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**POLICE INTERROGATION OF THE SUSPECT IN  
CROATIA AFTER THE IMPLEMENTATION OF THE  
DIRECTIVE 2013/48/EU – STATE OF PLAY AND  
OPEN QUESTIONS\***

**ABSTRACT**

*This paper tackles the issue of the police interrogation of the suspect after implementation of the Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings. Therefore, this paper first analyses the standards of the European Convention of Human Rights and European standards aimed at strengthening the procedural position of suspects in criminal proceedings. Then it introduces new provisions regulating police inquires of criminal offenses and powers and duties of the police during the formal interrogation of the suspect. Next, the paper considers the possibility of using the results of the police interrogation of suspects as a sufficient basis for filling the indictment, and points to some solutions in comparative law. Finally, the authors critically examine first rulings of Croatian courts on the sufficiency of police interrogation of suspect for filling the indictment and issuing a penalty order and in this regard, proposes possible solutions thereto de lege ferenda.*

**Keywords:** Directive 2013/48/EU, right of access to a lawyer, police interrogation, suspect, police inquires, investigation

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## 1. INTRODUCTION

The latest amendments to the Criminal Procedure Act (hereinafter CPA)<sup>1</sup>, which entered into force on 1 December, 2017, made a significant step towards the further Europeanization of Croatian criminal procedural law. The latter alignment of the CPA with the *acquis communautaire* of the European Union (hereinafter: EU) has been implemented by transposing several important Directives.<sup>2</sup> Among them, the Directive on the right of access to a lawyer in criminal proceedings is particularly emphasized.<sup>3</sup> The implementation of the said Directive significantly reformed the traditional formal concept of the suspect and the legal nature of police informal questioning of the suspect.

In that sense, Croatia abandoned the formal concept of the suspect (person against whom the crime report has been submitted, the inquiries were made, or the urgent evidentiary action was taken), and the concept of the suspect with a substantive meaning has been accepted. According to the new provision, the suspect is a person in relation to whom there are grounds for suspicion of having committed a criminal offense and against which the police or the public prosecutor acts to clarify this suspicion (Art. 202. (2) (1) CPA). The new definition of the suspect was a prerequisite to comply with Art. 2 (3) of Directive 2013/48/EU as in accordance to that provision, the Directive also applies to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.<sup>4</sup> Since the Direc-

<sup>1</sup> The Criminal Procedure Act of 18 December 2008, Official Gazette no. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17

<sup>2</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [2008] OJ L 350/60, Directive 2012/29/EU of the European Parliament and of the Council of 25 October, 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57, Directive 2014/42/EU of the European Parliament and of the Council of 3 April, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [2014] OJ L 127/39, Directive 2014/62/EU of the European Parliament and of the Council of 15 May, 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [2014] L 151/1

<sup>3</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October, 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] L 294/1

<sup>4</sup> In this way, European criminal law tries to cope with the problem of the uneven protection of defense rights in the early stage of criminal proceedings among the EU states. Đurđević, Z., *The Directive on the Right of Access to a Lawyer in Criminal Proceedings filing a human rights gap in the European Union legal order*, in Đurđević, Z., Ivičević Karas, E. (eds), *European criminal procedure law in service of protection of European union financial interests: State of Play and Challenges*, Zagreb, 2016, p. 20

tive explicitly covers the situation of the police questioning of the suspect and at the same time clearly delimits cases that are not considered police interrogation (preliminary questioning by the police or by another law enforcement authority for the purpose of identifying 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),<sup>5</sup> the Croatian legislator significantly intervened in the informal questioning that the police carried out during the inquiry of criminal offenses. This resulted in the abandonment of the traditional informal questioning of the suspect and prescribing the formal police interrogation of suspects with the obligation of the police to inform suspects of their defence rights before carrying out a formal interrogation.<sup>6</sup> Consequently, now, there is a clear distinction between the informal questioning of citizens and the formal interrogation of a suspect during police inquiries.

Prescribing the duty of the police to inform the suspects prior to interrogation with rights of defence on the one side, and, on the other, following the strict rules for conducting the interrogation of the suspect—which includes the obligation of audio-video recording the first interrogation—was a sufficient reason for the legislator to determine that the result of such police interrogation of a suspect could be used as evidence in criminal proceedings.<sup>7</sup>

This significant turnaround of the law, as well as the consequences of police interrogation of suspects, has opened up many questions and doubts in Croatian jurisprudence, which has traditionally been accustomed to recognising and accepting as evidence in criminal proceedings only the examination of the defendant conducted by the public prosecutor.<sup>8</sup>

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<sup>5</sup> Directive 2013/48/EU, Preamble, recital 20

<sup>6</sup> See: Explanatory memorandum to the amendments of the Criminal procedure act, P.Z.E., no. 78, 2017, p. 7, [\[http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2021643\]](http://edoc.sabor.hr/Views/AktView.aspx?type=HTML&id=2021643) Accessed 7 May, 2018

<sup>7</sup> However, such a request was not explicitly stated by the Directive 2013/48/EU. Nonetheless, the Croatian legislator ensured the protection of the suspect's rights to defence and, on the other hand, provided an effective control mechanism for respecting the proclaimed defence rights. This mechanism is a well-known exclusionary rule that prevents evidence collected in violation of the suspect's rights of defence from being used in a court if the interrogation is conducted in an improper way. Ivičević Karas, E., *Moving the limits of the right to a defence counsel under the influence of European criminal law*, Croatian Annual of Criminal Law and Practice, vol. 22, no. 2, 2015, p. 377

<sup>8</sup> Exceptionally, a police investigator may conduct an interrogation of the defendant for criminal offenses under the competence of the municipal court but only upon the order of the public prosecutor (Art. 219 (3) CPA). See: Pavliček J., *The role of the investigator in the criminal procedure*, Croatian Annual of Criminal Law and Practice, vol. 16, no. 2, 2009, pp. 900–903

Therefore, this paper first analyses the standards of the European Convention of Human Rights and European standards aimed at strengthening the procedural position of suspects in criminal proceedings. Then, it introduces new provisions regulating police inquires of criminal offenses and powers and duties of the police during the formal interrogation of the suspect. The following chapter considers the possibility of using the results of the police interrogation of suspects as a sufficient basis for filling the indictment and points to some solutions in comparative law. Finally, the authors critically examine the first rulings of Croatian courts on the sufficiency of police interrogations of suspects for filling the indictment and issuing a penalty order and, in this regard, proposes possible solutions thereto *de lege ferenda*.

## 2. CONVENTIONAL AND EUROPEAN STANDARDS AND THEIR IMPACT ON STRENGTHENING THE POSITION OF SUSPECTS IN PRE-TRIAL PROCEEDINGS IN THE REPUBLIC OF CROATIA

### 2.1. Jurisprudence of European Court of Human Rights

#### 2.1.1. *Concept of a suspect in substantive terms*

The criminal procedures of continental European countries are implemented in a firm and strict form of proceeding. This form, of course, is necessary in order to clearly define the prerequisites for taking action in the proceedings, the persons authorized to undertake them, and the form of these acts as well as the legal consequences for non-compliance with those cogent regulations.<sup>9</sup> This ensures that the criminal prosecution authorities know in advance what arsenal of weapons they have in the fight against criminality and that the citizens on the other side can be acquainted with the assumptions under which the state repressive bodies are authorized to invade their fundamental rights and freedoms.<sup>10</sup>

However, the overly formal prescribing of the moment of commencement, duration, and completion of a stage of criminal proceedings—as well as the formal defining and binding of terms like “suspect”, “defendant”, and “the accused” with certain stages of the proceedings—often lead to the undesirable phenomenon of repressive bodies, under the guise of strict formal regulation, seemingly “legally” overcoming the protective guarantees of the rights of defence. This practically leads to a situation that one and the same person at an earlier stage of preliminary

<sup>9</sup> Krapac, D., *Kazneno procesno pravo*, Prva knjiga: Institucije, Narodne novine, Zagreb, 2014, p. 7

<sup>10</sup> *Ibid.*, p. 92

proceedings, just because he has the formal status of suspect, enjoys less protection of his rights and freedoms. This is despite the fact that actions and measures taken by the repressive authorities have so aggravated his position and *de facto* transformed him into the defendant, which in nature requires the imposition of additional and stronger rights of defence. However, the realization of these rights does not arise since the formal acquisition of the position of the defendant is bound to the later stage of pre-trial proceedings.

This problem was already recognized by the European Court of Human Rights (hereinafter: ECtHR), for which reason it has autonomously defined the conception of the charge for criminal offence: the moment from which it should be taken that a person has been under investigation irrespective of national legal provision defining the official opening of the investigation.<sup>11</sup> In this respect, the ECtHR provided a definition of the term “charge”, stating that it may be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, to which corresponds every action or measure that substantially affects the situation of the suspect regardless of whether there is a formal indictment of the competent authorities in the specific case.<sup>12</sup> This autonomous interpretation was used as an argument for extending the guarantees of the right to a fair trial of art. 6. ECHR to the earliest stages of the criminal proceedings, which ultimately led to the notion of the suspect in substantive meaning.<sup>13</sup> Consequently, from the aspect of practice of the ECtHR, the national legal provision on the commencement of criminal proceedings is not relevant at all, but the ECtHR evaluates the actions and measures that are taken by repressive bodies against the suspect or in connection with the suspect to see whether the suspect is substantially affected by the steps taken against him.<sup>14</sup> In

<sup>11</sup> „...one must begin by ascertaining from which moment the person was “charged”; this may have occurred on a date prior to the case coming before the trial court such as the date of the arrest, the date when the person concerned was officially notified that he would be prosecuted, or the date when the preliminary investigations were opened.“ Judgment *Foti v Italy* (1982) 5 EHRR 313, § 52

<sup>12</sup> „the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a “substantive”, rather than a “formal”, conception of the “charge” contemplated by Article 6 par. 1 ECHR. The Court is compelled to look behind the appearances and investigate the realities of the procedure in question. “The “charge” could, for the purposes of Article 6 par. 1 ECHR, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence, or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect” Judgment *Deweere v Belgium* (1980) 2 EHRR 239, § 44

<sup>13</sup> Stavros, S., *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, Martinus Nijhoff, Dordrecht, 1993, p. 71

<sup>14</sup> Harris, D., O’Boyle, M., Warbrick, C., *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2014, pp. 376–377

this way, it does not allow the bodies of criminal prosecution to undergo stringent institutional guarantees during the investigation or to manipulate the length of the proceedings by raising a formal indictment in a late stage of the proceedings such as the end of the investigation.<sup>15</sup> Therefore, the autonomous notion of the charge shows an important criterion for securing at least the approximately equal status of the defendant through the entire criminal proceedings regardless of the formal designation of the defendant (suspect, defendant, accused) and irrespective of the national provision defining the formal commencement of the criminal proceedings (decree on investigation, filling an indictment, etc.).<sup>16</sup>

### ***2.1.2. Right to the assistance of a lawyer***

While the substantive concept of the defendant is now a firm standard in the jurisprudence of the ECtHR, this cannot be said for the realities of constituting this procedural position especially in the early phases of the criminal proceedings, when the police make the first contact with the suspect or the citizen that potentially could become suspected of having committed a criminal offense. Therefore, the ECtHR began to consider the reality of the procedural position of the suspect in the earliest stages of the proceedings. This was confirmed by noting that Art. 6 and, in particular, Art. 6 (3) ECHR may also be relevant before a case is sent for trial if and insofar as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it.<sup>17</sup>

Taking the aforementioned into account, the ECtHR came to the idea that the application of Art. 6 ECHR should relate to the earliest stages of the criminal proceedings, particularly regarding the exercise of the right to counsel in the police interrogation as a special guarantee of the right to a fair trial. The idea was conceived in the case of *Salduz v. Turkey*,<sup>18</sup> stressing that access to a lawyer should be provided 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.<sup>19</sup> This decision struck the foundations of the procedural rights of the suspect before the police but also raised the issue of the admissibility of the results of police interrogations when the protective guar-

<sup>15</sup> Trechsel, S., *Human Rights in Criminal Proceedings*, Oxford University Press, New York, 2005, p. 138

<sup>16</sup> „...even if the primary purpose of Article 6 ECHR, as far as criminal proceedings are concerned, is to ensure a fair trial by a ‘tribunal’ competent to determine ‘any criminal charge’, it does not follow that the Article 6 has no application to pre-trial proceedings.” Judgment *Imbrioscia v Switzerland* (1994) 17 EHRR 441, § 36

<sup>17</sup> *Ibid.*

<sup>18</sup> Judgment *Salduz v. Turkey*, no. 36391/02, 27 November 2008

<sup>19</sup> *Ibid.*, § 55

antees of the suspect's defence are not respected. This problem was evident from the point of the Croatian criminal procedural law since the police, until the last changes of the CPA, conducted informal questioning of the suspect that could not be used as evidence before the court. At first sight, there was nothing problematic about it. However, it is a controversial circumstance that the police, based on the results of such informal conversations with suspects, directed their further inquiries, which subsequently resulted in the taking of evidentiary actions by the public prosecutor on the basis of which the indictment was brought before the court, and that evidence significantly influenced the outcome of the criminal proceedings.<sup>20</sup> Commentators point out that the jurisprudence of the ECtHR, starting from the *Salduz* case, simply shifted the access to a lawyer at the earliest stages of criminal proceedings, which, as a rule, exist already from the first police interrogation of the detained person.<sup>21</sup> They warned that the judgment linked the right to a lawyer with the circumstance of the deprivation of liberty.<sup>22</sup> For this reason, there have been interpretations that the right to a lawyer does not have to be secured during the police questioning of a suspect who is not deprived of liberty.<sup>23</sup> Therefore, they concluded that the judgment in the *Salduz* case did not achieve the desired harmonization effects since the member states interpreted their obligations differently when it came to the implementation of the standards of the right to access to a lawyer developed in the jurisprudence of the Strasbourg court.<sup>24</sup>

Further development of the jurisprudence of the ECtHR in the area of the right to access a lawyer in the police station can be followed in the *Ibrahim v. UK* case.<sup>25</sup> In that judgment, the ECtHR tried to elaborate in detail the “compelling reasons” as a basis for the possible limitation of the right to lawyer through the so-called

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<sup>20</sup> An obvious example is *Mader's* case in which the suspect, waiting for the lawyer, was questioned by the police before his arrival, and later, the verdict was decisively based on a confession given to the police. Judgment *Mader v. Croatia*, 21 June 2011, no. 56185/07, § 154. Likewise, in the *Šebalj* case, the applicant was questioned in front of the police without the presence of a defence lawyer although he did not waive his right to legal assistance during the police interview. Later on, conviction was to a significant degree based on the applicant's statements given to the police. Judgment *Šebalj v Croatia*, 28 June 2011, no. 4429/09. § 256, § 263

<sup>21</sup> Ogorodova, A., Spronken, T., *Legal Advice in Police Custody: From Europe to a Local Police Station*, *Erasmus Law Review*, no. 4, 2014, p. 191

<sup>22</sup> Ivičević Karas, E., Valković, L., *Right of access to a lawyer while at a police station: legal and real restrictions*, *Croatian Annual of Criminal Law and Practice*, vol. 24, no. 2, 2017, p. 415

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Judgment *Ibrahim and the others v. the UK*, 13 September 2016, no. 50541/08, 50571/08, 50573/08 and 40351/09

“two-step test”.<sup>26</sup> On that occasion, the court took the view that the restriction of the rights to access to lawyer could, in principle, be possible under certain conditions involving assessment as to whether there was a basis for the restriction in domestic law, whether the restriction was based on an individual assessment of the particular circumstances of the case, and whether the restriction was temporary in nature.<sup>27</sup> Interestingly, the court went a step further and emphasized that in the circumstance that compelling reasons criteria have not been met, it couldn't be concluded that there exists a violation of Art. 6 ECHR. Therefore, it falls to the court to examine the entirety of the criminal proceedings in respect of the first three applicants in order to determine whether, despite the delays in providing legal assistance, they were fair within the meaning of Art. 6 (1) ECHR.<sup>28</sup> The literature criticizes this view of the ECtHR, emphasizing that the reasoning of the court opens the possibility of such restrictions even when conditions are not met, and therefore, the Ibrahim judgment can be considered a step back in the protection of the right to a lawyer at the police station.<sup>29</sup>

Nevertheless, the Ibrahim judgment has another significance that is reflected in the fact that the court entered into a demanding problem of distinction between the informal questioning of a witness and the formal interrogation of a suspect. Namely, one of the applicants was questioned by the police as a witness, although, during the questioning, the suspicion of having committed a crime fell on him because he incriminated himself by his own statements. During his testimony, police officers considered that, as a result of the answers he was giving, he was in danger of incriminating himself. Even though they knew that the applicant was incriminating himself, they passed on the opportunity to caution and inform him of his right to legal advice. Therefore, the court stressed that from that moment onwards, his situation was substantially affected by the actions of the police and was accordingly subject to a “criminal charge” within the autonomous meaning of Article 6 of the Convention.<sup>30</sup> Consequently, the court concluded that there was a violation of Art. 6 (1) (3) c) ECHR since the government failed to convincingly demonstrate, on the basis of contemporaneous evidence, the existence of compel-

<sup>26</sup> See: Soo, A., *Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings: Ibrahim and the others v. the UK (13th of September 2016)*, European Journal of Crime, Criminal Law and Criminal Justice, vol. 25, no. 4, 2017, p. 335

<sup>27</sup> Judgment *Ibrahim and the others v. the UK*, *op. cit.*, note 25, § 277

<sup>28</sup> *Ibid.*, § 280

<sup>29</sup> Moreover, recent judgment of *Simeonovi v. Bulgaria* (12 May, 2017, no. 21980/04) confirmed that the absence of compelling reasons as the basis for limiting the right to a lawyer is insufficient for the court to conclude that the defendant's right to a lawyer in the police station was violated if the proceedings as a whole were fair. Ivičević Karas, Valković, *op. cit.*, note 22, pp. 423–425

<sup>30</sup> Judgment *Ibrahim and the others v. the UK*, *op. cit.*, note 25, § 296

ling reasons in the fourth applicant's case taking into account the complete absence of any legal framework enabling the police to act as they did; the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice; and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.<sup>31</sup>

However, the aforementioned explanation is not a consistent practice of the ECtHR. Specifically, in the case *Kalēja v. Latvia*,<sup>32</sup> during a seven-year investigation, the applicant was questioned on several occasions as a witness. Although the police officers who conducted the investigation considered her a suspect, they deliberately failed to caution and inform her of her right to legal advice. Despite the ECtHR's discovery that the applicant had not enjoyed the procedural rights of the defence through the entire pre-trial process, it concluded that the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance during that stage.<sup>33</sup> The court reached such a conclusion out of the circumstances that she had been informed of her rights as a witness throughout the investigation, including her right not to testify against herself, and that she was not held in detention during the criminal investigation; therefore, she was not prevented from receiving legal assistance before and after her questioning by the police. The applicant was also given ample opportunity to contest the evidence used against her during the pre-trial investigation and trial. She exercised her rights in that regard at all stages of the proceedings.<sup>34</sup>

This conclusion of the court is extremely important for the criminal proceedings in the Republic of Croatia after the amendment to the CPA of 2017. In particular, this is true in complex cases, in which the extension of the investigation often changes the procedural stance of individual defendants. In this context, the issue of defining the delineation of the police questioning of witnesses from the formal interrogation of the suspect may arise.<sup>35</sup>

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<sup>31</sup> *Ibid.*, § 300

<sup>32</sup> Judgment *Kalēja v. Latvia*, 5 October 2017, no. 22059/08

<sup>33</sup> *Ibid.*, § 69

<sup>34</sup> *Ibid.*, § 68

<sup>35</sup> Commentators point out that from the doubtful standpoint of the ECtHR should not come the erroneous conclusion that the questioning of the suspect as a witness overrides the right to counsel in accordance with the Convention rights under the sole condition that the judgment is not based on evidence so obtained. Ivičević Karas, Valković, *op. cit.*, note 22, p. 14

## 2.2. European criminal law

### 2.2.1. *Directive on the right to information in criminal proceedings*

These standards of practice of the ECtHR get their epilogue at the level of the criminal law of the EU foremost through the Directive 2012/13/EU on the right to information in criminal proceedings. It is clear that the Directive also accepts the substantive concept of the defendant. The right to information is not linked to a formal decision to initiate criminal proceedings; therefore, the Directive presupposes that it applies from the time persons are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence (Art. 2 (1) Directive 2012/13/EU). Thereby, it specifies that in order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.<sup>36</sup> As a matter of fact, police interrogations usually precede the formal initiation of the criminal proceedings. Therefore, it is obvious that the Directive's intent was to cover factual situations in which the suspect may appear and facilitate its procedural situation by prescribing the prosecution authorities to inform him or her of the rights of defence. In doing so, the scope of information goes far beyond the mere formal enumeration of the rights of the defence and includes a description of the facts, including, when known, the time and place relating to the criminal act that the persons are suspected or accused of having committed, and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.<sup>37</sup>

### 2.2.2. *Directive on the right of access to a lawyer in criminal proceedings*

The concept of the defendant in substantive terms gained a broader meaning in the Directive on the right of access to a lawyer. In principle, like the Directive on the right to information in criminal proceedings, the Directive on the right of access to a lawyer applies to suspects or accused persons in criminal proceedings

<sup>36</sup> Directive 2012/13/EU, Recital 19. Candito points out that Art. 2(1) Directive 2012/13/EU follows the jurisprudence of the ECtHR, which in several cases noted that „any differences in the legal classification of the defence, if not the subject of an adversarial procedure, constitutes a violation of Article 6(3)(a) of the Convention” (Drassich v. Italy, no. 25575/04). Candito, G.L., *The influence of the Directive 2012/13/EU on the Italian System of Protection of the Right to Information in Criminal Procedures*, in: Ruggeri, S., (ed), *Human Rights in European Criminal Law*, Springer, 2015, p. 234

<sup>37</sup> Directive 2012/13/EU, Recital 28

from the time they are made aware by the competent authorities of a member state, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence (Art. 2 (1) Directive 2013/48/EU).<sup>38</sup> However, the Directive on the right to access to a lawyer makes an important step forward and extends its scope to persons other than suspects or accused persons who, during questioning by the police or by another law enforcement authority, become suspects or accused persons (Art. 2 (3) Directive 2013/48/EU).<sup>39</sup> In other words, the Directive presupposes a situation where a citizen, during the informal questioning before the police, can suddenly become a suspect of having committed a criminal offence. At that moment, the citizen *de facto* becomes a suspect in the material wording, which obliges the police to discontinue such an informal conversation and inform him of the accusation, rights of defence, and, especially, the right of access to a lawyer, which should be communicated at such a time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively (Art. 3 (1) Directive 2013/48/EU).<sup>40</sup> In addition, the Directive has made an important step forward in terms of guaranteeing the rights of the access to a lawyer in criminal proceedings compared with the jurisprudence of the ECtHR. The Directive requires that the right to a lawyer be guaranteed to every suspect before they are questioned regardless of whether they are deprived of liberty or have been summoned to appear before the police or another law enforcement or judicial authority (Art. 3 (2) Directive 2013/48/EU).

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<sup>38</sup> See: Hodgson, J., *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of suspects*, in: Mitsilegas, V., Bergström M., Konstantinides T., (eds), *Research Handbook on EU Criminal Law*, Elgar, 2016, pp. 178–179

<sup>39</sup> Symeonidou-Kastanidou points out that that provision is consistent with the ECtHR's jurisprudence pronounced in *Zaichenko v. Russia* (decision of 28.6.2010) according to which the right to legal assistance must always be guaranteed to all persons from the moment that their position is significantly affected even if they have not been declared suspects or accused persons. See: Symeonidou-Kastanidou, E., *The Right of Access to a Lawyer in Criminal Proceedings: The Transposition of Directive 2013/48/EU of 22 October 2013 on national law*, *European Criminal Law Review*, vol. 5, no. 1, 2015, p. 72

<sup>40</sup> The moment in which a citizen acting as a witness suddenly becomes a suspect is extremely controversial. Therefore, there is no precise moment when it can be undoubtedly stated that a witness becomes a suspect. Practically, it will depend on the police officer interrogating the person to autonomously decide about the moment from when a citizen should be treated as a suspect. It is therefore proposed that, in the event of doubt as to whether the person is in the status of a suspect or not, the authorities should stop the interrogation and grant the person interrogated all the defence rights, including the right to be assisted by lawyer. Winter, L.B., *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment*, in Ruggieri, S., (ed), *Human Rights in European Criminal Law*, Springer, 2015, p. 114

### 3. THE POLICE INQUIRY OF CRIMINAL OFFENSES ACCORDING TO THE AMENDMENTS OF THE CRIMINAL PROCEDURE ACT OF 2017

#### 3.1. New organization of police inquires pursuant to amendments of CPA in 2017

The conventional and European standards on the substantive concept of the suspect and the right to a lawyer in pre-trial proceedings have significantly influenced the recent development of the Croatian criminal procedural law. The amended definition of the suspect not only affected significantly different understandings of the concept of suspect and strengthened the procedural rights of his defence but also had a major influence on the reorganization of police inquires of criminal offences, especially when it comes to the police treatment of the suspect in the earliest phases of criminal proceedings.<sup>41</sup>

Until the entry into force of the amendments of the CPA in 2017, police carried out the so-called interviews with citizens.<sup>42</sup> In doing so, it was explicitly prescribed that the police authorities may not examine citizens in the role of defendants, witnesses, or expert witnesses (Art. 208. CPA). Therefore, the information that the police collected during the informal questioning could not be used as evidence in criminal proceedings since it was collected in an informal manner, i.e., not in the manner prescribed for conducting these actions in criminal proceedings.<sup>43</sup> Likewise, the police conducted informal conversations with the suspect, who in most cases was not warned of his rights of defence.<sup>44</sup> The information thus obtained was also treated as a result of informal (cognitive) activity and could not be used as evidence in criminal proceedings. Nevertheless, the actual scope of the informal interviews conducted with the suspect was of utmost importance. Based on such

<sup>41</sup> For a brief overview of the historical development of police inquires, see: Burić, Z., Karas, Ž., *A contribution to the discussion of doubts concerning the new definition of suspect and the act of interrogating the subject*, Croatian Annual of Criminal Law and Practice, vol. 24, no. 2, 2017, pp. 445–454

<sup>42</sup> Informal conversations with the suspect were conducted in the same way as informal conversations with the citizens. Police interrogation of the suspect as a formal action was not regulated at all. Ivičević Karas, E., Burić, Z., Bonačić, M., *Strengthening the rights of the suspect and the accused in criminal proceedings: a view through the prism of European legal standards*, Croatian Annual of Criminal Law and Practice, vol. 23, no. 1, 2016, p. 47

<sup>43</sup> This event today means that when police officers collect information from a person who, for example, perceived the commitment of crime, they do not apply the provisions of the CPA on the examination of witnesses but perform the so-called informal conversations. Therefore, the citizen with whom the police would informally speak only later during an investigation would be questioned formally as a witness by the public prosecutor, and that testimony could then be used as evidence in criminal proceedings

<sup>44</sup> Ivičević Karas, *op. cit.*, note 7, p. 370

information, the police often directed their further inquiries, and occasionally, the findings that arose during the informal talks with the suspect were used for the later collecting of evidence by the public prosecutor in the investigation as a formal stage of pre-trial proceedings.

With the entry into force of the amendments of the CPA in 2017, significant changes were made in Art. 208. CPA. Former informal interviews with citizens (including interviews with the suspect) are now divided into three groups. Thus, Art. 208. still regulates the above-mentioned informal interviews with citizens. Art. 208.a addresses the first-time police interrogation of a suspect, whereas Art. 208.b regulates police conduct and gathering information from citizens found at the place of the commission of a criminal offence.

In a given context, exceptionally important is Art. 208.a, which, after transposition of the Directive 2013/48/EU, expressly prescribes the police interrogation of a suspect. In other words, the police can no longer conduct the informal questioning of a citizen suspected of having committed a criminal offense but must interrogate him in a formal manner as a suspect, and before getting to the first interrogation, he or she will have to be fully acquainted with the rights of the defence. It is no matter whether it is about a citizen who, in the course of questioning by the police, becomes a suspect; a suspect who has been summoned to appear before a police officer for a formal interrogation; a suspect brought into the police station by force because, although duly summoned, he failed to appear in the police station; or a suspect who is arrested. The way the police should act is uniform. The police are obliged to treat any suspect in the same way, bearing in mind that they can no longer conduct informal questioning but only formal interrogation preceded by information about the crime he is suspected of having committed and the rights of his defence. This has greatly improved the procedural position of the suspect starting from the first contact with the police that occurs in the earliest stages of criminal proceedings. Strengthening the procedural rights of the defence is reflected, on the one hand, by laying down obligations for the police to give a notification to the suspect as to why is he charged and which are the basic suspicions against him and to warn him of the procedural rights of the defence, which was not the case in the earlier practices of police. In this way, the boundaries of the right to effective defence were shifted practically to the earliest stages of the criminal proceedings. This abolished many years of the tolerated phenomenon in practice that one and the same person during the pre-trial proceedings had significantly weakened rights of defence only because the police acted against him, whereas during the investigation conducted by the public prosecutor, he benefited from the procedural rights of the defence.

### 3.2. Procedural safeguards for the legality of the police interrogation of suspects

An important change in the legal nature of the police interrogation of the suspect during the police inquires of criminal offenses resulted in a detailed formal standardization of the police treatment of the suspect. As previously stated, to guarantee an effective defence, before the first interrogation, the suspect is immediately granted the right to know the following: a) why is he charged and which are the basic suspicions against him, b) that he has the right to a lawyer, c) that he has a right to interpretation and translation, and d) that he has the right to leave the police premises at any time except if he has been arrested (Art. 208.a (2) CPA).

In order that the notification of rights is not merely formal and illusory, the CPA stipulates the additional duty of the police to ensure that the suspect receives a letter of rights and that he understands its contents. Therefore, the police are obliged prior to the first interrogation to determine whether the suspect received and understood the written instructions on the rights. If the suspect did not receive the instruction on the rights, the police shall deliver the instruction on the rights to the suspect. If the suspect received the instruction but did not understand it, the police shall instruct him on his rights in an appropriate way (Art. 208.a (4) CPA).

As an additional guarantee that the police will act in accordance with the legislator's intended intention, it is prescribed that the interrogation of the suspect be conducted in accordance with the provisions of the law applicable to the interrogation of the defendant during the investigation and that the interrogation must be recorded by an audio-video device. The audio-video record has to include the statement of the suspect and whether he has received and understood the letter of rights, what the rights of the suspect are, the statement of the suspect as to whether or not he wishes to undertake the services of a lawyer, and the warning that the interrogation is recorded and that the recorded statement can be used as evidence in the court proceedings (Art. 208.a (6) (7) CPA).

The aforementioned formal expression of the CPA is the result of the implementation of the convention obligations arising from the jurisprudence of the ECtHR and the transposition of the Directive on the right to information in criminal proceedings and the Directive on the right of access to a lawyer in criminal proceedings. With this new legislation, the Croatian pre-trial procedure has taken the idea of the necessity of extending the fundamental provisions of the right to a fair trial to the earliest stages of the criminal proceedings. Therefore, it can be preliminarily concluded that the legislative intervention that had been carried out largely annulled the former pronounced gap in the realization of the procedural rights of the defence that could easily be perceived by comparing the procedural position of the suspect during the police inquires of criminal offenses and the

procedural position of the defendant during the investigation as a formal phase of the criminal proceedings.

### **3.3. Using the statements of the suspect before the police as evidence in criminal proceedings**

Determining the police interrogation of the suspect on one side and guaranteeing high protective standards of suspects' defence on other side was a sufficient reason for the legislator to specify that the outcome of a police interrogation of a suspect could be used as evidence in criminal proceedings. Although the Directive on the right to access to a lawyer did not make such a request as to the probative force of the police interrogation, it seems that the Croatian legislative solution is justified, taking into account the guaranteed procedural rights of the defence and the prescribed form of the police interrogation of the suspect. Besides, additional guarantees are also provided to control the lawfulness of the police conduct while interrogating the suspect. This is primarily evident from the police obligation to produce an audio-video record of the interrogation as well as the moment of the warning of the defendant of his rights as well as his possible waiver of the right to a lawyer. Therefore, if the police made any omissions when warning the suspect about the rights of the defence or during the formal interrogation, the evidence so obtained will be sanctioned as illegal evidence,<sup>45</sup> and using the "fruit of the poisonous tree" doctrine, any other evidence that derives from the illegally obtained statements of the suspect during the police interrogation would be illegal too.<sup>46</sup>

## **4. POLICE INTERROGATION OF THE SUSPECT IN THE GAP BETWEEN CONTEMPORARY TRENDS AND ARCHAIC FORMAL BACKLOGS IN CROATIAN CRIMINAL PROCEDURAL LAW**

### **4.1. The Tradition of Croatian Criminal Procedure vs. Conventional and European Standards**

Successful realization of the police interrogation of the suspect that more deeply integrates police inquiries into the reality of Croatian criminal procedure may be potentially challenged by its traditional and strictly formal organization. There are

<sup>45</sup> Soo, A., *How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?*, New Journal of European Criminal Law, vol. 8, no. 1, 2017, 70

<sup>46</sup> Strictly equalizing the modality and methods used to interrogate the suspect before the police and public prosecutor demands a system of equal responsibility and the same sanctions for the equal procedural violations of the form of interrogation. Ivičević Karas, E., *op. cit.*, note 7, p. 377

three fundamental backlogs in the Croatian criminal procedure that potentially could put into question the meaning and purpose of carrying out the police interrogation of the suspect: a) the strict division of the pre-trial procedure on informal and formal phases of proceedings; b) the perception of the police as a pure body of executive authority and the public prosecutor as a judicial body; and c) further strictly formal understanding and contradistinction of the terms of “suspect” and “defendant”.

A) The division of the pre-trial procedure at the stage of informal and formal proceedings

In the context of pre-trial procedure, Croatian criminal procedural law traditionally strictly formally differentiates between inquires at the informal stage of pre-trial proceedings and investigation as the formal stage thereof.<sup>47</sup> Inquiry is aimed at the verification of the suspicion that a crime has been committed and elucidation as to who is the perpetrator, including collecting data necessary for the initiation of criminal prosecution.<sup>48</sup> During inquiry, the public prosecutor and police undertake actions and measures in an informal way and gather information and data that, as a rule, cannot be used as evidence in criminal proceedings. The goal of investigation is to produce enough evidence to bring charges against the defendant or to discontinue the criminal procedure (Article 228 (1) CPA). Investigation shall commence with a public prosecutor’s decree on investigation if the reasonable suspicion that a particular person has committed a crime has been ascertained and if there are no legal obstructions to the criminal prosecution of that person (Article 217 (1)). Investigation represents a formal phase of the pre-trial procedure in which the public prosecutor collects evidence in a formally prescribed manner so the results of investigation can be used as evidence before the court. The strict separation of the informal and formal phase of the pre-trial proceedings has the consequence that the phase of inquires is not considered a criminal procedure *stricto sensu*, while on the other hand, the CPA explicitly provides for criminal proceedings to be initiated in investigation.<sup>49</sup> Such an organizational structure of the pre-trial procedure differs from the organizational structure of pre-trial procedure

<sup>47</sup> See: Pajčić, M., *Investigation pursuant to the amendments to the Criminal Procedure Act*, Croatian Annual of Criminal Law and Practice, vol. 20, no. 2, 2013, pp. 633–645

<sup>48</sup> Prerequisites for the initiation of criminal proceedings are prescribed by the principle of mandatory prosecution. Krapac, D., *op. cit.*, note 9, pp. 99–102

<sup>49</sup> It follows from the aforementioned that the actions and measures taken before the formal commencement of investigation are not part of the criminal procedure. However, in a broader substantive meaning, even the inquiries may constitute criminal procedure according to the jurisprudence of the ECtHR. See: *supra*, sub-heading 2.1.1.

in some European countries whose criminal procedures are often role models for Croatian legislators undertaking major reforms of Croatian criminal procedure.<sup>50</sup>

B) Police as a body of executive authority and public prosecutor as a judicial body

In the presented traditional formal structure of the pre-trial procedure, the police are perceived as the body of the executive authority whose powers in the criminal proceedings are reduced to informal actions and measures that are primarily aimed at discovering the perpetrator of the criminal offence; preventing the perpetrator or accomplice from fleeing or going into hiding; discovering and securing traces of the offence and objects of evidentiary value; and gathering all information that could be useful for successfully conducting criminal proceedings (Art. 207 (1) CPA). In commencing such activities, the police collect information and data unrelated to strict legal forms, so their results cannot be used as evidence in criminal proceedings.<sup>51</sup> The explanation for such reasoning is that the police act before the commencement of criminal proceedings, and for undertaking those actions and measures, there are not prescribed strict legal forms. Because of that, these actions are only informal.

On the other hand, the public prosecutor is an autonomous and independent judicial body that is empowered and duty-bound to instigate the prosecution of perpetrators of criminal and other penal offences, to initiate legal measures to protect

<sup>50</sup> German StPO knows only the investigation (*Ermittlungsverfahren*) as a single stage of the preliminary proceedings. Pre-trial proceedings are regulated in such a way that there is no division into an informal proceeding, stage aimed at the examination of whether a criminal offence has been committed and clarification as to who is the perpetrator and investigation as a formal proceeding stage. It is obvious that the investigation of a criminal offense represents a single phase of the proceedings of public prosecutor and police where there is no formal delimitation between clarifying the suspicion that a criminal offense has been committed and an investigation against a particular person. Kühne, H.H. *Strafprozessrecht, Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts*, C.F. Müller Verlag, Heidelberg, 2010, pp. 204-205

The same solution exists in Austria as well. Namely, it is a fundamental feature of the Austrian StPO that the investigative procedure is not divided into the stage of preliminary (informal) investigation and the stage of formal initiation of the investigative procedure. The public prosecutor does not make a special, formal decision to open an investigation; rather, investigation and criminal prosecution are deemed initiated as soon as the Police and Public Prosecutor's Office commences with investigative activities for the purpose of clarification regarding the suspicion of a crime against a known or unknown person or undertakes a coercive measure against a suspect (§ 1 (2) StPO). Bertel, C., Venier, A., *Einführung in die neue Strafprozessordnung*, Springer-Verlag, Wien, 2006, p. 6

<sup>51</sup> An exception are urgent evidentiary actions: search, temporary seize of objects, judicial view, taking fingerprints and prints of other body parts (Art. 212. CPA). Of course, it is about actions that are taken only when there is a danger of delay, and in circumstances where such a danger doesn't exist police cannot undertake these evidentiary actions. Ljubanović, V., *Kazneno procesno pravo*, Grafika, Osijek, 2002, pp. 245-246

the property of the Republic of Croatia and to apply legal remedies to protect the Constitution and law (Art. 125. Constitution of the Republic of Croatia). Hence, the public prosecutor, in accordance with the principle of mandatory prosecution, initiates and conducts an investigation and, during the investigation, collects evidence and other procedural materials relevant for making the decision to file an indictment or to discontinue criminal proceedings. The public prosecutor is so called “*dominus litis*—master of the pre-trial proceedings”, and only he can take the formal evidence collection actions pursuant to the CPA, the results of which can be used as evidence in criminal proceedings.

Therefore, in the context of Croatian pre-trial proceedings, the activity of the police is still seen as informal. This attitude creates confusion since the police, acting through the formal interrogation of a suspect, enter the sphere of taking the formal evidentiary actions, the result of which can be used as evidence before the court. By conducting a formal interrogation of the suspect, the police emerge from the domain of informal activity, and the result is the interrogation of suspects becomes evidence and part of the criminal proceedings. Through the implementation of Directive 2013/48/EU, Croatia practically made a “mini reform” of police inquiries and abandoned a more than fifty-year-old tradition of informal police interviews of suspects. This reform suddenly transferred police inquiries into the formal criminal proceedings.<sup>52</sup> Therefore, the present strictly formalized system, which still makes a clear line of difference between informal police inquiries and formal public prosecutors’ evidentiary actions, slowly but surely loses its—until recently—unquestionable conceptual background and partly gives way to the concept of criminal proceedings in the substantive term.<sup>53</sup>

### C) Formal understanding and contradistinction of the terms of “suspect” and “defendant”

The division of pre-trial proceedings between the informal phase of police inquiries and formal investigation is followed up by different definitions of suspect

<sup>52</sup> In Germany, the police may conduct informal questioning only to establish „factual indicators of suspicion“ that a criminal offence has been committed. But, as soon as factual indicators of suspicion have been established, the police must turn to a formal interrogation of the person suspected of committing the crime. Schumann, S., *Germany*, in: Schumann, S., Bruckmüller, K., Soyer, R., (eds), *Pre-trial Emergency Defence*, Intersentia, 2012, p. 86

<sup>53</sup> Such a solution is well-known in Austria, where the understanding of criminal proceedings in a substantive sense derives from § 91 para 2 StPO, which states that investigation (*Ermittlung*) is every action of the criminal police, the Public Prosecution service, or of the courts, which serve for the gathering, safekeeping, evaluation, or processing of information to clarify the suspicion of a criminal offence. Kert, R., Lehner, A., *Austria*, in: Ligeti, K., (ed) *Towards a Prosecutor for the European Union*, Hart Publishing, 2013, p. 10

and defendant. Namely, during police inquiries, the person against whom police are conducting their actions and measures has the procedural position of suspect. Therefore, the suspect is a person in relation to whom there are grounds for the suspicion of having committed a criminal offense and against which the police or the public prosecutor take actions to clarify this suspicion (Art. 202. (2) (1) CPA). Then, during the formal phase of investigation, the suspect becomes the defendant. In that context, the defendant is the person against whom the investigation is conducted, the person against whom a private charge is preferred, and the person against whom a penalty order was issued in a judgement (Art. 202 (2) (2) CPA). Also, the term “defendant” is a general term for a person against whom the criminal proceedings are carried out (Art. 202 (4) CPA). In accordance with the aforesaid, a suspect is a person against whom criminal proceedings have not yet begun, and his procedural situation is rather viewed through the prism of police inquiries that are said to be the informal stage of the proceedings. Such an attitude still exists in the jurisprudence of Croatian courts, although the implementation of the Directive on the right to access to a lawyer puts an emphasis on the notion of the defendant in the substantive meaning. It can therefore be concluded that the notion of the defendant in the substantive meaning has not been fully established in Croatian criminal procedure since the very concepts of criminal procedure, suspect, and defendant still continue to be interpreted in the jurisprudence of Croatian courts in a strictly formal way.

#### **4.2. Interrogation of a suspect and/or a defendant as a mandatory requirement for filling an indictment**

Although from the above it follows that a police interrogation of a suspect can be used as evidence in criminal proceedings, this standard opens several legal questions to which the first answers of judicial practice are yet to be expected. Due to the recent enforcement of the new legal provisions, there is still no case law on the possibility of using the results of the interrogation of the suspect before the police as evidence in the trial phase of criminal proceedings. However, Croatian courts have made several decisions regarding the adequacy of the police questioning of the suspect for filling the indictment.<sup>54</sup>

Namely, according to the explicit provision of Art. 341 (4) CPA, before preferring the indictment, the defendant must be interrogated. In accordance with that, the public prosecutor is not allowed to file an indictment before the court until he has formally examined the defendant. This evidence collection action is essentially the only evidence that the public prosecutor must have before filing the indictment.

<sup>54</sup> See *infra* sub-heading 5.2.

All other evidentiary actions are only optional and are taken depending on the circumstances of each case.<sup>55</sup> Considering that the interrogation of the defendant is the only evidence-collecting action that the public prosecutor must carry out before filing the indictment, in the process of the judicial review of the indictment, the court *ex officio* controls whether the public prosecutor has conducted the interrogation of the defendant in accordance with the statutory obligation.

With the entry into force of the new provisions of the CPA that authorizes the police to formally interrogate a suspect, the public prosecutor's office took the stance that the police questioning of suspects meets the criteria for the interrogation of defendants pursuant to Art. 341 (4) CPA<sup>56</sup> and that it is not necessary to repeat the interrogation of the defendant<sup>57</sup> before filing the indictment if the police already interrogated the suspect in accordance with Art. 208.a CPA. This standpoint is justified with the circumstance that the police interrogation of the suspect is carried out with the same procedural safeguards of suspect defence and in the manner of conducting the interrogation of the suspect, which is practically identical to the interrogation of the defendant before the public prosecutor. Therefore, the public prosecutor's office points out that any subsequent re-interrogation of a defendant the police have already interrogated in the role of a suspect represents a repetition of the actions already taken and an unnecessary prolongation of the criminal proceedings. It should be emphasized that the described standpoint of the public prosecutor's office comes into consideration only if the public prosecutor determines that the facts in the case justify such a decision. In other words, there is no limitation to the fact that the public prosecutor, in order to clarify the circumstances of the criminal case, takes further evidence-collecting actions and thus conducts the interrogation of the defendants with a case by case evaluation. However, be that as it may, it is solely within the jurisdiction of the public prosecutor in accordance with the principle of the separation of procedural functions. On the other hand, the courts are explicitly referring to Art. 341 (4) of the CPA, pointing out that the police interrogation of the suspect is not the same as the interrogation of the defendant and that the public prosecutor must file an indict-

<sup>55</sup> An exception is an indictment with a proposal for imposing a penalty order (Art. 540 CPA) and an indictment with a motion for trial in absence (Art. 341 (4) CPA)

<sup>56</sup> Although in Germany the public prosecutor is the *dominus litis* of pre-trial proceedings in practice, the interrogation of the suspect during the investigation phase occurs at the police station. The prosecution and the courts are not typically involved. Bohlander, M., *Principles of German Criminal Procedure*, Bloomsbury Publishing, 2012, p. 93

<sup>57</sup> In most cases, the interrogation of the suspect in Austria is executed by the police. The prosecutor is only informed later, and has, in reality, more supervisory function. Bruckmüller, K., *Austria*, in: Schumann, S., Bruckmüller, K., Soyer, R., (eds), *Pre-trial Emergency Defence*, Intersentia, 2012, p. 36

ment, which can be done only after the formal interrogation of the defendant as opposed to the suspect.

### **4.3. The reasons „pro et contra“ for the police questioning of the suspect as the basis for filing the indictment**

#### ***4.3.1. Arguments against the police questioning of suspects as grounds for filing indictments***

When it comes to arguments against the use of the police questioning of suspects as sufficient evidence to substantiate an indictment, several allegations of a formal nature may be highlighted.

First, the police questioning of the suspect is regulated to the criminal investigation phase. This phase of the proceedings is informal and cognizant; it is revealed and not proven. In contrast, an investigative function consisting of the gathering of evidence for the decision to initiate an indictment is solely in the hands of the public prosecutor. Consequently, only the public prosecutor is authorized to take evidentiary actions, and the interrogation of the defendant is an evidentiary act carried out by a public prosecutor but not by the police.

Second, according to the explicit provision of Art. 341 (4) of the CPA, the defendant must be examined before the indictment is filed. By the very nature of the matter, only the public prosecutor is authorized to examine the defendant because he is being examined in the investigation as a stage of the proceedings and is a criminal procedure in the formal sense.

Third, the general provision of Art. 202 (4) of the CPA prescribes that the term defendant refers to the general name of the accused and the convicted, while the term of “suspect” is not covered by that provision since the suspect has not been formally prosecuted yet.

#### ***4.3.2. Arguments for the police questioning of suspects as the basis for filing the indictment***

Contrary to the tradition of Croatian criminal proceedings, under the influence of convention and European criminal law, Croatian law has increasingly been pervaded by the understanding that police activities at the earliest stages of the criminal proceedings often have a significant impact on said proceedings. Croatia has made an important step with the last reform of the CPA since it significantly improved the procedural position of the suspect in the pre-trial procedure. In addition, this reform gives legitimacy to the police questioning of the suspect, i.e.,

the interrogation of a suspect by the police can be used as evidence in criminal proceedings provided it is obtained in a legally prescribed manner.

This is also explained by the legislature, which emphasizes that it is illogical and ineffective that in the situation where the suspect is guaranteed the respect of all his procedural rights, and when the prescribed form of interrogation is prescribed in detail, such a questioning of the suspect by the police does not provide the probative force in further proceedings.<sup>58</sup>

In this respect, the following should be emphasized: First; in accordance with the provisions of Art. 208 (7) of the CPA, on the examination of the suspect, the provisions of the interrogation of the defendants referred to in Articles 272 to 282 shall apply. This regulation provides for the uniform interrogation procedure of the suspect while at the same time safeguarding the rights of suspect's defense applied in the same way regardless of whether it is a suspect or a defendant. Therefore, the circumstance that only the body responsible for conducting the examination has changed does not necessarily mean "a priori" that the outcome of that examination is insufficient to initiate the indictment. Moreover, the police questioning of the suspect can be used as evidence at the trial phase of criminal proceedings, and there is therefore no reason to dismiss this as grounds for filing the indictment.

Second, perhaps the most obvious argument can be found in Art. 202 (3) of the CPA, which prescribes that the provisions on the defendant apply to a suspect, defendant, accused and convicted person, and persons against whom special procedures are provided for by this law or others. From the excerpt of the said provision, no other conclusion can be drawn from the standpoint that the safeguards of defense prescribed by the law are appropriately applied to the suspect as defined in the law. The aforementioned provision anticipates the true meaning of Directive 2013/48/EU aimed at ensuring the same quality of protection of the rights of the defense in the pre-trial proceedings regardless of which body of the proceedings acts against the suspect or the defendant and regardless of the stage of the proceedings.

Third, it is unacceptable that for the activity of two state bodies that effectively share the common obligation to detect criminal offences and find perpetrators, two different "morals" apply in criminal proceedings—one for the public prosecutor, whose morality we do not suspect, and another for the police, whose morality is questioned.<sup>59</sup> Namely, the police are questioning a suspect linked to, on the one hand, a set of rules of Art. 208.a CPA and, on the other hand, the rules of

<sup>58</sup> Explanatory memorandum to the amendments of the Criminal procedure act, *op. cit.*, note 6, p. 7

<sup>59</sup> Bayer, V., *Zakonik o krivičnom postupku*, Uvod-Komentar-Registar, Zagreb, 1968, p. 140

professional ethics. The one who thinks that the police are at a lower standard of professional morals than the public prosecutor's does not understand the correct nature of the criminal prosecution bodies and thinks that the framework of the state's activities in combating crime can be governed by different mutually opposing moral principles.<sup>60</sup> This opinion is obviously shared by the legislature when it has decided to prescribe that a suspect's statements in front of the police can be used as evidence in criminal proceedings.

Fourth, the public prosecutor is the master of the preliminary proceedings. He preliminarily assesses the existence of the preconditions for the initiation of criminal proceedings. In one of the initiated proceedings, he is investigating and collecting evidence for the adoption of a decision to initiate the indictment. But, without the strong and ardent help of the police, he would be impotent and ineffective at prosecuting perpetrators of criminal offenses. These are two bodies that coordinate their functions during the pre-trial procedure. In doing so, the public prosecutor carries the absolute responsibility for the entire investigative activity in the pre-trial procedure. Consequently, when the result of the police questioning of a suspect is accepted as valid, it should be considered that public prosecutor merely validated the result of the interrogation as if it had undertaken it. This means that it also consciously accepts the potential risk of the illegality of such a interrogation and any legal consequences resulting from it. It is for this reason that the court should place the faith in the public prosecutor's in corresponding to the position of the public prosecutor as a judicial body which, by professional authority, guarantees that its acts are founded and established by law.

## **5. RAMIFICATIONS OF THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER IN THE PRACTICE OF CROATIAN CRIMINAL PROCEEDINGS**

### **5.1. General impressions**

The implementation of the Directive on the right of access to a lawyer in criminal proceedings, as well as other directives that have been introduced within the package of the VII Amendment of the CPA, required an adjustment of several other components of the domestic repressive apparatus. In this respect, it was noted that, in practice, there were no significant difficulties in the work of the police and the relationship between police and the public prosecutor's offices, especially

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<sup>60</sup> *Ibid.*, p. 143

regarding the interpretation of certain parts of the amended CPA, with reference to deviations from the uniformity of the proceedings.<sup>61</sup>

The differences in treatment that are perceived and referred to in further analysis concern the proceedings of the court. For the purposes of the analysis in this paper, data from multiple county and municipal courts in the Republic of Croatia was gathered, with regard to court decisions in cases tried in accordance with the procedural regime in force since 1 December 2017. The analysis focus was on the court's assessment regarding the new definition of the suspect in the criminal proceedings. It can be concluded that the collected data gives rise to apparent disagreement on the interpretation of the power of evidence during the interrogation of the suspect in the sense of the provision of Art 208a of the CPA and, in consequence of these differences, in the decisions of the indictment or appeal panels in the second-instance proceedings.

## 5.2. Analysis of individual decisions and differences in court decisions

The majority of the court decisions concerned were cases in which a public prosecutor filed an indictment with a proposal for issuing a penalty order while in other several analysed cases, a direct indictment was filed. According to the gathered data, the Municipal Courts in Novi Zagreb, Koprivnica, Pula (including its Permanent Service in Pazin), and Vukovar granted the motion of the public prosecutor and issued a penalty order in cases where the suspect was examined only in accordance with the Art 208a of the CPA and without having been presented evidence during the first examination in accordance with the provisions of the Art 272 of the CPA. Those cases, in which the court rendered a penal order, were not individually analyzed considering the fact that the record and DVD of the questioning of the suspect according to Art. 208a CPA was cited in the explanation part of the conviction which states details and evidence on which such a court decision is based.<sup>62</sup>

<sup>61</sup> See: Pavić, K., Gluščić, S., *The relationship between the police and the public prosecutor's office according to the VII. amendment to the CPA*, Croatian Annual of Criminal Law and Practice, vol. 24, no. 2, 2017, pp. 486-491

<sup>62</sup> For further information please review following court decisions: Decisions of the Municipal Court in Novi Zagreb No. K-29/2018-2 of 26 January 2018 and K-77/2018 of 27 February 2018, Decisions of the Municipal Court in Koprivnica No. K-35/2018-2 of 31 January 2018 and K-80/2018-2 of 21 March 2018, Decision of the Municipal Court in Pula-Pola No. K-66/2018-2 of 8 February 2018 and K-45/2018-2 of 9 February 2018, Decision of the Municipal Court in Pula-Pola, Permanent Service in Pazin No. K-27/2018-2 of 6 February 2018 and K-40/2018-2 of 8 February 2018 and Decisions of the Municipal Court in Vukovar No. K-6/2018-2 of 9 January 2018 and K-227/2018-2 of 8 May 2018

Such practice was not recorded at the Municipal Court in Varaždin. The Municipal Public Prosecutor in Varaždin filed an indictment with a proposal to issue a penalty order. In this situation the public prosecutor's proposal to the court was not granted, and the court, pursuant to the provision of Art. 344 of the CPA, dismissed the indictment.<sup>63</sup> In the explanation part of the decision, it is stated that the indictment panel found that the indictment was filed without the legal preconditions described in the Art. 341 (4) of the CPA – that the defendant, before the filing of the indictment, had not been examined. The court referred to Art. 202 (2) of the CPA, where the legal definitions of suspects and defendants are contained, and emphasized that terms “suspect” and “defendant” were not adequately defined. It also referred to Art 202 (4) of the CPA, claiming that the term “defendant” could not be used as a general term for the term “suspect”. As the last argument supporting its decision, the court stated that the rights of the suspect were listed in the Art. 208a of the CPA, which, in its scope, were significantly smaller than that of the rights of the defendant mentioned in Art. 239 of the CPA. By distinguishing the stages of the proceedings in which a person is questioned as a suspect from the one in which he is questioned as a defendant, any equalization of the concepts of the suspect and the defendant could call into question the violation of the defendant's rights in the proceedings.

Public prosecutor in the appeal against that decision emphasized the fact that the CPA stated that the DVD recording and the written record based on the Art. 208a of the CPA could be used as evidence in criminal proceedings. Additionally, the indictment could be filed in accordance with Art.341 of the CPA when the results of the actions pertaining to the criminal offense and the perpetrator give sufficient grounds for its filing, and for that reason, the requirement of Art. 341 (4) of the CPA have been fulfilled.

The Varaždin County Court rejected the appeal as unfounded and in its decision it confirmed the position of the first instance court,<sup>64</sup> stating that the legal opinion of the public prosecutor expressed in the appeal cannot be accepted “for purely formal reasons”. The appellate court found that the first instance court correctly pointed to a different normative definition of the terms of suspect and defendant (Art. 202, (2) (1) (2) of the CPA). The court considers that in any case, the provisions of the Art. 341(4) of the CPA deal with the examination of the defendant and not the suspect, where, in the particular case, according to the position of the court at the time of the examination of the person, the suspect was considered to be one in the traditional sense of the word. It therefore considered that the exami-

<sup>63</sup> Decision of the Municipal Court in Varaždin No. 30 Kov-64 / 18-2 of 28 March, 2018

<sup>64</sup> Decision of the County Court in Varaždin No. 19 Kž-153 / 18-4 of 17 April, 2018

nation, in accordance with the provisions of the Art. 208a of the CPA, could not be considered as the first examination of the defendant, at least not according to the legal definition of these two terms *de lege lata*. The appellate court pointed out that it considered that the legislator should have been more precise in relation to the possible application of the Art 208a in conjunction with Art. 341 (4) of the CPA. However, as it has not been done, the court did not accept the attitude of the public prosecutor due to formal reasons. The same court essentially equated the position in the ruling on the dismissed direct indictment.<sup>65</sup>

Unlike the practice of the Municipal and County court in Varaždin, the Karlovac County Court had a very different interpretation of the same legal provisions.

The Municipal Court in Gospić, in its decision No. 3 Kov-17/2018-2 of 27 February 2018, pursuant to Art. 344 (1) (2) of the CPA dismissed the indictment, citing, as did the Municipal Court of Varaždin, that the precondition for filing the indictment is the examination of the defendant. It also relied on Art 341 (4) of the CPA in terms of defining the notion of the defendant and emphasizing that the examination of a suspect in accordance with Art. 208.a of the CPA and the examination of a defendant could be found in various parts of the CPA and therefore did not accept the claim of the public prosecutor that the formal requirement for filing an indictment is fulfilled, i.e., that the defendant was examined.

An appeal by the Municipal Public Prosecutor's in Gospić was filed against this court decision due to the wrongly established factual situation.

The County Court in Karlovac granted the appeal of the public prosecutor, abolishing the contested ruling of the Municipal Court in Gospić, and referred the case to the president of the indictment panel with instructions to resume the proceedings. In the explanation of the ruling of the County Court in Karlovac<sup>66</sup> it was stated that the appellate court considered that the records of the suspect questioning were made in accordance with the provisions of the Art 275 of the CPA in conjunction with Art. 208a of the CPA, i.e. that they were in accordance with the implemented Directive of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, setting out the obligation of a member state to implement effective mechanisms within its criminal justice system for a person suspected of having committed a criminal offense, which guarantee not only the right to a lawyer, but to exercise that right virtually and efficiently. The appellate court, based on the data in the

<sup>65</sup> Decision of the Municipal Court in Varaždin No. 29 Kov-56 / 18-2 dated 26 March 2018, confirmed by the County Court's decision in Varaždin No. 21 Kž-166 / 18-4 of 24 April 2018

<sup>66</sup> Decision of the County Court in Karlovac No. Kž-44 / 2018-3 of 4 April 2018

case file, concluded that the defendant was questioned by the police, pursuant to Art. 208a of the CPA, and that his examination was recorded with an audio-video device; that an instruction on the rights of the suspect (Art. 208a (3) of the CPA) was recorded on the audio-video device; that during the examination, the suspect gave unambiguous written statement that he did not want a lawyer i.e. his waiver (Art. 208a 3, 4, and 5 of the CPA) as well as the instruction the suspect, in the same form, on what a lawyer's function in that situation was (Art. 273, paragraph 2, 3 and 5 of the CPA). Thus, the County Court in Karlovac concluded that the suspect was undoubtedly aware that the examination was recorded and that the recorded testimony could be made under the conditions of the Art 208 of the CPA, thus making it sufficient to be used as evidence in criminal proceedings. In connection with this, a record was made in the sense of the provision of Art. 275. of the CPA, which can be used as evidence in the procedure. Consequently, the court concluded that there was no reason to dismiss the indictment in the present case.

### **5.3. Further development of court practice**

The described differences in the jurisprudence of different courts in the Republic of Croatia for the same procedural situations are primarily causing legal uncertainty, which will result in the proceedings being finalized in one court, while in the second court it will not even begin. The resolution of such procedural situation may, on the one hand, be in the new amendments of the Criminal Procedure Act, as further indicated by the Varaždin County Court in the aforementioned decisions. Another possibility is the decision of the Supreme Court of the Republic of Croatia regarding which requests for protection of legality are filed by the Head Public Prosecutor of the Republic of Croatia, and, in which proceedings the highest Croatian court gives the final interpretation of the current provisions of the Criminal Procedure Act after the implementation of the above mentioned Directive.

## **6. CONCLUSION**

This paper shows that, currently in the Republic of Croatia, and after the seventh amendment of the Criminal Procedure Act, there is no unified standpoint on the notion of the defendant in the material sense, which has been introduced as a procedural standard by the Directive on the right of the access to a lawyer in criminal proceedings. It is evident that the courts partially accept such a Europeanized model and still have a firm formal concept of the defendant. However, further Europeanization of the Croatian Criminal Justice System will contribute to the change of this established paradigm, which is why further assumption of the

term of the defendant in the material sense is expected in the future. Removing possible ambiguities and taking into account an extremely traditional approach to the interpretation of legal provisions might have been avoided by harmonizing the existing provisions of the CPA with its seventh amendments package, but as it was not done, it is up to jurisprudence to determine the further course of the application of the law.

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