctrine and the inevitable discovery doctrine.[97] As there is no case law of the ECtHR that deals with application of the "fruit of poisonous tree" doctrine in cases where the right to counsel has been violated, the approach of the US is a good starting point for the elaboration of such a doctrine in Europe. However, this article proposes that the "good faith exception" should be discarded in the European context even if the intentions of the authorities were good, because

91 *Salduz v. Turkey* (fn. 54), margin no 54.

92 *Miranda* exclusionary rule does not cover the fruit of poisonous tree: *Oregon v. Elstad,* 470 U.S. 298 (1985); *Massiah* exclusionary rule, however, does: *Nix v. Williams,* 467 U.S. 431 (1984).

93 *Murray v. United States*, 487 U.S. 533 (1988).

94 *Nix v. Williams,* 467 U.S. 431 (1984).

95 *Wond Sun v. United States,* 467 U.S. 431 (1984).

96 *United States v. Leon,* 468 U.S. 897 (1984) and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

97 *Gäfgen v. Germany,* No. 22978/05, 1 June 2010, margin nos 174 and 180. See also *F. P. Ölcer*, The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights, pp. 380-381 in *S.C. Thaman (ed.),* Exclusionary Rules in Comparative Law, 2013.

by violation of the right to counsel, the person has not received fair trial. The other three exceptions acknowledge the fact that the evidence indirectly related to the violation could in fact have been gathered (or was actually gathered) legally, and should therefore be recognised, as they support society's interest in truth-finding and do not contradict the principle that the remedy should aim at restoring the person's initial position prior to the violation having occurring.

b.) Retrial as a remedy

Retrial has been repeatedly suggested by the ECtHR in cases where violation of the right to counsel resulted in evidence used as a basis for the accused's conviction.[98] According to the Directive 2013/48/EU, suspects and accused persons should "have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively" (Article 3 § 1). Therefore, it can be argued that retrial could also be a proper remedy in a number of cases in which the exclusionary rule is not applicable – because the violation would not itself have resulted in obtaining a piece of evidence – yet it tainted the fairness of trial such that the defence rights could not be exercised practically and effectively. In cases where the violation of the right to counsel has had such an effect on exercising defence rights during trial, it should be considered whether it could be remedied by retrial.[99] Violations that affect the fairness of a trial could occur both during the pre-trial phase and the trial itself. For instance, counsel might appear at trial without prior consultation with the accused as it has either been denied by the authorities, or counsel has not initiated such consultation himself. It could even be that counsel appears at the trial unprepared and therefore does not perform effectively during trial.

Comparatively, in the US the main remedy for the violation of the right to effective assistance of defence counsel is the annulment of the court judgment and providing an opportunity for retrial. This is both discussed in theory and is provided for in jurisprudence.[100] The US Supreme Court US has linked such remedy with an element of preju-

98 *Salduz v. Turkey* (fn. 54), margin no 72; *Martin v. Estonia,* Application no. 35985/09, Judgment 30 May 2013, margin no 107.

99 See discussion on how to remedy violations of the right to effective assistance of counsel with re-trial in Estonia in*A. Soo,* An Individual's Right to the Effective Assistance of Counsel versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings? Juridica International 2010, p. 258 et seq.

100 For some examples of articles that analyse this issues, see: *E. Gable, T. Green*, Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland Current Developments 2003–2004, Georgetown Journal of Legal Ethics (Geo. J. Legal Ethics) 2003–2004, p. 755 et seq.; *J.F Fatino*, Ineffective Assistance of Counsel: Identifying the Standards and Litigating the Issues,South Dakota Law Review (S. D. L. Rev.) 2003–2004, p. 31 et seq.; *J.M Allen,* Free for all a Free for all: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense,Law and Inequality (Law & Ineq.) 2009, p. 365 onwards; *R.N. Knake*, The Supreme Court's Increased Attention to the

dice, requiring that "[t]he defendant […] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[101] The ECtHR, however, has rejected this element stating that "there is nothing in Article 6 par. 3 (c) (Art. 6-3-c) indicating that such proof is necessary; an interpretation that introduced this requirement into the sub-paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice (see the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, par. 27); prejudice is relevant only in the context of Article 50 (art. 50)."[102] Concerning this issue of prejudice,the ECJ has found: "[A]ccording to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different[.]"[103] The ECJ, however, has not had a chance to interpret Article 12 § 2 of the Directive 2013/48/EU. As has already been discussed, the right to counsel is an essential feature of fair trial. In this sense, it could be claimed that if it was not guaranteed, the proceedings were not fair and, therefore, the outcome could not be considered to be fair either.[104]

As plea-bargaining and out-of-court settlements are gaining popularity in Europe, it is important to discuss them separately here. By agreeing to a plea, the accused usually waves number of fair trial rights including the right to call witnesses, have full evidence evaluation by the court etc. It is a speedy proceeding which aims at saving resources, and therefore could be appealing to both the prosecution and the defence. Yet, it might happen that a plea agreement is concluded as a result of violation of the right to counsel. This subject is nearly untouched in European discussions. According to the case law of the US Supreme Court where the counsel's error leads to the conclusion of an agreement and the defendant is able to prove that without it he would have insisted on going to trial, the plea is annulled.[105] Interestingly, a similar approach also applies to cases in which counsel's error caused the defendant to reject the plea. In such cases, according to the US Supreme Court, a proper remedy is for the courts to decide, with potential outcomes leading to the plea being reinstated, a review of the sentence the de-

Law of Lawyering: Mere Coincidence Or Something More? 59 American University Law Review (Am. U. L. Rev.) 2010, p. 1499.

101 *Strickland v. Washington*, 466 U.S. 688, 694 (1984).

102 *Artico v. Italy* (fn 42.),margin no 35.

103 *European Court of Justice* (ECJ) 10.9.2013, case C-383/13*(M. G., N.R. v. Staatssecretaris van Veiligheid en Justitie),* 2007 I-05557, margin no 38.

104 Based on this argument, the requirement to prove an element of prejudice has strongly been criticised in the US. Yet, it was inserted to the US Supreme Court's case law on the right to effective assistance of counsel because the Court was afraid that without such an obstacle, courts would be flooded with complaints about the performance of counsel. Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster, Harvard Law Review (Harv. Law Rev.) 1980. p. 769; *R.L. Gabriel*, Stickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of due Process, University of Pennsylvania Law Review (U. Pa. L. Rev.), p. 1286.

105 *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

fendant received at trial, or something in between.[106] This approach could be criticised because the judgment received as a result of fair trial is annulled and the courts are left to use the their discretion as to the remedies that are either difficult to apply (-how can the prosecution be forced to reinstate the offer for a plea in a case in which it sees that there is a strong chance of conviction due to the fact that a person has already been convicted once?) or do not change the situation of a person at all (applying the sentence the defendant received at trial).[107] Yet it demonstrates clearly that the right to counsel applies even to proceedings that do not impact directly on the fairness of the trial as such.[108] In any case, whether or how a violation of the right to counsel during plea-bargaining could be remedied is an aspect worth discussing at EU level.

4. Retrospective v. preventative remedies

When it comes to the exclusionary rule, the aim is to restore the person's situation to what it would have been had the violation not occurred. Yet if the evidence received in breach of the right is used to gather additional evidence, the question on how much of the latter should be excluded as tainted evidence arises. Reaching agreement on the extent to which the "fruit of poisonous tree" doctrine should be applied is complicated due to the fact that often it is difficult to ignore the existence of obtained evidence (e.g. what to do with the fact that a body was found as a result of unlawful interrogation?). Additionally, when tainted evidence, although formally inadmissible, finds its way into the dossier, it potentially (at least subconsciously) influences the judge's decision.[109] Therefore, although both the exclusionary rule and the "fruit of poisonous tree" aim at restoring the person's pre-violation situation, this is hardly ever actually achieved. In addition, the exclusionary rule often contradicts society's interest in truth-finding: it is difficult to accept that the evidence that is already available should be left aside as though it does not exist. Re-trial, again, is limited by the principle of finality as the annulment of a judgment and re-trial always result in extra expenditure of resources (both material and human). What is more, violations that did not produce a concrete product at all (e.g. the counsel failed to discuss the case before the trial with the accused) are very hard to detect and to cure as they are rarely reflected in documentation (e.g. in protocols, minutes of the court session etc.) and it is difficult to argue what the pre-violation position would really be. If such violations occur during trial, or pre-trial

106 *Missouri v. Frye*, 132 S. Ct. 1399 (2012), *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

107 *G.M. Dery, A. Soo,* Turning the Sixth Amendment Upon Itself: The Supreme Court in Lafler v. Cooper Diminished the Right to Jury Trial with the Right to Counsel, Connecticut Public Interest Law Journal (CPILJ) 2012, p. 119 et seq.; *G.M Dery, A. Soo,* The Right to Effective Counsel in Plea Bargaining in Estonia: A Comparison Between the Member State of the European Union and the United States, Journal of Eurasian Law (JEL) 2013, p. 28 et seq.**ater remedies basis for the list of common remedies the author proposes in this article.24**

108 *J.M. Marceau*, (fn. 89), pp. 479-480.

109 The same argument could be raised if evidence is gathered during trial.

proceedings but have an effect on fairness of the trial, re-trial might be a proper remedy. If they occurred during pre-trial proceedings, however, and do not have a direct impact to the fairness of the trial, it might be that they cannot be resolved.

For the reasons mentioned above, often the most effective 'remedy' is something that does not follow the violation but prevents it. As the ECtHR has found in its case law on Article 13, the effectiveness of a remedy not only comprises redress, but also "prevent[s] the alleged violation or its continuation".[110] In the US, it has also been suggested that the justice system should move from curing the violations towards preventing them by increasing the monitoring competence of trial judges.[111] The monitoring system, including bodies responsible for such monitoring, depends on the nature of the national criminal system. Yet the obligation to have such system could be something worth considering on the level of the EU in order to better enhance the right to counsel.

IV. Remedies in practice: plans for qualitative research in this area

As the discussion in this article has shown, the issue of remedies for violation of the right to counsel is a very complicated and multi-faceted one, and should be discussed in detail in Europe. This article makes some initial proposals for concrete remedies for violation of the right to counsel, and was written in the course of a project entitled "Towards Guaranteeing the Right to Effective Assistance of Defence Counsel in Member States in Trans-border Criminal Cases". The project focuses on remedies for violation of the right to counsel provided in Article 12 of Directive 2013/48/EU on the right to access to lawyer. Although the title of the project indicates otherwise, it is not limited to trans-border cases alone, but extends to all criminal proceedings conducted in MSs of the EU, i.e. to all cases to which Directive 2013/48/EU is applicable as every suspect and accused should have their right to counsel respected in the EU. In order to raise the practical importance of proposals presented in this article, they will soon be supplemented by empirical findings.

The aim of the empirical part of the project is to investigate whether the MSs provide remedies for violation of the right to counsel, in addition to the kinds of remedies available. To this end, a questionnaire has been devised and sent to all ministries of justice of the MSs asking them about the remedies provided for violations of the right to counsel in national law. Furthermore, the information received from MSs will be sent to defence counsel in all MSs so that these results can be corroborated. These empirical findings will then be compared to the results of desktop research. Consequently, common remedies for violation of the right to counsel within the EU will be proposed. Final results of the research will be drawn up as a report, which will be distributed

110 *Kudla v. Poland,* No. 30210/96, 26 October 2000, margin no 158.
111 *K. Roach,* (fn. 61), p. 446; Identifying and Remedying (fn. 104), pp. 772-773; *W.W Schwarzer* (fn. 61), pp. 642-643.

among interested institutions. The expected publication date of the report is December 2017.

V. Conclusions

The content of the right to counsel is defined in the Directive 2013/48/EU on a certain level, yet the nature of remedies is left for the MSs to decide. It gives the MSs a large margin of appreciation that potentially leaves each MS to its own understanding of and practice on concrete remedies. As the exercise of a right depends on remedy, it means that although the Directive provides the right to counsel to suspects and accused, it could be guaranteed on different levels across the MSs. This article suggests that the remedy for violation of the right to counsel is 'effective' in the meaning of Article 12 § 1 of the Directive only if it aims at restoring the person's position back to that which it would have been had the violation not occurred. The requirement that a person's pre-violation situation should be reinstated reduces the list of remedies significantly as there are only a few that have such potential. The proposes that main remedies worth considering are the exclusionary rule, the doctrine of the "fruit of poisonous tree", and re-trial. At the same time, the application of a principle that a person's pre-violation situation should be restored raises a number of questions as it is often difficult to determine what the pre-violation position actually is. In addition, due to a number of practical reasons, it is almost impossible to reinstate such a position to the full extent. It is impossible to turn back the clock.In such cases, a viable solution might focus on determining preventative 'remedies' much more than has been done so far. These proposals, as noted in the article, are made based on the jurisprudence of a range of international courts and the US Supreme Court, and the accompanying scholarly discussion. In order to make further conclusions on the applicability of the approach proposed in this article to the MSs of the EU, the range of existing remedies in the MSs should be investigated with the aim of identifying common examples and best practices. In the near future, the author of this article will conduct empirical research on remedies that the MSs provide for violation of the right to counsel. Based on such empirical findings, a report will be composed in which recommendations for moving forward will be made.