

Degrees of compliance and structural differences: National idiosyncrasies and conformity in the Hungarian experience of transposing Directive 2012/13/EU on the right to information in the criminal procedure

Abstract

This paper seeks to illustrate the general concerns regarding the transposition of EU directives through pre-existing legislation on the example of the Hungarian criminal procedural provisions transposed on the basis of Directive 2012/13/EU on the right to information in criminal proceedings. Leaving many pre-existing measures untouched, the national legislation transposes the Directive in a scattered manner, through individual rights and obligations across numerous laws. The example will show that while this leads to a conform textual solution in national law, conform transposition is a deeper question which should be addressed in the level of the application.

In line with the structure of the Directive, after a brief introduction of the national legal environment (Section II), I will look at the transposition of the right to information in the criminal procedure (Section III: Art. 3 and 6 Directive), the rights of persons deprived of their liberty (Section IV: Art. 4 and 5 Directive), the right to access to documents (Section V: Art. 7 Directive), verification and remedy (Section VI: Art. 8 Directive) and non-regression (Section VII: Art. 10 Directive). The paper concludes with some observations on transposition in general and on how the conformity of the national legislation based on the Directive may be improved.

I. Introduction

This paper seeks to illustrate the general concerns regarding the transposition of EU directives through pre-existing legislation on the example of the Hungarian criminal procedural provisions transposed on the basis of Directive 2012/13/EU on the right to information in criminal proceedings. Leaving many pre-existing measures untouched, the national legislation transposes the Directive in a scattered manner, through individual rights and obligations across numerous laws. The example will show that while this leads to a conform textual solution in national law, conform transposition is a deeper question which should be addressed in the level of the application.

The Directive implements the right to an effective system of information provision in the member states in all phases of the criminal procedure to suspects or accused² persons³. This is not only important to ensure individual dignity, but to secure the conditions under which mutual trust can exist. Even more so as the *‘extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons’* – as stated by Recital 3 of the Directive.

Indeed, without the right to information effective defence cannot be realised and defence rights, otherwise afforded, may be hollowed out which impedes trust in the legal systems of

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² The notion ‘accusation’ is clarified in Recital 14 as meaning the same concept as ‘charge’ used in Art. 6(1) ECHR.

³ The Directive applies to all suspected or accused persons: nationals, third-country nationals, or EU citizens.

non-conformist states. A striking feature of the Directive is its consistency with a rights-based thinking reminiscent of modern human rights law, in particular the European Convention on Human Rights and Fundamental Freedoms (the ‘ECHR’),⁴ concerning the right to information. As a consequence, although used in the law of Hungary, the Directive does not create obligations for national authorities to perform certain procedural acts, but refers to what rights to information require, when it creates normative requirements for how national authorities should act.

This paper argues that this difference is relevant to the conform application and understanding of the context of criminal provisions by national authorities. Beyond the primary, illustrative intention, this paper will suggest, hopefully plausibly, that a *(re-)shaping of the national legislation’s structure* is important for ensuring conform application. The ineffectiveness is supported by the empirical data collected and drafted into a rather recent national report by the Hungarian Helsinki Committee⁵ which is complemented by this paper. It is assumed that ultimately the effectiveness of a conform application depends on the national legislation and its ability to relate national application to international and supranational case-law. The technique chosen to effect transposition may further influence the extent of judicial authorities having the chance to review decisions of the investigating authorities, the prosecution and the competent court and create a useful national case-law ensuring a uniform understanding of information rights.

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Instead of surveying the opinion of the professional literature, this paper directly refers to the text of the legislation and the relevant notions of the Directive. As a final *caveat* it is pointed out that, in order not to obscure the view on the analysis of individual rights, I pay no attention herein to the transposition of the scope of the Directive (Art. 2 Directive) and the provisions on training (Art. 9 Directive) and non-regression (Art. 10 Directive).

II. The Hungarian legal environment and the transposition of the Directive

II.1. The national legislative family of the Directive

The Hungarian legislator transposed the Directive essentially through amending the already existing legal framework. In lack of a consistent reform after 1989, on the date of transposition⁶ the legal framework consisted of a number of laws adopted in several different stages as amended in numerous instances. Though the specific provisions on the right to information, which were not already present, were inserted into the relevant laws, those laws,

⁴ As established by Recital 14 Directive, ‘the Directive builds on the rights laid down in the Charter, and in particular Art. 6, 47 and 48 thereof, by building upon Art. 5 and 6 ECHR as interpreted by the European Court of Human Rights.’

⁵ EU-irányelvek a gyakorlatban: A büntetőeljárás során a tájékoztatáshoz való jogról szóló EU-irányelv átültetésének vizsgálata:

http://www.helsinki.hu/wp-content/uploads/HHC_Measure_B_National_Report_on_Hungary_2015_HUN.pdf

⁶ As per Art. 11(1) Directive, the deadline for transposition expired on 2 June 2014.

some of which originated from as early as 1979, retained their original structure and fragmentary nature.

Primarily, transposition required the amendment of the provisions governing the criminal procedure in line with Art. 2(1) Directive: the Criminal Procedure Code of 1998 (the 'Be.')⁷ and additionally Joint Decree 23/2003. (VI. 24.)⁸. As that text of the legislation largely already complied with the Directive, only minor adjustments were made.

This problem is present even more clearly in the provisions governing the regime of the misdemeanour procedure.⁹ The Misdemeanour Act (the 'Szabstv.')¹⁰ and the BMr.¹¹ resemble a simplified criminal procedure. In general, the Szabstv. seems to be inspired by the Be. Unfortunately, it seems to omit provisions not only due to logical necessity and the sake of simplification, but to simply 'shorten' the text of the Be. leaving individual provisions hanging. Such is the case with the dead letter right to legal remedy for a failure to provide information in Art. 35 Szabstv.

After the notification of the national transposing measures of the Directive to the European Commission, the corrections reform, comprising of the relevant Execution Code (the 'Bvtv.')¹² and the Decree on Police Detention Rooms (the 'Rfr.')¹³, entering into force on 1 January 2015, and the subsequent amendments caused considerable inconsistencies regarding the transposing legislation. The earlier Execution Code of 1979¹⁴ and the earlier Decree on Police Detention Rooms¹⁵ have been superseded.

As a consequence of the subsequent amendments to that new regime,¹⁶ Art. 12(4) and (5) Bvtv. now both contain a list of information obligations applicable to persons deprived of their liberty. The right to information is granted in a conform manner in execution measures of a European Arrest Warrant under Art. 12(5a) Bvtv. Some elements of information are to be provided also to convicts and persons otherwise suffering deprivation of liberty as a sanction.¹⁷ The Rfr. no longer contains the full list of transposing measures as regards misdemeanour arrest, as now the subject matter of its relevant Art. 14 is covered also by Art. 73(11) Szabstv.

In cases where lists of information obligations are duplicated, if one list is subject to certain further obligations (time of provision of information or requirements regarding its quality), it cannot be verified whether those additional obligations also extend to the other relevant list.

Subject to the above, it is immediately worrisome that, while the Directive requires the provision of a coherent Letter of Rights,¹⁸ the national legislation does not do so. Therefore,

⁷ Act XIX of 1998 on the criminal procedure

⁸ Joint Decree of the Minister of Internal Affairs and the Minister of Justice 23/2003. (VI. 24.) on the detailed rules of the investigation of investigating authorities directed by the minister of internal affairs and the rules on registering investigation actions in a manner different from a protocol

⁹ Including in a conform manner also cases falling under Art. 2(2) Directive.

¹⁰ Act II of 2012 on misdemeanours, the misdemeanour procedure and the register system of misdemeanours

¹¹ Decree of the Minister of Internal Affairs 22/2012. (IV. 13.) on provisions implementing Act II of 2012 on misdemeanours, the misdemeanour procedure and the register system of misdemeanours and the amendment of specific decrees in relation to this

¹² Act CCXL of 2013 on the execution of punishments, criminal law measures, specific forced measures and the detention for misdemeanours

¹³ Minister of Internal Affairs 56/2014. (XII. 5.) on police detention rooms

¹⁴ Legislative Decree 11 of 1979 on the execution of punishments and criminal law measures

¹⁵ Decree of the Minister of Internal Affairs 19/1995. (XII. 13.) on police detention rooms

¹⁶ Most notably Act LXXII of 2014 (on the amendment of Act CCXL of 2013 on the execution of punishments, criminal law measures, specific forced measures and the detention for misdemeanours and other acts related to it) and Act LXXVI of 2015 (on the amendment of specific criminal law related acts).

¹⁷ Art. 12(4) Bvtv.

¹⁸ Art. 4(4) and 5(2) Directive

different authorities are to apply different legislative material essentially ensuring the same information without a model to copy. Most interpretative problems earmarked in this paper could have been avoided, if the legislator would have chosen to follow the Directive in this regard and discard the existing national framework.

The terminology used by the national legislation is similar to the one of the Directive. The Be. specifies the defendant as *suspect* during the investigation, *accused* following the filing of the indictment with the competent court and *convict* following the final and binding sentence. Certain provisions based on the Directive also apply to convicts, although this is not required by the Directive. Conversely, the Szabstv. specifies, in all phases of the misdemeanour proceeding, the suspect/accused as a *person made subject to a proceeding*, as there is no formal act of accusation or ordinary involvement of the prosecutor. Differences in terminology arise accordingly with no effect on conformity.

Finally, certain provisions of the Directive can be found in the Act on Charges¹⁹ (the 'Itv.') and Joint Decree 9/2003. (V. 6.)²⁰, which ensure that legal assistance and copies of documents can be obtained free of charge by the suspect or accused person, if the conditions have been met.

II.2. The transposition of the Directive

The above general observations affirm a simple hypothesis. Either the legislator assumed that the national legislation to the largest part already complied with the ECHR and the Directive, or the simple fact that transposition is reported will make what was already in the national legal order accurate transposing measures of the Directive. This is even more likely as there were visibly few direct efforts to make the national legislation conform to the structure and wording of the Directive. It is possibly assumed that ECJ case-law ensures that national legal measures are interpreted and applied in line with the Directive's provisions.²¹ Otherwise, it would be impossible to leave the legislative environment largely untouched.

The following sections of this paper will illustrate in detail what is worthwhile to note beforehand in general: relying on these assumptions is insufficient for the effective transposition of the Directive. A comprehensive right to information, representing the same standard which national authorities need to ensure, has not been established.

As the empirical report mentioned above shows, the specific nature of the subject matter of the Directive does not fare well in the environment of EU law, where the national legislator may simply declare that pre-existing legislation, in the presence of the Directive, becomes transposing legislation and shall thus be interpreted in a conform manner. It is unlikely that low level authorities will use ECtHR case-law or the wording of the Directive to interpret national law. Nor is it likely that consistency can be ensured in the contents of the information provided in lack of a Letter of Rights uniform for all authorities.

To sum up the concerns following from the hypothesis, while literal transposition is not required, the national legislation shall give effect to the Directive at the level of its application. As the detailed analysis will show that might in itself require a literal transposition and the structural reconstruction of a differently premised legal system.

¹⁹ Act XCIII of 1990 on charges

²⁰ Joint Decree of the Minister of Justice, the Minister of Internal Affairs and the Minister of Finance 9/2003. (V. 6.) on the application of the personal waiver of expenses in the criminal procedure

²¹ C-106/89 *Marleasing* [1991] ECR I-7321

III. The right to be informed: the criminal and misdemeanour procedure (Art. 3 and 6 Directive)

The Directive applies to all procedures criminal in nature. Thus, Hungary's obligation to give effect to rights to information under Art. 3 and 6 Directive applies to both the criminal and the misdemeanour procedure. It shall be noted that the latter is not considered criminal in the national legal environment only in the autonomous understanding of the Directive, as it regulates lesser forms of crimes and administrative wrongs.

Art. 3(1) Directive²² specifies the meaning of the right to information about rights stating that suspects or accused persons must be provided promptly with information, either orally or in writing, concerning at least the procedural rights set out in Art. 3(1), pts. (a)-(e) Directive. 'Promptly' reasonably means that a suspect or accused person is informed as soon as he/she is subject to a procedural act (e.g. questioning or evidence gathering and especially before the first official interview). Information shall be provided in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons²³.

Art. 43(2), pt. (f) Be. states that defendants have the right to receive information on their procedural rights and obligations. It is less clear (and affecting conformity) whether this information provision on rights also covers the some 'rights' which are ensured by the law as obligations of the acting authority to provide information.

The legislation of Hungary grants all rights in the criminal procedure listed by the Directive in its Art. 3(1), pts. (a)-(e): the right of access to a lawyer;²⁴ the entitlement to free legal advice and the conditions for obtaining such advice;²⁵ the right to be informed of the accusation;²⁶ the right to interpretation and translation²⁷ and the right to remain silent²⁸.

Art. 62 Be. requires that all authorities involved in the procedure, investigating authorities, the prosecutor or the court shall provide information to defendants on the rights and obligations that concern them. Thus, it appears that information is provided promptly, upon commencement of the first interview in the criminal procedure, but already in the summons for the first interview in a misdemeanour procedure²⁹.

However, certain rights of the suspect or accused are not provided as rights in the Be., and in lack of a provision explicitly mentioning information to be provided on it, the applicability of Art. 62 Be., saying that information is to be given on rights, is questionable. That applies in case of the right to free legal advice, which is ensured through obtaining a waiver of costs, where both the Be. and the Szabstv. only state that a waiver may be granted in case certain conditions are met. Even though Art. 179(3a) Be. states the requirement to give information on the possibility, yet not as a right. The Szabstv. only specifies a right to representation by any adult person³⁰ meaning to extend the right to representation beyond the simple employment of a lawyer to relatives or other adult persons. As a result, it cannot be verified whether information to be given under the provision includes information specifically on the right to a lawyer.

²² To be read in conjunction with Recitals 19, 25 and 26 Directive.

²³ Art. 3(2) Directive read in conjunction with Recital 26 Directive.

²⁴ Art. 5(3) Be. and Art. 53(1) Szabstv.

²⁵ Art. 179(3a) Be. and Art. 92(5) Szabstv.

²⁶ Art. 43(2), pt. (a) Be. where the Szabstv. does not provide an explicit right.

²⁷ To be read in conjunction with Recital 25 Directive. As a consequence of the right to use the mother tongue in Art. 9(1)-(2) Be. and Art. 36 Szabstv.

²⁸ Art. 117(2) Be. and Art. 71(2) Szabstv.

²⁹ Art. 10/A(1) BMr.

³⁰ Art. 53(1) Szabstv.

Art. 62/A Be. specifies the obligation to take into consideration the age and maturity of persons under 18 years, persons who have mental disabilities, irrespective of imputability, and persons who have speaking and hearing disabilities, but apart from the latter two, no special rules are in place with respect to persons who cannot understand the content or meaning of the information in the Szabstv.

Suspects or accused persons are provided with detailed information about the criminal act they are suspected of having committed. Information is provided on the material facts of the case and the possible legal classification in accordance with the available information.

While Art. 3(1), pt. (c) Directive requires the provision of information on the right to be informed of the accusation, it does so in accordance with Art. 6 Directive. Art. 6 establishes the specific obligation for the national authorities to take active steps to provide the suspect or accused person with detailed information about the accusation against him/her and ensure he/she understands it.

Art. 6(1) Directive concerns the right to promptly³¹ receive information about the criminal act. As the ECtHR stated in *Mattoccia v. Italy*, because ‘the suspect must be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence’.³² It is not sufficient to make the information available only if the suspect requests it, the authorities can be required to take additional steps to bring the information to the suspect’s attention.

The reasons need not be related in their entirety by the arresting officer at the very moment of the arrest.³³ Normally, the constraints of time imposed by the notion of promptness will be satisfied where the arrested person is informed of the reasons for his arrest within a few hours.³⁴

The national legislation ensures the provision of the information upon commencement of the first procedural act on the basis of Art. 62 Be., as mentioned above, the transposing measures of Art. 52(2) Szabstv. and Art. 10/A(1) BMr. ensure conformity in the misdemeanour procedure.

Art. 6(2) Directive concerns the information given to the suspects or the accused when they are arrested or detained about the reasons for their arrest or detention.³⁵ The reasons do not have to be set out in the text of any decision authorising detention and do not have to be in writing or in any special form.³⁶ Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Art. 5(4) ECHR. However, Art. 5(2) does not require that the information consist of a complete list of the charges.³⁷

Conformity issues arise in regard to Art. 6(3) Directive, as the Hungarian legislation does not ensure more detailed information on the accusation until the indictment is served on the accused by the first instance court.³⁸ The Directive would require the information on the nature of the accusation, namely, the legal qualification of the material facts and the nature of

³¹ To be read in conjunction with Recital 28 Directive, ‘at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of on-going investigations’. It should be provide a description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed.

³² *Mattoccia v. Italy*, no. 23969/94, § 60, ECHR 2000-IX

³³ *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 40, Series A no. 182

³⁴ *Kerr v. the United Kingdom*, no. 40451/98, Partial Decision on Admissibility, 7 December 1999

³⁵ To be read in conjunction with Recitals 21 and 28 Directive and Art. 5(2) of the ECHR and its related case law.

³⁶ *X. v. the Federal Republic of Germany* (dec.), no. 2428/65, 5 October 1967

³⁷ *Bordovskiy v. Russia*, no. 49491/99, § §§ 56-59, 8 February 2005

³⁸ Art. 263(2) Be.

participation by the accused person in the commission of the act at the latest on submission of the merits of the accusation to a court.

Finally, Art. 6(4) Directive³⁹ concerns possible changes in the information given. It is therefore unacceptable for the prosecution to change or amend (substantially) the accusation without notifying the accused, also the ECHR case-law according to which the principle of fairness requires that if the cause of an accusation is changed the accused shall have the opportunity to defend himself in a practical and effective manner⁴⁰. The national legislation does not provide for the obligation clearly, and even here it remains with the Opinion of the Criminal College of the Curia No 92, point VIII, a mandatory interpretation opinion of the court system to ensure conformity.⁴¹

The chief concern the transposition of the Directive raises is that in the criminal procedure, both the information provision on rights⁴² and some rights themselves (the right to free legal advice) are transposed as obligations of authorities, not a general right. Conformity might thus be challenged, as the general obligation to provide information on the rights might not extend, due to the wording of the statute, to some rights under the Directive. Full compliance may only be ensured through the application of a statutory Letter of Rights and the restructuring of national provisions as a corresponding regime of rights. A similarly structural move is required to inform the suspect of accused person of the charges upon submission with the first instance court.

IV. The right to be informed: deprivation of liberty and the European Arrest Warrant (Art. 4 and 5 Directive)

The difficulties arising from the inconsistent amendments of the national legislative framework is most visible in the transposing measures of Art. 4 Directive on the Letter of Rights which should be provided on arrest. Art. 4(1) Directive⁴³ refers to the case in which the suspected or accused persons have been arrested or detained, i.e. deprived of their liberty. Information, also here, shall be given promptly, i.e. immediately or as soon as practicable after the liberty of a person is deprived.⁴⁴

The national legislation transposing the article is not referring to the model Letter of Rights provided by the Directive⁴⁵. It introduces instead an overly complex and in some places unreasonably constructed framework. It contains four lists (in four paragraphs respectively) of information to be provided to persons subject to different kinds of deprivation of liberty. On one hand, Art. 12(4) and (5) Bvtv. apply to all persons deprived of their liberty in the Hungarian legal order in relation to a criminal procedure or a misdemeanour procedure, except for persons in misdemeanour arrest. On the other hand, the information to be provided to persons in misdemeanour arrest is specified by Art. 73(11) Szabstv. and Art. 14(1) Rfr.

³⁹ To be read in conjunction with Recital 29 Directive.

⁴⁰ *Mattoccia v. Italy*, no. 23969/94, § 71, ECHR 2000-IX

⁴¹ In fact, accused persons are provided with an information letter upon service of the indictment by the first instance court, in form of the notification letter 220, made a serial document by the Annex of Policy No 5 of 2003 of the National Justice Council, which is however not a public document.

⁴² Art. 62 Be.

⁴³ To be read in conjunction with Recital 21 Directive.

⁴⁴ On this point, the ECtHR has proceeded on a case-by-case basis and has avoided setting a maximum time-limit concerning the provision of the Letter of Rights. In *Kaboulov v. Ukraine* (*Kaboulov v. Ukraine*, no. 41015/04, §§ 146-148, ECHR 2009), the applicant was arrested pending deportation, and the ECtHR held that a 40 minute delay in informing him of the reasons for his arrest would not necessarily raise an issue. In *Saadi v. the United Kingdom* (*Saadi v. the United Kingdom*, no. 13229/03, §§ 83-85, ECHR 2008), the ECtHR found a breach where an asylum-seeker was only informed of the reasons for his detention at a reception centre after 76 hours.

⁴⁵ See Art. 4(4) referring to Annex I Directive

Art. 12(4) and (5) Bvtv. specify two lists of information to be provided in writing. Art. 12(5) Bvtv. exclusively applies to the persons falling into the scope Directive, while Art. 12(4) Bvtv. applies both to persons within the scope Directive and persons who are subject to deprivation of liberty as a sanction, comprising of convicts, persons subject to forced medical treatment, misdemeanour detention and detention substituting an order fine.

Persons who are subject to the Directive as specified above and to whom information is thus provided under the Bvtv. are defined by Art. 3, point (12) Bvtv. as *persons subject to forced measures*. The definition includes persons subject to any deprivation of liberty in a criminal procedure or in the framework of international and EU criminal cooperation.⁴⁶

Art. 73(11) Szabstv. and Art. 14(1) Rfr. both provide a list of information obligations, which both apply to misdemeanour arrest, complementing each other's provisions. Art. 14(1) Rfr. also applies to public security arrest.

Apart from the above application of the Rfr. to public security arrest, forms of deprivation of liberty, which are not related to criminal or misdemeanour procedures (such as general police measures, i.a. public security arrest ordered to obtain identification from a person, or execution arrest, which helps to subject convicts to punishment) do as a rule not fall into the scope of the transposing measures.

As regards the requirement to provide information promptly, only Art. 12(5) Bvtv. and Art. 14(1) Rfr. provide that information shall be provided to persons upon their reception to the corrections institution. With respect to the rights specified in Art. 12(4) Bvtv., no specific time of provision is provided, conformity is thus affected.

All national transposing provisions require that the relevant information is provided in writing. All information is provided *ex officio*, persons deprived from their liberty are not bound to request information themselves.

The national legislation ensures that, in accordance with Art. 8 Directive, the fact of the provision of the information and the acknowledgment of that is laid down in writing.

Art. 12(7) Bvtv. ensures that the right to keep the written information is granted to all persons, except for persons in misdemeanour arrest. Conformity is affected as with respect to misdemeanour arrest only Art. 14(2) Rfr. provides the right to keep information, it cannot be verified whether the rights under Art. 73(11) Szabstv. are also covered.

Although the national legislation does not refer to the right to read the provided information separately, conformity is inferred in the case of Art. 12(4)-(5) Bvtv. and Art. 14(2) Rfr. on the basis of the right of persons to keep the written information on them. The Szabstv. does not specify a corresponding right, thus conformity is affected.

Information on the rights specified in Art. 3(1) Directive, as required by Art. 4(2) Directive, is almost entirely provided in the relevant written letter.⁴⁷ Conformity is affected as no information is provided in accordance with the Szabstv. to persons subject to misdemeanour arrest on the right to free legal advice under Art. 3(1), point (b) Directive. It shall be noted though, that in lack of a reference to the transposing measures relating to the criminal procedure, the consistent interpretation of the relevant measures cannot be verified with those obligations. Staff of correction institutions thus may develop their own practices

⁴⁶ In essence Art. 12(4) Bvtv. extends to persons subject to forced measures, because such persons are included by reference in the definition of *persons detained for other reasons* under Art. 3, point (4) Bvtv., to whom it applies besides *convicts*.

⁴⁷ The Bvtv. requires the provision of information regarding the rights under Art. 3(1) Directive in Art. 12(4), point (b) and Art. 12(5), point (a) regarding the right to access to a lawyer, in Art. 12(5), point (c) regarding the right to be informed of the accusation, in Art. 12(4), point (c) and 12(5), point (d) regarding the right to interpretation and translation and Art. (5), point (f) regarding the right to remain silent. Art. 73(11) of the Szabstv. requires the provision of information regarding the rights under Art. 3(1) Directive in point (a) regarding the right to access to a lawyer, in point (b) regarding the right to be informed of the accusation, in point (c) regarding the right to interpretation and translation and in point (d) regarding the right to remain silent.

(also as there is no model letter of rights made available) and divert from a general idea of rights.

The national legislation transposes, in a conform manner, the rights specified in Art. 4(2), pts. (a) to (c) Directive: the right of access to the materials of the case;⁴⁸ the right to have consular authorities and one person informed;⁴⁹ the right of access to urgent medical assistance;⁵⁰ and the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority⁵¹.

Art. 4(3) Directive⁵² requires the provision of basic information about any possibility in the Hungarian legislation of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release. Thus, where no such information provision in place, conformity is not impaired until that follows from the normal system of legal remedies in Hungary. The national legislation complies with the obligation in a fully conform manner.⁵³

The national legislation meets fully the requirement to provide information in a simple and accessible language⁵⁴, though it does not define what that means or provide a model. Conformity is thus impaired.

As required by Art. 4(5) Directive, in conjunction with the provision of Directive 2010/64/EU, information shall be provided, orally in a language the person understands, where the appropriate letter is not available. A Letter of Rights in the appropriate language shall then be given without undue delay.

Conformity is affected in different ways regarding the provision of information to persons who do not understand the language or who otherwise do not understand the information provided. The Rfr. only requires information to be provided orally in case the person cannot read or write, and not in case the information is not available in the appropriate language. Possibly due to another drafting mistake, the national legislation does not set a clear obligation to produce the language version of the information appropriate for the person deprived from their liberty under Art. 12(8) Bvtv. It only provides that the letter of rights shall be provided if prepared. Conformity is further affected as Art. 12(4) Bvtv. and the Szabstv. do not contain a corresponding obligation to provide information upon reception. Furthermore, those laws do not contain the obligation to translate and provide written information without undue delay. Under such circumstances, it cannot be verified whether a uniform letter is provided in a required time.

The Bvtv. explicitly refers to the European Arrest Warrant as required by Art. 5 Directive, and extends the notification to the right to be informed of its content, the right to consent to simplified surrender and the legal consequences of giving or withholding such consent⁵⁵. The provision refers, without showing the exact reference, to the implementing measures of the European Arrest Warrant in Act CLXXX of 2012 on cooperation with the Member States of the European Union in criminal matters. However, conformity is likely hampered also here, as the national legislation does not refer to the model Letter of Rights set out in Annex II Directive, and also does not require the use of any different letter either.

In conclusion, the legislature and the relevant preparatory documents do not explain the logic behind inconsistencies in the national legal framework. It is not possible to assume,

⁴⁸ Art. 12(5), point (e) Bvtv., Art. 12(4) Bvtv. and Art. 73(11), point (e) Szabstv.

⁴⁹ Art. 43(3) Be., Art. 73(11), point (f) Szabstv., Art. 12(4), point (f), Art. 12(5), point (h) Bvtv.

⁵⁰ Art. 12(4), point (k) Bvtv. and Art. 14(1), point (b) Rfr.

⁵¹ Art. 73(11), point (g) Szabstv., Art. 12(4), point (i), Art. 12(5), point (g) Bvtv., Art. 126(3) Be. and Art. 73(2) Szabstv.

⁵² To be read in conjunction with the case-law of the ECtHR on Art. 5(4) ECHR.

⁵³ Art. 12(4), point (a), Art. 12(5), point (g) Bvtv., Art. 73(11), point (g) Szabstv.

⁵⁴ Art. 4(4) Directive read in conjunction with Recitals 25 and 26 of th Directive.

⁵⁵ Art. 12(5a) Bvtv.

based on the legislation available, that the rights to information specified in the Bvtv. and the Rfr. will be interpreted in line with the each other, and with the interpretation of the provisions Be. and the Szabstv. and their implementing measures. As different authorities will be dealing with different provisions, it is more likely that they will develop their own internal practices and impede both the consistent interpretation of national law and overall compliance with the ECtHR case-law. The overly complex nature of the legislation does not suggest otherwise and the tendency to apply rules formalistically bars the reach of interpretation into the practices of other authorities. Internal measures and guidelines of authorities are not likely able to mend these problems.

V. Access to documents (Art. 7 Directive)

The national legislation provides generous access to case documents compared to the minimum requirement set out in Art. 7 Directive. Access is, in principle, ensured to the entire case file, from the moment of the creation of documents. In certain cases, the access of defendants and defence counsels to the case-file may be restricted both in course of the investigation and the court procedure.

Art. 7(1) Directive⁵⁶ concerns the right of a suspect or accused person to access evidence on the case-file in any stage of criminal justice proceeding. Persons deprived of their liberty in arrest or detention shall have the right to sufficient information and evidence in order to challenge the lawfulness of their detention, in accordance with the possibilities granted by national law. The documents and, where appropriate, photographs, audio and video recordings, should be made available to the arrested persons or to their lawyers. General access to documents is ensured in a conform manner in the Hungarian legislation.⁵⁷

Art. 7(2) Directive in line with the ECtHR case-law requires that the prosecution authorities disclose to the defence all material evidence (for or against the suspect/accused) and that both parties to the procedure must be given the opportunity to have knowledge of and comment on the observations and evidence of the other party.⁵⁸

The Directive refers to essential documents, the national law does not mention these. Access is granted to the entire case file, while some limitation is possible on the basis of Art. 7(3) Directive.⁵⁹ The right to gain detailed information on the content of the accusation in due time, but at latest upon filing with the court under Art. 7(3) Directive is ensured.⁶⁰ Disclosure under Art. 7(2) Directive is ensured in full, as a full, paper-based bound copy of the case-file is handed over to the defendant and/or the defence counsel upon closure of the investigation, in the premises of the investigating authority⁶¹.

⁵⁶ To be read in conjunction in Recital 31 Directive.

⁵⁷ Art. 43(2), pt. (b) Be., Art. 186(1)-(2) Be., Art. 50(2)-(3) Be., Art. 52(3) Szabstv., Art. 53(2) Szabstv. and Art. 26(1)-(2) Bvtv.

⁵⁸ Art. 7(2) Directive should be read in conjunction with Recital 31 Directive and the Judgment of the ECtHR in *Natunen (Natunen v. Finland)*, no. 21022/04, § 42, 31 March 2009), where the ECtHR ruled that disclosure includes the opportunity for the suspect to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings.

⁵⁹ Thus, the obligation following from the ECtHR case-law (abstracts of the file do not suffice, nor does an oral account of facts and evidence) can be considered as complied with.

⁶⁰ Art. 7(3) Directive creates a hierarchy between the two temporal references by giving priority to the requirement of ensuring effective exercise of the rights of the defence over the second ('at the latest') requirement. The provision is to be read in conjunction with Recital 30 Directive. Access should be possible sufficiently in advance of the procedural step for which the access is relevant: e.g. before the hearing or before the expiry of a time-limit for lodging an application or an appeal) and at the latest when it is decided that the merits of the accusation will be submitted to the judgment of a court (the investigation is concluded).

⁶¹ Art. 193(1) Be.

Art. 7(3) Directive also specifies the timing of access to the case file.⁶² It should be provided in due time to allow for the effective exercise of the rights of the defence, and at the latest before a court is called to decide upon the lawfulness of the arrest or detention in accordance with Art. 5(4) ECHR.

The national legislation does not foresee a definition of ‘essential documents’, access to the case file in the criminal procedure is essentially granted with some restriction before the investigation is closed⁶³. Access to information may be restricted in the court phase of the criminal procedure on the basis that the personality, piety rights and data on the private life of others shall not be affected⁶⁴.

Documents and evidence contained in the case-file is granted access to, yet there is no specific reference to other material evidence in the possession of the authorities. In principle, video and audio recordings produced by the authorities are attached to the case file.

Art. 7(4) Directive⁶⁵ establishes that, by derogation from Art. 7(2) and (3) Directive, access to the material evidence in the possession of the competent authorities, whether for or against the suspect or accused person, may be refused, where such access may lead to a serious threat to the life or fundamental rights of another person or where refusal of such access is strictly necessary to safeguard an important public interest. Any refusal of such access must be weighed against the rights of the defence of the suspect or accused person, taking into account the different stages of the criminal proceedings.

Only measures restricting the rights of defence which are strictly necessary are permissible under Art. 6(1) ECHR.⁶⁶ Negative decisions must be reasoned, so as to make it possible to exercise the right to challenge them.⁶⁷

The national legislation allows for a restriction on access, where the on-going investigation would be prejudiced.⁶⁸ No restrictions apply in accordance with the Szabstv. The restriction to access is subject to challenge before the prosecutor. However, only the challenge against the refusal of a request for a copy may be challenged before a judicial authority (complaint is only granted in case of refusal to obtain a copy under Art. 70/B(8) Be.), which affects conformity.

Access to files as per Art. 7(5) Directive is provided free of charge, fees only apply, in line with the Directive, to obtaining copies of those. Even so, the first copy of case file documents by the defendant and the defence counsel is free of charge,⁶⁹ which would not be required by the Directive⁷⁰.

All in all, the national legislation falls short on a comprehensive system of remedies as that would require rights to be defined as rights deriving from fair trial. Only such a system could ensure judicial review in all cases where rights are involved. In lack of such a system, a judicial review of access denied to investigation documents on the basis that the on-going investigation would be prejudiced, escapes judicial purview.

⁶² To be read in conjunction with Recital 30 Directive.

⁶³ at a time allowing sufficient opportunity to develop the defence, as per Art. 43(2), pt. (c) Be.

⁶⁴ Art. 60(1) Be.

⁶⁵ To be read in conjunction with Recital 34 Directive.

⁶⁶ *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, Reports of Judgments and Decisions 1997-III

⁶⁷ Recital 32 requires a ‘balancing exercise’ between any refusal and the rights of the defence, also in the light of the stage of the procedure when this refusal occurs.

⁶⁸ Art. 186(2) Be.

⁶⁹ Art. 57(2), pt. (e) Itv.

⁷⁰ To be read in conjunction with Recital 34 Directive, this provision Directive applies without prejudice to provisions of national law providing for fees to be paid for documents to be copied from the case file or for sending materials to the persons concerned or to their lawyer.

This raises again the genuine suspicion that it is less likely that a comprehensive interpretation of the right to fair trial can be ensured in the national legal order, or that access to documents is always taken as part of that right. Were a clear link to the right to fair trial established, appeal for violations of it could be referred to the court in a more straightforward way.

VI. Verification and remedy (Art. 8 Directive)

The conform transposition of Art. 8(1) Directive⁷¹ is ensured which establishes that the *competent authorities should take note* that the information was given in accordance with existing recording procedures under national law. The member states may not introduce new mechanisms or any additional administrative burdens. Not covering the obligations following from the right under Art. 7 Directive, this provision is established in order to safeguard the overall transparency of criminal proceedings.

The obligation arises for each of the acting authorities which provide information based on Art. 166(3) and 250(3) Be. and Art. 91(3) Szabstv. with regard to rights listed in Art. 3 and 6 Directive in course of the investigation, the court procedure and throughout the misdemeanour procedure. The provisions of the Be. and the Szabstv. are general in nature and require the recording of all acts of the investigating authorities, prosecution and courts with the level of detail necessary to enable the verification of compliance with procedural rules.

The interview of the defendant is considered an investigation act and procedural act in the court procedure. Thus, the provisions apply to the information provided based on the transposing measures of Art. 3 Directive. The provision of information regarding the accusation is covered by the transposing measures of Art. 3 Directive in the same logic.

With respect to persons deprived of their liberty, Art. 12(8) Bvtv. contains specific reference to all rights on which information is provided on the basis of the transposition of Art. 4 and 5 Directive. The acknowledgment of the information of the person shall also be recorded in writing. The national legislation requires the presence of two witnesses to ensure that evidence of this act is produced. It shall be noted that Art. 14(3) Rfr. provides, as regards the information on rights provided under its provisions, that the provision of the information shall be recorded in writing along with the relevant acknowledgment in misdemeanour arrest.

As regards Art. 8(2) Directive⁷², the Be. grants the general right to the defendant, in all stages of the criminal procedure, to *file a challenge for the failure of the authorities to provide the information* under the transposing measures Directive. The refusal to provide such information is treated the same way by the Be. Failure to provide information may be challenged in form of a complaint, filed with the authority failing to act, which may, based on the complaint, remedy its failure. Should the authority not comply on its own, it shall forward the complaint to the competent prosecutor for detailed assessment.

Conformity is affected as the challenge is not judicial by nature, the possibility to proceed to a court after the complaint procedure is only granted in case of a refusal to provide copies of documents.⁷³

The situation is even more troubling in misdemeanour proceedings. Art. 35 Szabstv. provides for the possibility of remedy in case of failure to perform the obligations of misdemeanour authorities; however, no specific further rule is provided in the national legislation on what the procedure would look like. The regulation is a dead letter thus leaving no space for a relevant challenge, in lack of detailed rules on the time, form to file a challenge, the authority to file to or the decision based on the appeal.

⁷¹ To be read in conjunction with Recital 35 Directive.

⁷² To be read in conjunction with Recital 35 Directive.

⁷³ Art. 70/B(8) Be.

Art. 21(1) Bvtv. as regards all persons deprived of their liberty allows for the filing of a complaint with the head of the organisation responsible for the execution of the measure in relation to which the complaint is filed. Art. 21(2) Bvtv. ensures that both the persons subject to detention for other reasons and thus also persons who are subject to forced measures have the right to appeal.

Thus, the system of challenges is scattered and even where an effective remedy is ensured, the interpretation of certain rules is not likely to be of judicial nature and to happen consistently with the rule in the Be. and the Szabstv. on the basis of the Bvtv. and the Rfr., and *vis-à-vis*. A development of a consistent interpretation is at least jeopardised by the very structure of the legal system, as propounded above.

VII. Conclusions

VII.1. Transposition

I set out to illustrate, through the main findings on the conformity of the transposition of Directive 2012/13/EU into the Hungarian legal order, in what ways the structure of a legal order may allow too much flexibility for national authorities in applying the transposing legislation of EU law. A closer analysis of the transposition of the Directive yielded two core observations.

First, that the Hungarian legislation complies with the obligation to transpose the Directive through a *mixture of rights of the suspect or accused person and obligations of the authorities*. As a result, those obligations can hardly be conceived by the authorities as a comprehensive interpretation of a central right, rather as a set of individual rules to comply with. As no model Letter of Rights is used in the Hungarian legislation (in fact no model is required by legislative means), authorities essentially create their own structure of information escaping the legislator's purview and direct judicial and/or constitutional review.

Second, in multiple instances the *right to an effective remedy is prejudiced* with regard to violations through non-compliance with obligations following from rights. Either there is no *effective* remedy declared for failure to act (the Szabstv.) or it is not provided through a judicial authority (the Be.). This runs the risk that the review of the judiciary will be limited, and even if granted, directed at the individual obligations in a formalistic way, rather than the interpretation of the comprehensive right.

To summarise the state of the art, the (i) Directive is currently considered transposed in a conform manner, (ii) despite that the national legislation does not always seem to give clear instructions on what information to provide and (iii) the system of effective remedies and conform application appears to be deficient.

VII.2. Conformity

While the conformity of the transposition of the Directive, as stated above, can be concluded on the formal level, this should be deemed insufficient to ensure it also on the level of application. It appears that a certain meta-thinking about the right to fair trial and the right to information, without reconstructing the national transposing measures around these, is insufficient. It is not enough to refer to the international legislation, as often happens in Hungary, or to refer to the conform interpretation obligation based on EU law. The national legislation must reflect a *rights-based approach*. A clear textual and telling representation of the essential parts of the right to information can enhance the conformity of application and give clear legal basis for courts performing judicial review to supervise the activity of the lowest authorities.

Nevertheless, the most interesting tentative conclusion is that the success of such an approach seems not only to be due to the higher textual similarity, but also to the logical aptness of a rights-based system to comply with the requirements of the supranational legislation. A rights-based system may help to ensure that ECtHR case-law can have a direct influence on the interpretation of central rights across platforms, that is different authorities, while the implications of that case-law are represented in the text of the legislation. In such a manner lower authorities do not have to comply at the same time with international case-law and with the national idiosyncrasies of their own legal order which can prove to be a difficult task even for higher courts.

Most risks mentioned herein would be ruled out already by providing a detailed model Letter of Rights through e.g. secondary legislation, and reducing the content of the legal provisions to that directly relating to the individual rights necessary to perform effective defence, the appropriate time and opportunity to prepare the defence and the right to be informed promptly and in a simple and accessible language. The benefit of a clear and 'ahistorically developed' direction is plausibly yield unrivalled benefits over preserving what is already in positive law, hoping that it will be interpreted differently.

Ultimately, the conformity of the national legislation also depends on a conceptual shift. Rather than maintaining the mixed design of the national provisions, the national legislation should be harmonised with the ECHR and represent a regime focused on the rights of the individual. In that context, it seems that the transposition of EU law in some cases requires more than the transposition of individual legal provisions, and a legislative culture solely based on the latter technique is insufficient.

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