1. Introduction

The European Union is increasingly active in matters of criminal justice, concerning both transborder crime and domestic provisions. Criminal procedures however vary enormously across EU jurisdictions and so does the level of legal protection offered to suspects in criminal proceedings. Initial attempts by the European Union to establish minimum procedural rights for suspects and defendants throughout the EU failed in 2007 in the face of opposition by a number of member states who argued that the European Convention on Human Rights (ECHR) and the enforcement mechanism of the European Court of Human Rights (ECtHR) in Strasbourg rendered EU regulation unnecessary. However, with ratification of the Lisbon Treaty, criminal defence rights are on the agenda again. To increase mutual trust, and thus improve the operation of mutual recognition, in November 2009 the European Council adopted the Roadmap on Procedural Rights setting out a step-by-step approach to strengthen the rights of suspects and accused persons.

This article describes how procedural safeguards for suspects and defendants are protected by the European Convention on Human Rights and the increasing and sometimes competing impact of the European Union in this area.

To set the context, first an outline will be given of a three year research study on the subject of access to effective defence in criminal proceedings across nine European jurisdictions that constitute examples of the three major legal traditions in Europe, inquisitorial, adversarial and post-state socialist: Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey.
Subsequently we will describe current developments within the Strasbourg enforcement mechanism and the way EU policy aims to fill the gaps in human rights protection in the area of criminal procedural law. Finally two EU legislative proposals on the right to information and the right to legal assistance in criminal proceedings will be discussed.

2. Effective Criminal Defence in Europe

The research project, ‘Effective Defence rights in the EU and access to justice: investigating and promoting best practice’ was conducted over a three year period commencing in September 2007. The research was conducted within a team of 30 scholars and practitioners coming from nine jurisdictions, and who have closely cooperated in order to produce comparable information for analysis. The results are published in a book: Ed Cape, Zaza Namoradze Roger Smith and Taru Spronken, Effective Criminal Defence in Europe, Intersentia Antwerp 2010. The aim of the project was twofold: first to provide empirical information on the extent to which the procedural rights that we identify as being indispensable for effective criminal defence are provided for in practice and second to contribute to effective implementation of the right of suspects and defendants, especially those who are indigent, to real and effective defence, as part of a process of advancing observance of, and respect for, the rule of law and human rights.

The research was however not only simply concerned with justice or, indeed, fair trial. Our focus was more specific – effective criminal defence as a precondition for effective enjoyment of fair trial guarantees. We took as our starting point article 6 of the ECHR. Art. 6 § 1 ECHR provides that in the determination of any criminal charge against him everyone is entitled to a fair and public hearing. This is underpinned by the presumption of innocence in paragraph two, and in paragraph three the article sets out a number of minimum rights that must be accorded to anyone who is charged with a criminal offence such as the right to adequate time and facilities to prepare a defence, access to legal representation, the right to examine witnesses or have them examined and the right to free assistance of an interpreter.

We argue that effective criminal defence is an integral aspect of the right to fair trial, and that it requires not only a right to competent legal assistance but also a legislative and procedural context, and organisational structures, that enable and facilitate effective defence as a crucial element of the right to fair trial. The argument is based on the premise that however good legal assistance is, it will

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1 Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey.
not guarantee fair trial if the other essential elements of fair trial are missing. Thus effective criminal defence has a wider meaning than simply competent legal assistance. It is therefore necessary to approach the assessment of access to effective criminal defence in any particular jurisdiction at three levels:

1. Whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights taking ECtHR jurisprudence, where it is available, as establishing a minimum standard.
2. Whether regulations and practices are in place that enable those rights to be ‘practical and effective’.
3. Whether there exists a consistent level of competence amongst criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned with processes as well as outcomes, and in respect of which the perceptions and experiences of suspects and defendants are central.

The baseline for our examination and assessment was the ECtHR jurisprudence on the rights set out in article 6 ECHR, and also the jurisprudence on articles 5, 8 and 10 ECHR where this concerns the right to release during the pre-trial phase, confidential lawyer/client communication, and freedom of speech in the context of criminal procedure. It appeared from the analysis of each of the nine countries in the study that the various rights and standards cannot be considered in isolation from each other. Each has a dynamic relationship with some or all of the other rights. For example, the ability of a defence lawyer to effectively advise his or her client, whether at the investigative or trial stage, will be dependent on the information that is made available to them by the investigating or prosecuting authorities, and the timing of such disclosure.

From the country-studies five major themes arised showing deficiencies in the mechanisms and judicial cultures to support effective criminal defence in practically all jurisdictions that were included in the study. First legal assistance is in many countries problematic, especially with regard to access to legal assistance, the timeliness of the access and the quality of legal assistance. Second legal aid, closely linked to the right to legal assistance, often is ineffective due to slow, unclear and complicated application methods. In addition availability, quality and independence of criminal defence lawyers in legal aid cases proofs to be inadequate, inter alia due to low remuneration provided for legal aid work.
Thirdly, interpretation and translation are not always guaranteed and especially problems rise with regard to which documents are to be translated and how this is funded.

The fourth theme concerns adequate time and facilities to prepare a defence. Significant is that criminal investigations and proceedings are largely conducted according to the needs, interests and timetables of the investigative and judicial authorities and do not take into account the needs of the suspect or accused. This is especially the case in the initial stages of the investigation of which it is acknowledged that this stage often has a determinative effect on the eventual outcome of the case. Problems rise with regard to the way suspects are informed of their rights - such as the right to silence - lack of clarity at what moment rights become effective, time to prepare for pre-trial hearings, access to the case file, various forms of expedited proceedings that do not take into account the needs for an effective defence and no rights for independent investigation on behalf of the defence.

The fifth and final theme concerns the excessive use of pre-trial detention that in itself implies major concerns for the adherence to the presumption of innocence but has also it’s impact on defence strategy. The right to pre-trial release is weakly developed in most countries and being in custody limits the ability of suspects to prepare their defence. These problems are exacerbated by the fact that in many jurisdictions the material on which applications for detention are based is not disclosed to the accused, legal aid is in practice rarely available at this stage and if it is, lawyers tend to be passive to argue the case because of low remuneration.


Since the middle of the twentieth century promoting the protection of human rights on the European continent has – at the international level – been primarily the task of the Council of Europe. Shortly after World War II the Council of Europe was established to promote human rights, democracy and the rule of law. From a human rights perspective, one of its most important ‘achievements’ is without a doubt the European Convention on Human Rights, established in 1950 and binding all current 47 member states.

As mentioned in the introduction, the ECHR sets out fundamental rights for those who are charged with a criminal offence. In this respect, the most important provision can be found in article 6 dealing with the right to fair trial.
Also important for the protection of human rights in criminal cases are: article 3 (prohibiting torture), article 5 (dealing with the right to freedom) article 8 (dealing with the right to privacy) and art. 10 (regulating the freedom of speech). Any person who feels that his or her rights have been violated by a state who is party to the Convention may file a complaint with the European Court on Human Rights (ECtHR) vested in Strasbourg.2

3.1. Challenges facing the Strasbourg system
The European Convention on Human Rights is of vital importance for the protection of fundamental human rights in criminal proceedings within Europe.3 Over the years the Convention system has evolved into a well-known and lively human rights regime with the Strasbourg Court and its sophisticated case law playing the leading part. However, it is not all roses in Strasbourg: for the last fifteen years Europe’s main human rights protector has been confronted with complicated challenges threatening its authority and effectiveness.

Already for years, the Strasbourg institutions are faced with a steadily increasing backlog of cases caused by the increasing number of member states and the frequent use of the individual complaint procedure.4 As a result of the current caseload, it may take years before the Court reaches a final decision in an individual case.

The vast majority of current violations in the case law of the ECtHR concerns so-called ‘repetitive cases’: cases in which the Court decides on matters which have already been dealt with in previous cases but which remain problematic because the concerned member state has not (yet) taken the necessary steps to improve or adjust the situation. An important example of such repetitive cases concerns the excessive delay-cases against a small number of countries (such as Italy and

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2 The ECtHR can also hear inter-state complaints but the possibility to file a complaint against another state is rarely used by member states.


4 To illustrate the increasing workload of the ECtHR: on 31 December 2007 there were 79400 pending applications (before a judicial formation), on 31 January 2011 this figure was as high as 143350. This means that the number of pending applications has almost doubled in three years. Statistical information on the functioning of the ECtHR is available at: http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+information+by+year/
France) in which the ECtHR time after time finds a violation of the right to be tried within a reasonable time.\(^5\)
Although it is for the member states to uphold complaints by victims of manifest violations of the Convention and to make reparation for the consequences of violations\(^6\), the fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by states. In a way, this is closely connected to the nature of the Strasbourg case law: decisions of the Court are always inextricably bound up with the circumstances of the case which makes it difficult to draw general conclusions from it. When the Court finds that a member state has violated its obligations as laid down in the ECHR, it rarely happens that part of national law (or practice) is \textit{in abstracto} declared incompatible with the Convention.\(^7\) As a result, whether a judgment of the ECtHR will have actual consequences for the national legal system depends to a large extent on the interpretation of the national authorities who have a substantial margin of appreciation in this respect.\(^8\) Although the Council of Europe – through the Committee of Ministers – formally supervises the execution of judgments, bringing the national criminal justice system in compliance with the Strasbourg case law is primarily the responsibility of domestic authorities.

In the long run the large amount of repetitive cases and the Court’s growing backlog may have considerable consequences for the general role and function of the Strasbourg system. Essentially, they may cause the ECtHR to lose part of its authority as a mechanism for effective human rights protection. Already there seem to be signs of ‘fatigue’ especially within certain Western member states with regard to the constant effort of fully implementing the requirements of the

\(^5\) As provided for in art. 6 § 1 ECHR.
\(^6\) See art. 46 § 1 of the Convention.
\(^7\) When dealing with alleged violations of art. 6 ECHR the Court will always assess whether ‘the procedure as a whole’ was in accordance with fair-trial requirements. See for example ECtHR 10 March 2009 (Bykov v. Russia) no.4378/02. Judgments of the ECtHR considering art. 6 ECHR will therefore never be based on one isolated incident during criminal proceedings.
\(^8\) With regard to the specific subject of criminal defence rights there is another characteristic of Strasbourg case law influencing its effectiveness. As a general rule, the ECtHR exercises restraint when it comes to the quality of the defence: it is a basic principle of ECtHR case law that the conduct of the defence is essentially a matter between the defendant and his counsel in which national authorities and the ECtHR should not interfere, see for example ECtHR 19 December 1989 (Kamasinski v. Austria) no. 9783/82, § 65.
Convention. In this respect, the system seems to be trapped in a vicious circle: because member states do not (adequately) fulfill their ECHR-obligations, the repetitive nature of the case law increases which – in turn – causes a threat for the authority of the ECtHR because the feeling grows that it’s judgments mainly concerns old wine in new bottles.

As an addition to the foregoing, it should be stressed that the current problems with the functioning of the Strasbourg system do not refrain the Court from delivering ‘revolutionary’ judgments every now and then. Important examples in this respect are the 2009 Salduz case concerning to the right to legal advice before and during police interrogation and the Rantsev case concerning state’s obligations to prevent human trafficking.

Some of the Court’s recent far-reaching case law has in certain member states led to political debate on the question whether the ECtHR goes too far in its judgments. For example in the United Kingdom there is a lively debate in politics and the media in which Strasbourg-critics argue that the Court is drifting away from its original task of dealing with traditional ‘fundamental’ human rights violations (such as fair-trial issues) and is too often interfering in matters which belong to the sovereignty of the member states. Recently a similar discussion seems to be emerging in the Netherlands.

For some time now, it has been agreed that facing the current problems of the Strasbourg system requires some sort of reform of the convention mechanisms. There are many different reform-proposals but the actual scope and contents of the measures to be taken are still subject to debate. Last year a special ministerial conference was held on the future of the convention system in Interlaken (Switzerland). In the ‘Interlaken Declaration’ concluding the conference an eight-point Action Plan was adopted as an instrument to provide political guidance for

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9 ‘The legislator, the administrator and the courts have other pressing needs pushing human rights to the background’: C. Brants and S. Franken, The protection of fundamental rights in criminal process – General report, Utrecht Law Review 2009-2, p. 49.

10 ECtHR 27 November 2009 (Salduz v. Turkey) no. 36391/02 (Grand Chamber decision) and ECtHR 7 January 2010 (Rantsev v. Cyprus and Russia) no. 25965/04.

11 These discussions are closely linked to the fundamental question on the role of the ECtHR: is it the Court’s primary task to provide individual protection or does it have a constitutional status? See on this matter: A. Stone Sweet and H. Keller, The Reception of the ECHR in National Legal Orders, in: A. Stone Sweet and Helen Keller (eds.), A Europe of Rights: The Impact of the ECHR on National Legal Systems, Oxford 2008, p. 5-8.
the process towards long-term effectiveness of the Strasbourg system. Shortly after the Interlaken conference, in June 2010, the 14th Protocol to the ECHR was finally ratified by all member states and entered into force after Russia had ‘blocked’ ratification for years. This Protocol provides for several changes to the Convention aiming to increase the effectiveness of the system. Amendments include the introduction of the possibility to have admissibility decisions taken by a single judge (instead of the previous panel of three judges) and the introduction of a new admissibility criterion according to which a case may not be admissible if it is found that the applicant has not suffered ‘a significant disadvantage’. It remains to be seen whether these measures will indeed improve the efficiency of the Court and – even more importantly – the effectiveness of its case law.

3.2. Filling the gap in European human rights protection

Although it is a general principle of ECtHR case law that the Convention is intended to guarantee rights that are not ‘theoretical and illusionary’ but rights that are ‘practical and effective’ the Strasbourg system does not seem to be able to (adequately) enforce this rule in the criminal justice systems of its member states. As mentioned in § 2, research on the existing level of safeguards within the EU clearly shows that a considerable number of European countries does not (adequately) fulfill its obligations resulting from the Convention. These studies illustrate that certain fundamental rights – such as the right to remain silent, to have access to the case file and to call and/or examine witnesses or experts: all basic requirements of a fair trial in the ECHR – are not provided for in the legislation of all member states.


13 This is according to the ECtHR ‘particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (...)’ ECtHR 13 May 1980 (Artico v. Italy) A37, no. 6694/74, § 33.

are guaranteed by law but at the same time it is doubtful whether their implementation in everyday practice corresponds to the Strasbourg standard.¹⁵

In short, it can be argued that the European Convention has been successful in setting general (minimal) standards but since it does not provide for clear guidelines on how to implement them, the practical and effective character of the Convention rights leaves much to be desired. The current situation in practically all EU member states shows that it is not realistic to claim that the ECHR already provides adequate standards for protecting procedural safeguards in criminal proceedings which demonstrate that additional legislation is needed.

And with the risk of being too pessimistic: even if the planned measures to increase the effectiveness of the Convention system will eventually result in a more efficient case management by the ECtHR, there is no reason to expect that this will drastically change the way ECHR standards are implemented in national criminal justice systems. In other words: improving the efficiency of the Strasbourg system – as important as it may be – does not necessarily mean that member states will be more inclined to take all necessary action to prevent future violations.

So, if we agree that the current level of human rights protection in criminal proceedings is insufficient in practically all European countries and we agree that additional legislation is needed to provide for adequate standards of protection, the question remains: where should this new legislation come from?

Over the last few years it has become more and more likely that the European Union is willing and able to fill the abovementioned gap in European human rights protection. Given its original economic objectives, the EU initially had no explicit ambitions in the field of human rights protection and was not – or rarely – active in the area of criminal (procedure) law. As will be discussed below, this picture has drastically changed over the last few years.

4. EU policy on procedural rights of suspects and defendants: background and recent developments

The European Union is the result of the joining together of the European Coal and Steel Community (1951), the European Economic Community (1957), and

the European Atomic Energy Community (1957). The original goal of the EU was – and to a certain extent still is – to promote economic integration within Europe through the creation of an Internal Market. However, over time the Union’s activities have widely expanded outside its original scope. With the expansion of its activities the European Union has become more and more involved in human rights matters. And nowadays even criminal law – which is traditionally considered to be a field of law belonging to the exclusive domain of national governments – has become an important field of the Union’s activity. The developments in the area of European criminal law are moving forward so quickly that one might even argue that ‘the European Union is gradually creating a criminal justice system of its own’.¹⁶

Before focusing on the emergence of an EU policy on procedural rights of suspects and defendants, the development of criminal law as a topic of EU law will be discussed.

4.1. The emergence of criminal law as a topic of EU law (pre-Lisbon)
Criminal law became a topic of EU law for the first time with the entering into force of the Maastricht Treaty (1993). This Treaty established the so-called three-pillar structure of the European Union. In the third pillar, called ‘Justice and Home Affairs’, criminal law became the most important enforcement mechanism. However, given the intergovernmental (international law) character of this third pillar, it had its limitations. For example, the main legal instrument was the framework decision which – other than the directive – did not have direct effect.¹⁷ Furthermore, decision-making was done primarily through unanimity which meant that member states maintained control and were able to block initiatives which they considered to be incompatible with their national criminal justice system.

In the years after 1993 the activities of the EU in the field of criminal law were further developed and deepened. The Treaty of Amsterdam (which entered into force in 1999) made fundamental changes to the Maastricht Treaty and inter alia

¹⁷ A framework decision is binding only as to the result to be achieved: the choice of form and methods is left to the national institutions. See A. Klip, European Criminal Law. An Integrative Approach, Antwerp (etc.): Intersentia 2009, p. 53. However, with regard to the (direct) effect of framework decisions reference should be made to the famous Pupino case in which the European Court of Justice made clear that the principle of interpretation in conformity with Community Law is (also) binding in relation to third pillar law: Pupino case (16 June 2005, Case C-105-03, criminal proceedings against Maria Pupino [2005]ECR I-5285).
introduced the Area of Freedom Security and Justice (AFSJ) replacing the former third pillar-title ‘Area of Justice and Home Affairs’. In 1999 the European criminal law policy received new impetus at the European Council of Tampere introducing mutual recognition as the cornerstone of judicial cooperation in criminal matters.\(^{18}\)


Over the years, the emergence of criminal law as a topic of EU law has lead to many achievements concerning police and judicial cooperation such as the European Arrest Warrant and the European Evidence Warrant. In sharp contrast to this, until recently, there has been little to no progress in developing similar instruments for the creation of common standards for the protection of suspects and defendants in criminal proceedings. Before the entering into force of the Lisbon Treaty, there has been one unsuccessful attempt to create an EU level of procedural safeguards for suspects and defendants. In 2004 – the European Commission presented a proposal for a Council Framework Decision to set common minimum standards as regards to certain procedural rights applying in criminal proceedings throughout the European Union.\(^{19}\) The original proposal contained the right to legal advice (including legal aid), the right to free interpretation and translation, specific attention for persons who cannot understand the proceedings, the right to communication and/or consular assistance and the right to information (including the duty to inform a suspected person of his rights in writing).

For many years the proposed Framework Decision was subject of heated debate among member states. One of the main arguments of the opponents was that the European Convention on Human Rights already provides for procedural safeguards in criminal proceedings and that there is no need for the EU to create another set of rules on this subject. In addition, some opposing member states argued that there was no legal basis in the EU Treaties for such a proposal and that the Union therefore did not have the competence to deal with the issue of procedural rights. Several revised (and much more limited) counter-proposals

\(^{18}\) Commission of the European Communities, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SI (1999). In addition to mutual recognition, the Tampere Conclusions listed approximation of substantive and procedural law as key objectives of Justice and Home Affairs.

were introduced but due to the difficulties of the negotiation process none of them were ever adopted. Eventually, in 2007, no further action was planned on the procedural-rights topic and the matter – at least temporarily – disappeared of the EU’s agenda.

The failed negotiations on the 2004 proposed Framework Decision had made it painfully clear that it was difficult to reach political agreement on whether and how the EU should set a ‘separate’ set of standards for procedural rights in criminal proceedings. However, after 2007, the awareness grew that the current discrepancies in levels of procedural safeguards between member states could seriously affect the realization of an ‘area of freedom security and justice’. After all, mutual recognition – as the cornerstone of cooperation in criminal matters – relies on mutual trust and confidence and can therefore be seriously hindered by divergent standards for suspects’ procedural rights.20

As a result of this consciousness, the subject of procedural rights was recently put back on the political agenda. And as will be discussed below – since the entering into force of the Lisbon Treaty – it may be expected that realization of EU legislation in this field will be less problematic in the near future than before.

4.3. The Lisbon Treaty (2009)

The Lisbon Treaty entered into force on 1 December 2009.21 Since then, the EU is mainly founded upon two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).22 With regard to criminal (procedure) law in general – and more specifically the protection of rights of suspects and defendants – the Lisbon Treaty has at least three important consequences.

First of all, the Treaty has introduced several institutional changes significantly simplifying the decision making process in the field of criminal law. With the Treaty of Lisbon, the three pillar system has been abolished leaving the EU with

21 The Lisbon Treaty is an amended version of the Treaty establishing a Constitution for Europe which could not be ratified after being rejected by voters in France and the Netherlands.
one institutional structure for all areas of activity with the directive as its main legislative tool and majority voting (in stead of unanimity) as the main voting mechanism. This is important because – as the fate of the 2004 Framework Decision had made painfully clear – the unanimity-rule dominating pre-Lisbon decision making in third pillar issues made it virtually impossible to reach consensus on procedural rights matters. Also, the directive is a more influential legislative tool than the framework decision, inter alia because according to the direct effect doctrine of the European Court of Justice (ECJ) unimplemented or badly implemented directives can actually have direct legal force. In addition when the provisions of a directive are described unconditionally and are sufficiently precise, they leave the member state no room for interpretation and they must be strictly complied with.23

As a result, it is fair to say that the Lisbon Treaty has considerably strengthened the legislative powers of the EU in the field of criminal (procedure) law. More specifically, the above-mentioned institutional changes have made it easier for the EU to draw up – by means of directives – (minimum) rules on inter alia the rights of individuals in criminal procedures.24

Secondly, as a result of the Treaty of Lisbon, it is now possible for the EU to accede to the ECHR and the fundamental rights as guaranteed by the ECtHR and as they result from the constitutional traditions common to the member states now constitute general principles of European Union law.25 Debate about the accession of the EU to the European Convention had already been going on for decades but had not yet led to any concrete steps. Currently the European Commission has proposed negotiation directives for the Union’s accession but this is a complicated process which is expected to take several years. However, once accession will be realized, it is beyond doubt that this will have far-reaching consequences for the European system of human rights protection.


24 Art. 82 § 2 under b Treaty on Functioning of the European Union provides the explicit legal basis for such instruments: ‘To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (...)’.

(b) the rights of individuals in criminal procedure;(...)
Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.’

25 Respectively art. 6 § 2 and 3 Treaty on the European Union.
Thirdly, with the entering into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (CFREU) has become legally binding. Although there is debate on the added value of the Charter to the ECHR, fact is that it creates a new, separate set of rights, freedoms and principles which can be used by the ECJ and national courts while interpreting EU law. The Charter includes – *inter alia* – the right to a fair trial and respect for the rights of the defence.

An important side-effect of the developments mentioned above is that the protection of human rights within Europe is becoming more and more complex. With the EU expanding its activities in human rights protection, the division between the legal orders of the European Union on one hand and the Council of Europe on the other, has become increasingly unclear. The complementary relationship between both organizations raises many complex legal questions on how the two organizations could and should relate to each other in the near future. For example, an important question is how the different rights as mentioned in the European Convention on Human Rights, in the Charter of Fundamental Human Rights and in the (expected) new rules to be promulgated by the EU will relate to each other. It is clear that the rights of the Charter have to be interpreted in consistence with ECHR rights but – in practice

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26 Art. 6 § 1 Treaty on the European Union.

27 See for example A. Klip: ‘The added value of the Charter is limited because it does not offer much more or different rights than those that were already protected under the ECHR’, A. Klip, European Criminal Law. An Integrative Approach, Antwerp (etc.): Intersentia 2009, p. 213.

28 The right to an effective remedy and to a fair trial is laid down in article 47 of the Charter of Fundamental Rights of the European Union (‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’). Article deals with the presumption of innocence and the rights of the defence: ‘1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.’

29 The Charters relationship with the ECHR is defined in art. 52 § of the Charter which reads as follows: ‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’ A reference to the case law of both the ECtHR and the European Court of Justice, was included in the Preamble. With this provision however, many questions remain unanswered (such as: which rights are equivalent to those in the ECHR and what is the relationship between the Charter and the Strasbourg case law. See on these and other problems with art. 52 § 3 of the Charter: L. Rincón-Eizaga, Human Rights in the European Union.
– this might not be as easy as it seems. Surely, the two acts are based on the same values and principles but their wordings differ and this may raise confusion as to their interpretation. The same will be true for the rights of the ECHR and their relationship with future regulations of the EU on procedural safeguards in criminal proceedings. Another aspect of the matter which could add to the confusion on how EU- and ECHR-norms relate to each other is the fact that both legal orders have different scopes: after all, a large group of European countries is ‘only’ bound by the ECHR and not a member of the EU. Therefore their citizens will – within their national borders – only be protected by the Strasbourg standards for the protection of suspects in criminal proceedings and not by similar EU procedural safeguards.

The upcoming role of the EU in guaranteeing citizens effective protection of fundamental rights does not only raise questions on the relationship between the two different legal orders, it also complicates the relationship between the two corresponding control mechanisms: the ECtHR in Strasbourg and the ECJ in Luxembourg. With the entering into force of the Lisbon Treaty, the ECHR has become part of European Union law and is therefore subject to control by the ECJ. Furthermore, the Luxembourg Court will also be able to apply and interpret procedural safeguards as laid down in the Charter of Fundamental Human Rights and (new) EU legislation in this field. Additionally, when the European Union will indeed accede to the ECHR, the ECHR and its control mechanisms will also apply to EU acts. This means that it will be possible for the ECtHR to examine whether the application and implementation of EU legislation is in conformity with Strasbourg standards. What if the ECJ’s interpretation of ECHR norms differs from the interpretation given by the Strasbourg Court and vice versa?30

With these complex legal questions on the relationship between the two different legal orders and their respective control mechanisms, there is a growing risk of


30 From a procedural point of view, it might be possible that a question on procedural rights is – for example in a preliminary ruling – answered in a certain way by the ECJ and subsequently brought before the ECtHR. Until now, the two courts generally respect and follow each others judgments but there are already numerous examples of divergent interpretations, for example on the right to respect for private and family life (art. 8 ECHR). See on this matter: L. Rincón-Eizaga, Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of article 8 of the European Convention on Human Rights, International Law: revista colombiana de derecho internacional 2008-11, p. 134-144.
confusion and legal uncertainty. If and how these questions will be answered in the near future remains to be seen but it is beyond doubt that clarity on these matters is of paramount importance for the future effectiveness of European human rights protection.

4.4. The Roadmap on procedural rights (2009)
A few months before the entering into force of the Lisbon Treaty, the matter of procedural rights was explicitly put back on the EU’s agenda by the European Commission. Subsequently the Swedish presidency presented a Roadmap on procedural rights in which member states agreed that measures at the European level were necessary. In the Roadmap strategic guidelines were formulated for developing an area of freedom, security and justice in Europe for the period 2010-2014.

It was explicitly mentioned in the Roadmap that EU action in the field of procedural rights is essential for the purpose of enhancing mutual trust within the European Union and to complement and balance existing EU policy on law enforcement and prosecution. Furthermore, it was stressed that there was room for further action on the part of the EU to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.

The Roadmap was adopted by the European Council on 10-11 December 2009 as an explicit part of the Stockholm Programme. In the Stockholm Programme the European Council stated:

“The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union. The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will

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32 Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings (1 July 2009, 11457/09, DROIPEN 53, COPEN 120).
strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme. 35

The Roadmap contains six measures which should – during the years 2010-2014 – result in legislation providing a minimum set of procedural rights within the European Union on the following topics:

- Measure A: Translation and Interpretation.
- Measure B: Information on Rights and Information about the Charges.
- Measure C: Legal Advice and Legal Aid.
- Measure D: Communication with Relatives, Employers and Consular Authorities.
- Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable.

According to the step-by-step approach chosen in the Roadmap, these matters should be dealt with one by one.

The first measure – dealing with the least controversial subject of the right to translation and interpretation has been adopted in 201036 (reference PE-CONS 27/10).

With regard to the second measure concerning the right to information a Proposal for a Directive of the European Parliament and the Council on the right to information in criminal proceedings is currently being discussed in the European Parliament37. Originally, member states wanted to limit the scope of this directive only to suspects and defendants in cross border cases. This lead to heavy criticism: such a limitation would result in differential treatment between citizens of the EU and thus in discrimination.38 The draft Proposal was adopted

35 Council of the EU, The Stockholm Programme – An open and secure justice serving and protecting the citizens (Official Journal 2010/C 115/01), §2.4.
by the Commission in July 2010 and offers a right to information to all suspects/defendants and is thus not limited to cross border cases.
The third measures on legal advice and legal aid is planned by the Commission for 2011 and is also work in progress.

In the remainder of this paper we will analyse in more detail the development of EU regulations on the right to information in criminal proceedings (measure B of the Roadmap) and the right to legal assistance (measure C of the Roadmap.)

5. Measure B: Information on Rights and Information about the Charges

The suggestion to inform suspects and accused persons of their basic rights was – at the European Union level – for the first time addressed by the Commission in its Green Paper of 19 February 2003 on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.\(^\text{39}\) The Commission stated that is important for both the investigating authorities and the persons under investigation to be fully aware of what rights exist and suggested that a scheme be instituted requiring Member States to provide suspects and defendants with a written note of their basic rights – a ‘Letter of Rights’. According to the Commission, this suggestion received a favorable response during its consultations prior to the Green Paper. In the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of 28 April 2004,\(^\text{40}\) the Commission proposed a written Letter of Rights notifying suspects of their rights to be introduced as one of the common minimum standards to be regulated in a framework decision.\(^\text{41}\) To require Member States to produce a short, standard written statement of basic rights and to make it compulsory for all suspects at the earliest possible opportunity, especially before the first police interrogation, in a language that the suspect would be able to understand, was according to the Commission a simple and inexpensive way to ensure an adequate level of knowledge. Article 14 of the proposed framework decision contained the following text:

\begin{quote}

Article 14

Duty to inform a suspected person of his rights in writing – Letter of Rights

\end{quote}

\(^\text{41}\) Next to access to legal advice, access to free legal interpretation and translation, special features for vulnerable suspects and access to consular assistance.
1. Member States shall ensure that all suspected persons are made aware of the procedural rights that are immediately relevant to them by written notification of them. This information shall include, but not be limited to, the rights set out in this Framework Decision.

2. Member States shall ensure that a standard translation exists of the written notification into all the official Community languages. The translations should be drawn up centrally and issued to the competent authorities so as to ensure that the same text is used throughout the Member State.

3. Member States shall ensure that police stations keep the text of the written notification in all the official Community languages so as to be able to offer an arrested person a copy in a language he understands.

4. Member States shall require that both the law enforcement officer and the suspect, if he is willing, sign the Letter of Rights, as evidence that it has been offered, given and accepted. The Letter of Rights should be produced in duplicate, with one (signed) copy being retained by the law enforcement officer and one (signed) copy being retained by the suspect. A note should be made in the record stating that the Letter of Rights was offered, and whether or not the suspect agreed to sign it.

As there was insufficient consensus between Member States for the proposals the original draft framework decision was significantly diluted. At the end of 2006, a more limited compromise of a proposal was put forward by the Austrian Presidency, listing general rights such as the right to information, right to legal assistance and the right to interpretation. In this proposal the concept of a written Letter of Rights was abolished and the right to information was phrased in general terms in Article 2:

Article 2

Right to information

1. Member States shall ensure that any person subject to criminal proceedings is provided with effective information, in a language which he or she understands, on the nature of the suspicion and of the fundamental procedural rights that he or she has.

2. This information shall be delivered as soon as these rights become relevant.

3. The information referred to in paragraph 1 shall include in particular information on the right to legal assistance, the right to such assistance free of charge and the right to free interpretation and translation.

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42 19 May 2006, 9600/06 DROIPEN.
However even a more watered down version that did not include the third paragraph of the proposed Article 2\textsuperscript{43} could not find agreement. As mentioned before in § 4.4, on the eve of the coming into force of the Lisbon Treaty, the Swedish Presidency again took up the issue of procedural safeguards by presenting a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings which provided for a step-by-step approach.\textsuperscript{44} According to the Roadmap, the second step, Measure B is described as follows:

Measure B: Information on Rights and Information about the Charges

Short explanation:

The suspect or defendant is likely to know very little about his/her rights. A person that is suspected of a crime should get information on his/her basic rights in writing \[i.e. \text{ideally by way of a letter of rights}\]. Furthermore, that person should also be entitled to receive information about the nature and cause of the accusation against him or her. The right to information should also include access to the file for the individual concerned.\textsuperscript{45}

5.1 Research Project An EU-Wide Letter of Rights

To gain insight in the matter a study has been conducted into the way suspects in the EU Member States are informed in writing of their rights in criminal proceedings. In this study a normative framework has been developed based on the jurisprudence of the ECtHR to establish standards and a legal basis for information that should be given to the suspect in the initial phase of police investigations. Finally a model has been designed for an EU-wide Letter of Rights to be applicable throughout the EU that was intended to function as an inspiration for initiatives on the national level as well as on the EU level. The research was concluded in July 2010.\textsuperscript{46}

The study revealed that in 17 (of the 27) EU Member States suspects are informed of their rights by a Letter of Rights or in a similar standardised form. In the documents that were gathered 12 topics could be identified that were addressed, although in different compounds and with different frequency. All documents contain information on legal assistance, although to a lesser extent information on legal aid is provided. Also, the right to silence, to have contact with trusted

\textsuperscript{43} 2 April 2007 8182/07 DROIPEN 30.
\textsuperscript{44} Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.
\textsuperscript{45} Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.
\textsuperscript{46} Taru Spronken, An EU-Wide Letter of Rights, Towards Best Practice, Interseintia Antwerp-Cambridge-Portland 2010.
persons, the right to interpretation and translation, medical care and consular assistance are dealt with in a considerable number of Letters of Rights and similar forms. With lesser frequency access to the file, information on charge or suspicion, detention and custody, provisions for vulnerable suspects, conditions of detention and participation in proceedings are mentioned.

Significant differences could be observed as to how and in what kind of format the information is provided. In some Member States information on rights is included in a standardised form of the record of the questioning of the suspect by the police, clearly functioning as a checklist for the interrogating officers to read out to suspects their rights and for the suspect to sign in order to record that the interrogating officer has performed his duty to caution the suspect.47 Other Member States provide information in the form of leaflets or brochures that obviously are meant to be handed out to suspects.

An important aspect for a Letter of Rights or written information to be understandable is the language used. In many cases the rights are formulated in very formal and legal language, even using lengthy quotations of legal provisions, which are probably very difficult to understand for lay people. There are, however, also examples where more or less successful efforts have been made to draft the information in a simple form so as to be easily understood.48 Where juveniles are concerned it has to be borne in mind that on average within the EU, children from the age of 15 years are considered criminally liable. Some Member States, however, apply diverging age limits. For example in Cyprus, children from the age of 7 can be considered liable and in France, children from the age of 10 are criminally liable.49 Letters of Rights should also provide understandable information for this category of suspects.

Detrimental for the effectiveness of a Letter of Rights for foreign suspects is that there are few Member States that have the Letter of Rights available in more languages. England and Wales and Germany, Sweden, Belgium50 are noticeable exceptions having a Letter of Rights (respectively written information) that is translated in more than 40 languages.

Interviews that were conducted with practitioners provide evidence that the Member States that have a Letter of Rights appear to have a well-organised

47 Czech Republic, Luxembourg, Estonia.
48 See for instance the Letters of Rights of Austria, Germany, Luxembourg and Spain in Annex 1 and the written information of Belgium, Ireland.
50 See for Belgium the written information given to persons in administrative arrest, EU-Wide Letter of Rights, Annex 2.
procedural framework to support it. The effectiveness is, however, dependent on how this is carried out in practice. The attitude of police is pivotal to the question whether or not the Letter of Rights is given in accordance with the underlying legal obligation. In general, the attitude of the police towards the Letter of Rights is that it is considered as a nuisance, rather than a valuable procedural right for the defence. This means that the Letter of Rights is treated as a formality, which gets in the way of the interrogation.

Consequently, in the opinion of the interviewed lawyers, the police often negatively impact the effectiveness or value of the Letter of Rights, for example, by discouraging the person deprived of his liberty to exercise his defence rights, not explaining these rights adequately or by starting with informal chats before informing about the defence rights. It therefore seems that in many Member State adequate instructions as to how and when to make the Letter of Rights available to the person deprived of his liberty is lacking.

The model for an EU-wide Letter of Rights that has been developed within this study addresses the situation where a person is deprived of his liberty because he is suspected of having committed a criminal offence. The model contains the core basic rights that are applicable at the first contact of the suspect with the police in relation to a criminal investigation based on the norms that derive from the ECHR and its jurisprudence and other international treaties.
Model EU-Letter of Rights for suspects and defendants in criminal proceedings

You are entitled to keep this letter of rights with you during your detention

If you are deprived of your liberty by the police because you are suspected of having committed an offence you have the following rights:

A. to be informed of what offence you are suspected
B. not to answer the police’s questions or to give any statements to the police
C. to assistance of a lawyer
D. to an interpreter and translation of documents, if you do not understand the language
E. to notify somebody of your deprivation of liberty
F. to inform your embassy if you are a foreigner
G. to know for how long you can be detained
H. to see a doctor if you feel ill or need medicine

You can find more details of these rights inside
A. Information on the suspicion

- You have the right to know what offence you are suspected of immediately after deprivation of liberty, even if the police do not question you.

B. Right to remain silent

- You do not have to answer the police’s questions nor give any statements to the police

- A lawyer can help and advise you on the law and help you to take decisions on whether or not to answer questions.

- If you want a lawyer, the police are not allowed to start questioning you before you have had the opportunity to talk with a lawyer.

C. Help of a lawyer

- You have the right to talk to a lawyer before the police start questioning you.

- If you ask to speak to a lawyer, it does not make you look like you have done anything wrong.

- The police must help you to get in touch with a lawyer.

- If you are not able to pay for a lawyer, the police have to provide you with information how to get free legal assistance.

- If you want to talk to a lawyer but do not know one, or cannot get in touch with your own lawyer, the police must take care of arranging that a lawyer is appointed for you in case you have a right to free legal assistance.

- The lawyer is independent from the police and will not reveal any information you give to him or her without your consent.

- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.

- You can ask your lawyer to be present during the interrogation by the police.

D. Help of an interpreter
- If you do not speak or understand the language, the police will arrange for an interpreter.

- The interpreter is independent from the police and will not reveal any information you give him without your consent.

- You can also ask for an interpreter to help you to talk to your lawyer.

- The help of an interpreter is free of charge.

- You have the right to receive a translation of any order or decision concerning your detention.

- You have the right to have documents of the investigation translated that are important for a request for release (see under G).

**E. Telling somebody that you are detained**

- Tell the police if you want someone, for example a family member or your employer, to be told that you are detained.

**F. For foreigners: how to contact your embassy**

- If you are a foreigner, you can tell the police to inform your embassy or consular authority that you are detained and where you are being held.

- The police must help you if you want to talk to officials of your embassy or consular authority.

- You have the right to write to your embassy or consular authority. If you do not know the address the police must help you.

- The embassy or consular authority can help you with finding a lawyer.

**G. How long can you be deprived of your liberty?**

- You have the right to ask a judge for your release at any time. Your lawyer can advise you on how to proceed.

- You or your lawyer can ask to see the parts of the case-file relating to the suspicion and detention or be informed about their content in detail.
- If you are not released, you must be brought before a judge within * hours after you have been deprived of your liberty.

- The judge must then hear you and can decide whether you are to be released or to be kept in custody.

- You have the right to receive (a translation) of the judge’s decision if he decides that you will remain in custody.

H. Medical care

- If you feel ill or need medicine, ask the police to see a doctor.

- You have the right to be examined by a doctor in private.

- You can ask for a male or a female doctor.

5.2. Proposed Directive on the right to information in criminal proceedings

At the moment of finalising the results of the above mentioned study, the European Commission presented a proposal for a Directive on the right to information in criminal proceedings, including an indicative Model Letter of Rights that is inspired by the model developed in the study mentioned above.\(^5\)

The most striking difference between the model and the proposed Directive is that the proposed Directive does not address the right to silence. This gave rise to criticism in Council and the European Parliament and it is proposed that the suspect should be informed of his right to silence.\(^5\)

The fact that the right to silence is not included in the first draft of the proposed Directive is a good example of the difficulties that are faced when trying to draft practical rules for implementation of procedural safeguards aimed to be applicable throughout the EU. Evidently, the right to silence is considered to be one of the fundamental features of the concept of fair trial by the ECtHR and is applicable immediately at arrest or before the first questioning of a suspect. So it is quite astonishing that this right is not included in a Directive setting minimum standards. The probable reason for not including the right to silence in the first draft is that within the member states there might be certain restrictions to the right to silence. This is for example the case in England and Wales, where adverse inferences may be drawn from using the right to silence or that in some member states the right to silence does not apply in situations where a person is not yet suspected of an offence.


\(^5\) See draft Report of Committee on Civil Liberties, Justice and Home Affairs 20 December 2010, 2010/0215(COD)
6. Measure C Right to Legal Advice and Legal Aid

At this moment (March 2011) there are no texts available yet for a Directive on Legal Advice and Legal Aid. In the Roadmap Procedural Safeguards Measure C concerning Legal Advice and Legal Aid is explained as follows:

“The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice”

This directive will probably be more difficult to negotiate than the foregoing on interpretation and translation and on information because of it’s financial consequences for the member states. The right to legal assistance is inextricably bound up with the right to legal aid. Recent Strasbourg case law has confirmed the importance of legal assistance for a proper defence in all its aspects, and that the right to legal assistance arises immediately upon arrest. Especially in the early stages of the criminal investigation it is the task of the lawyer, amongst other things, to ensure respect for the right of the accused not to incriminate himself. The ECtHR has also stressed that the principle of equality of arms requires that a suspect, from the time of the first police interrogation, must be afforded the whole range of interventions that are inherent to legal advice such as discussion of the case, instructions by the accused, the investigation of facts and search for favourable evidence, preparation for interrogation, support of the suspect and control of the conditions under which a suspect is detained. The ECtHR has even set standards for sanctioning breaches of the right to legal assistance by ruling that incriminating statements obtained from suspects who did not have access to a lawyer may not be used in evidence.

A directive should deal with several controversial issues on which there is no conformity within the EU member states such as the moment at which the right to legal advise arises, mechanisms to ensure that legal advise is available, minimum requirements regarding eligibility for legal aid and minimum quality criteria and remuneration for lawyers providing legal assistance paid for by the state.

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53 A draft proposal is expected in June-July 2011.
54 Effective Criminal Defence in Europe, Chapter 2 § 4.3.
55 Salduz**
To illustrate what kind of challenges will have to be taken up an overview is given of the way legal assistance is dealt with in the countries that were studied in the research project Effective Criminal Defence in Europe mentioned above.

Belgium

In Belgium there is a constitutional right to legal assistance. However, there are only limited rights to legal assistance during interrogation by the police or by an investigating judge, seemingly in breach of the Salduz doctrine. As a rule, such interviews are not currently even audio-recorded. The police are currently permitted to interrogate during the 24 hours following arrest, and there is discussion as to whether this should be extended to 48 hours. During this period, a person cannot consult with their lawyer. There is a system of ‘first’ and ‘second’ line legal aid. First line legal aid is advice from a ‘house of justice’. Second line assistance is obtained from a Legal Aid Bureau. All trainee lawyers are required to do some work for the bureaux. There is a means test and a merits test. A single person is eligible for free legal aid if they have a monthly net income below 865 Euro and, subject to a contribution, up to 1,112 Euro. Remuneration is low and slow, being made retrospectively on the basis of points per element of a case. Thus, the average remuneration per case for the Flemish bar appears to be as low as 367 Euro. Payment is made late, often more than a year after the case has finished. There are also anomalies in how the points system values different types of cases. There is a lack of research into the roles played by Belgian lawyers and other criminal justice actors. The majority of defence lawyers appear to adequately represent their clients. However, there also seems to be a minority who are not specialised in this field and whom judges deem ignorant and incompetent. This may be because there are no minimum quality requirements and trainee lawyers are widely used.

England and Wales

In England and Wales there is a statutory right to consult a lawyer privately at any time during detention at a police station. Around half of detainees are thought to ask for it and the majority receive it. Legal assistance at the police station is provided free of charge regardless of the financial circumstances of the suspect. Recent changes have been made to this scheme and there is a concern that the government may be intending to restrict its availability. Access to a lawyer can be delayed in specified circumstances for up to 36 hours, but in

56 Effective Criminal Defence in Europe, Chapter 3 § 2.2.2.
57 Effective Criminal Defence in Europe, Chapter 4 § 2.2.2.
practice this is rare. There are practical problems with the operation of the police station legal advice scheme in relation to the lack of private telephone facilities in police stations. There can also be difficulties over privacy in relation to consultations in prisons or at courts, due to inadequate facilities.

It is likely that around a third of defendants in magistrates’ courts and a significantly higher proportion in the higher courts (for example, 95% of those facing trial in the Crown Court) receive legal aid. Annual expenditure on criminal legal aid was £1.4bn in 2007/8. Expenditure peaked in 2006 but has been falling since then. It appears likely that something like six per cent of all solicitors and 40% of all barristers undertake criminal work (there is a split legal profession). The level of remuneration for legal aid work is controversial and is of particular concern to solicitors and more junior barristers.

Finland

In Finland a suspect or defendant has a right to representation, which need not be by a lawyer. Legal aid is guaranteed by the Finnish constitution and international human rights conventions. Legal aid has a ‘dual nature’ – it is provided through public legal aid offices and private attorneys, who may or may not be members of the Finnish Bar. The fact that a lawyer need not be a member of the Bar Association raises issues about the quality of what are sometimes graphically described as ‘wild lawyers.’ Eligibility for legal aid is set at a net income of less than 1,500 Euro per month for a single person. Eighty per cent of the population are estimated to be eligible. Assistance from a publicly funded private practitioner may be available in all serious cases but not in more straightforward ones, such as ‘drunk driving’. The court may appoint a public defender without applying a means test in certain types of cases, even against the wishes of the suspect. A criminal suspect or defendant in custody is entitled to legal representation free of charge. A public defender is free, whereas a private lawyer’s services are means-tested. Suspects tend to choose private lawyers. Indeed, private lawyers constituted around two thirds of all appointments in 2007. Basic remuneration is 100 Euro per hour, with a basic maximum from the end of 2009 of 80 hours, down from the former limit of up to 100 hours, although an extension of another 30 hours may be available in difficult cases. A lawyer may be appointed to oversee certain types of surveillance, but he may not have contact with the suspect. This is somewhat akin to the ‘special advocate’ procedure used in England and Wales.

58 Effective Criminal Defence in Europe, Chapter 5 § 2.1.
France

In France, when a suspect is held ‘Garde a Vue’ there is a right to consultation with a lawyer for an arbitrary period of 30 minutes prior to the initial police interview.\textsuperscript{59} The role of the defence lawyer has been dismissively described as that of a ‘tourist’ or ‘social worker’.\textsuperscript{60} Legal aid is organised through the local Bar and utilises predominantly inexperienced lawyers or trainees. Problems of confidential consultation between lawyers and their clients persist through the instruction stage, with little opportunity for private consultation. Criminal legal aid expenditure in 2006 was just over 100 Euro per case. Eligibility for free legal aid for someone with no dependants is set at a net income of below 911 Euro a month. This is just below the level of the minimum wage. Remuneration is significantly below private rates. Interestingly, some disrespect for legal aid lawyers was reported by defendants themselves because of the low status and remuneration of legal aid lawyers.

Germany

In Germany, there is mandatory legal representation in some serious cases. In less serious cases there may also be discretionary legal representation.\textsuperscript{61} In the case of mandatory representation, the lawyer is appointed by the court, although it will often take note of the defendant’s preference. The state scheme guarantees payment to counsel on the basis of recouping the cost from the defendant. The scheme is geared to representation at the trial stage. Eligibility for legal aid is set at just under 1,000 Euro a month for a single person. The state does not seek to recover the legal aid costs if the defendant is acquitted, or if the defendant’s income is below the minimum. In exceptional cases requiring mandatory representation, the court may appoint a lawyer even where the defendant has himself appointed one. This can happen when judges suspect that retained counsel may ‘drop out’ or because the appointed lawyer ‘ideologically’ sides with the defendant or delays the proceedings. State authorities are bound to assist a defendant with their choice of counsel. Assistance means more than simply providing a list of lawyers, but extends to providing guidance. There are privately organised regional networks of lawyers who operate emergency schemes to provide assistance, sometimes with the support of the regional bar association. There is no information about overall expenditure on criminal legal aid.

\textsuperscript{59} Effective Criminal Defence in Europe, Chapter 6 § 2.2.2.
\textsuperscript{60} Effective Criminal Defence in Europe, Chapter 6 § 2.2.2.
\textsuperscript{61} Effective Criminal Defence in Europe, Chapter 7 § 2.2.
Hungary

Hungary also has a system of mandatory legal representation in a range of circumstances including, where it applies, during the investigative stage and at trial. Representation is mandatory during certain special procedures, such as expedited and *in absentia* hearings. As a result, in 2006 and 2007, over 70% of defendants were represented by a lawyer. If defendants have no pre-existing lawyer the prosecution will often not wait while one is identified but will proceed with the investigation in their absence. Defence counsel must be appointed before the first interrogation, but evidence suggests that attendance at such interrogations is variable over the country and only occurs in around a third of cases nationally. This appears to reflect the very short period— in one district, an average of only 30 minutes – between notification to the lawyer and the start of the interrogation. Notification to the defence lawyer is often made by fax rather than telephone, and the police interview may commence without direct contact with the lawyer. A crucial systemic problem in this scheme is that defence lawyers are chosen by the investigating authorities. This has resulted in an overly close relationship between some defence lawyers and those who give them work.

There is credible evidence of low levels of quality of appointed lawyers, whose approach is reportedly less thorough than those lawyers retained directly by their clients. In fact, this was the finding of a survey by the Hungarian Helsinki Committee in 2003. If the appointed lawyer does not attend trial in a relatively straightforward case, the judge will appoint a lawyer on the spot. To anticipate this, the Budapest Bar Association operates a scheme under which trainees—with law degrees but not having passed the Bar exam—take turns in being on duty to pick up such cases. Some judges have questioned the quality of representation thus provided. The maximum time that a representative has to study the file in such circumstances is half an hour. Trainees also provide defence in local courts, although theoretically under the professional supervision of their supervisor. Thus, trainees undertake a considerable proportion of assistance and representation during the interrogation stage and in local courts. Questions arise as to the quality of such representation since neither the Ministry of Justice nor the Bar Associations monitor quality. A 1999 study, for example, suggested inadequate standards of representation by lawyers appointed to act for juveniles. Payment of defence lawyers in legal aid cases is made for different stages of the case by the investigating authority, the prosecution and the court.

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62 Effective Criminal Defence in Europe, Chapter 8 § 2.2.1.
This payment scheme fragments any overall accountability for the good working of the system as a whole.

Where defendants are in detention there are practical restrictions on contact between them and their lawyer: telephone calls are limited, and prisons can be a long way from the lawyer’s office, impeding access in person. Some prisons have only one interview room. As a consequence, busy lawyers cannot always see their client, even when they do attempt to visit them in prison.

**Italy**

In Italy, a suspect generally cannot be questioned by the police in the absence of a lawyer, regardless of the gravity of the case. Legal assistance is mandatory in all cases. The police must appoint a lawyer if the suspect does not have one. Ex officio lawyers are appointed by the Bar Association from a pool of lawyers who have attended a specified course. The appointment is made using a computer-based system that matches competence with the requirements of the case. The suspect or defendant is required to meet the costs of the lawyer except where their annual income is below 9,300 Euro. There are no ‘taper’ arrangements to mitigate the effect for those suspects or defendants who are just over the financial limit. Moreover, a lawyer must pursue the debt vigorously against the client in order to secure state payment of the fee in the case of default. This can affect lawyer-client confidence. Legal aid fees are low, the average being between 1,000-1,500 Euro per case, which is around a quarter of the private rate. There is, however, a practice in less serious cases or where the lawyer is appointed at trial, of lawyers acting for free, either for political or ethical reasons.

The number of grants, and the cost, of legal aid has grown rapidly in recent years. In the decade from 1996, the cost of legal aid rose from 4 million Euro to 70 million Euro. The choice of lawyer can be made in writing or orally, but if made orally it must be confirmed in writing in the records of the police or prosecutor. Attendance by the lawyer can be waived but in practice, with the exception of attendance at searches and inspections, it is usual for the lawyer to attend interviews. Legal representation is required at trial, the judge appointing a lawyer ex officio if the defendant has not done so. Culturally, Italian defence lawyers act adversarially. Lawyers must be members of the Bar Association, which requires successful completion of the Bar examination. There is a voluntary association of criminal practitioners, the Penal Chamber, which is organised nationally and locally. A compulsory national Bar Association code is

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63 Effective Criminal Defence in Europe, Chapter 9 § 2.2.2.
supplemented by a voluntary code of professional conduct drafted by the Penal Chamber.

**Poland**

In Poland, responsibility for granting legal aid rests with the judge and there is concern that judges may be influenced by budgetary considerations. There is no separate legal aid budget, and there is a lack of statistical information on legal aid. There is, in principle, a right to be represented by a lawyer at all stages of criminal proceedings, and a suspect must be informed of this. However, legal aid does not cover the period prior to the first court hearing concerning pre-trial detention. Thus, police interviews may be conducted in the absence of legal representation. Moreover, the courts frequently employ expedited proceedings, in which legal representation is not required. Communication between the lawyer and their client can be supervised during the first 14 days of pre-trial detention. The legality of this practice has been upheld by the Constitutional Court, but there is doubt as to whether the ECtHR would come to the same conclusion.

There is, apparently, relatively little concern amongst members of the bar about this lack of confidentiality. This is mainly because such supervision is not carried out on a large scale and lawyers do not consider postponing the first in-depth consultation with the client until after the first 14 days have passed to be problematic.

Representation during the period immediately following arrest is rare and, as noted, is not funded by legal aid. The court may order mandatory defence in some circumstances, for example, where the accused is a minor. In practice, legal assistance in these circumstances is free of charge to the accused. Otherwise, representation may be free if the suspect or defendant is unable to pay, but there is no clear means test. Thus, in practice, defence representation often depends upon the prosecutor’s ability to identify whether the accused is eligible for legal aid. This has been criticised as giving the prosecutor too much discretion.

Lawyers are appointed from a Bar Association list, without regard to specialisation, and there is no appeal against the appointment decision. This can mean that an inexperienced lawyer is appointed to represent a client in a complex case. Only qualified lawyers can represent defendants in court, but law clinics are used for advice, for example, in detention centres. Mandatory appointment of a lawyer does not mean that their attendance at hearings prior to the main trial is mandatory, and thus representation may be lacking at procedural hearings prior to trial. All members of the bar have a duty to provide

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64 Effective Criminal Defence in Europe Chapter, 10 § 2.2.2.
65 Effective Criminal Defence in Europe Chapter, 2 § 4.5.
legal representation, but the numbers that actually do are unknown. Minimum fees are regulated by ministerial decree for separate elements of cases, and remuneration levels are less than for private cases. There are indications, supported by research, that the quality of legal assistance is low. Reform of the legal aid system has been contemplated, but is currently stalled.

Turkey

In Turkey there is a right to representation at hearings following arrest.\(^{66}\) However, such hearings have been criticised as being more about providing a safeguard against ill-treatment than anything else.\(^{67}\) A further safeguard against abuse is provided by a rule that a statement by the defendant in the absence of a lawyer cannot be accepted as the basis for conviction unless confirmed to the court. There was some suggestion in interviews conducted for the research that the police circumvent the requirement of legal representation through a series of strategies designed to elicit information from the suspect before the formal interview conducted in the presence of lawyer. There are often practical problems in finding a room in which a confidential consultation between a lawyer and their client can be conducted. There are even reports that some police officers are deliberately obstructive. Research in Istanbul suggested that there was legal representation in only 10% of cases for courts of general jurisdiction, although this rose to just over 40% of cases in the superior courts. Around three-quarters of those sentenced to imprisonment were not represented at trial.

Legal aid is available without a means test from the time of first detention through to appeal, but expenditure on criminal legal aid is less than 1 Euro per capita. This low level of expenditure suggests, \textit{inter alia}, low levels of remuneration. Indeed, the fee for an aggravated felony, for example, is only 215 Euro. Legal aid is managed by local Bar associations, without any supervision by the Ministry of Justice. Both judges and prosecutors have expressed dissatisfaction with the quality of defence representation. To an extent, this concern is shared by lawyers themselves who admit, at least collectively, to failings such as delays and low motivation. Ordinary professional disciplinary proceedings provide the only form of quality control. In legal aid cases the accused has no right to dismiss the lawyer. Furthermore, the Istanbul bar is currently boycotting the legal aid scheme because of late payment, and as a result legally-aided representation in Istanbul is not currently available at all.

\(^{66}\) Effective Criminal Defence in Europe, Chapter 11 § 1.3.

\(^{67}\) Effective Criminal Defence in Europe, Chapter 11 § 1.3.
7. Conclusion

In this paper we tried to analyse how procedural safeguards for suspects and defendants are protected by the European Convention on Human Rights and what the impact of the European Union in this area is.

The ECHR and the jurisprudence that flows from it has been, and continues to be, of crucial importance in establishing standards in relation to effective criminal defence. However, there are important limitations. Some of them are practical, such as the back-log of cases waiting to be heard. Others are systemic; the \textit{ex post} nature of the application process, the weak mechanisms for ensuring compliance with ECtHR decisions, and the reservation of rules of evidence to member states. Furthermore some factors that are crucial elements of effective criminal defence, such as the standards of criminal defence lawyers, the ECtHR has largely, and rightly, been reluctant to go beyond broad requirements.

The most important issue is however that access to effective criminal defence does not simply depend upon whether suspects have access to legal assistance. No matter how competent the lawyer is, access to effective criminal defence relies on the presence of, and interrelationship between, a range of principles, laws, practices and cultures. It is of paramount importance that rights are expressed in sufficient detail and supported by appropriate enforcement mechanisms and judicial cultures. Thereby, it has to be taken into account that defendants are mostly poor, which requires an adequate legal aid system. In order to be practical and effective all components have to be in balance and require appropriate timing. For example without interpretation and translation it is hard to imagine how a defendant who does not speak the language could actually participate in the proceedings or communicate with his lawyer. The right to silence cannot protect the suspect from making incriminating statements when he is not aware or informed of this right before an interrogation. And last but not least without a properly functioning legal aid system access to adequate legal advice is illusionary for most suspects.

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69 Effective Criminal Defence in Europe, Chapter 2, § 4.6.
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National governments clearly have an important role to play in establishing the legislative context within which effective criminal defence is possible. Evidential and procedural rules, and effective enforcement mechanisms, are of fundamental importance in ensuring access to effective criminal defence. Similarly, national governments have an important responsibility for establishing structures and providing resources to ensure that free legal assistance as well as free interpretation and translation are available in a timely fashion to those who cannot pay for these.

Over the last few years, it has become increasingly clear that the Strasbourg human rights regime is not (sufficiently) able to make sure that national authorities take all the responsibilities mentioned above. The fact that the current level of human rights protection in criminal proceedings is insufficient in practically all existing EU member states shows that additional action at the European level is necessary and should be taken as soon as possible. As described in this paper, the European Union has recently taken up this task developing a policy on procedural rights for suspects and defendants in criminal proceedings.

The upcoming role of the EU in guaranteeing citizens effective protection of fundamental rights and its relation to the existing Strasbourg mechanism raises many complicated legal questions. These mainly concern the future relationship between the two legal orders and their corresponding control mechanisms. From a practical point of view, however, the most important question is whether the EU will be able to effectively improve the level of protection offered to suspects in criminal proceedings.

Although, at this stage, there are still many uncertainties on how the EU policy on procedural rights will develop, it can be argued that the EU potentially has far more possibilities to enforce human rights standards than the Strasbourg institutions do. After all, with its powerful legislative tools and effective control mechanism – the EU is better equipped than the Council of Europe to ensure that national authorities establish the legislative context to make effective criminal defence possible. The Lisbon Treaty enhances the role of the ECJ in relation to procedural rights and allows for minimum rules to be adopted in relation to rights of the individuals. This opens the way to enforcement mechanisms which have a different character than the ex post complaints to the ECtHR and can be of complementary significance for the Strasbourg enforcement mechanism. The EU enforcement mechanism operates in a different way and provides for the general
competence of the ECJ concerning questions of interpretation of the Treaty. Every national court may in criminal proceedings ask the ECJ to give a preliminary ruling on a relevant issue. In addition the European Commission has the power to bring a case against a member state that it considers has failed to fulfill its obligations under the Treaty, which is especially relevant when directives on procedural safeguards are adopted. A finding that a member state has not brought its national legislation into compliance may result in to financial penalties imposed by the ECJ.

Only the future will tell whether the potential of the EU in this respect can and will be used to the full extent. Much will depend on the scope and contents of the legislative instruments foreseen in the Roadmap on Procedural Rights. Obviously, the step-by-step strategy chosen in the Roadmap has at least one advantage: small bits will be easier to swallow than the bigger portion which was served to the member states in the 2004 proposal for a Framework Decision. However, there might also be a downside to the step-by-step approach: after all, as mentioned before in this conclusion, most of the procedural rights of suspects are complementary to each other and – therefore – it remains to be seen whether it is wise to deal with them separately.

The negotiations on the development of an EU-policy on procedural rights are at a crucial stage right now. Since measure B and C both concern rather controversial topics on which there is little conformity between member states, it remains to be seen if and how the planned directives will in fact force national authorities to create the necessary conditions for an effective defence. Only if this is the case, the European Union will be able to fill the gaps which Strasbourg left open by actually providing suspects with rights that are practical and effective.

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70 Art. 267 TFEU.