Selected Standards of Preparatory Proceedings in European Legal Systems

*Tomasz Bojanowski**

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Contents

Abstract

The subject of this article is an attempt to establish coherent standards for preparatory proceedings within European legal systems. Substantive, procedural, and executive criminal law in continental European countries share a common foundation in Roman law. Nevertheless, sovereign states are free-within the limits set by international law-to shape their legal provisions, particularly in this area. Despite numerous differences, the author argues that certain common elements can be identified which link the models of preparatory proceedings across European states. The author highlights shared standards in preparatory proceedings through the lens of accepted human rights protection frameworks, such as those established by the Council of Europe and the European Union, which exert significant influence on criminal law. Moreover, the article underscores a fundamental issue for the European model of preparatory proceed-

* PhD student, Cardinal Stefan Wyszynski University, Warsaw, ORCID: 0000-0001-8294-0968, e-mail: tomaszbojanovski@gmail.com.

ings: the involvement of judicial authorities in such proceedings, which ensures the protection of human rights and fundamental freedoms. In conclusion, the author points to the challenges and ongoing transformations occurring in the broadly understood domain of European criminal procedural law.

Keywords: criminal law, preparatory proceedings, human rights, ECHR, EU Charter of Fundamental Rights

I. Introduction

A distinct and structured preparatory proceeding is, as a rule, not present in common law jurisdictions; however, it constitutes an integral component of criminal procedure in continental European countries based on the civil law system.[1] It should be emphasized that criminal law-substantive, procedural, and enforcement-is a specific area of legislation, which is subject to harmonization under special principles and forms part of international legal instruments.[2] Nevertheless, sovereign states are generally reluctant to allow external interference in this field. As a result, individual legal systems and models retain their own specific features and unique solutions.

Accordingly, it is difficult to identify a uniform standard for preparatory proceedings that would correspond to specific solutions or institutions across the Member States of the European Union or those belonging to the Council of Europe. However, following the jurisprudence of the European Court of Human Rights, reference should be made to the developed standard of an effective investigation.[3] This standard should be understood *sensu largo*, meaning that it encompasses not only the investigation phase (preparatory proceedings) but the entire criminal process-from its initiation, through the trial, and up to the execution of the sentence.[4]

The purpose of this article is to present common standards applicable to preparatory proceedings, that is, in practice, the period from the initiation of the pre-

[1] Alfred Kaftal, 'Model postępowania przygotowawczego de lege ferenda w prawie polskim' (1989) 1 Studia Prawnicze 53; Krzysztof Eichstaedt, 'Czynności sądu w postępowaniu przygotowawczym' in Piotr Hofmański and Ryszard A. Stefański (eds), *System Prawa Karnego Procesowego* (Wolters Kluwer 2016).

[2] Andrzej Adamski, 'Europeizacja prawa karnego' in A. Adamski and others (eds), *Prawo karne i wymiar sprawiedliwości Unii Europejskiej. Wybrane zagadnienia* (Toruń 2007) 429; Magdalena Perkowska, International Criminal Law (Temida 2 2008).

[3] Michael O'Boyle, 'Duty to Carry Out an Effective Investigation under Article 2 of the ECHR' in Luis López Guerra and others (eds), *El Tribunal Europeo de Derechos Humanos: una visión desde dentro. En homenaje al Juez Josep Casadevall* (Tirant lo Blanch 2015) 215.

[4] Jakub Czepek, *Standard skutecznego śledztwa w sferze ochrony prawa do życia w systemie Europejskiej Konwencji Praw Człowieka* (Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego 2021).

paratory stage up to the submission of the indictment to the court. The author intends to examine this issue from three selected perspectives. First, through the lens of Council of Europe instruments and the case law of the European Court of Human Rights. Second, through the legislation of the European Union and the jurisprudence of the Court of Justice of the European Union. Third, by analysing a conglomerate of specific legal provisions and institutions constituting the involvement of the judiciary in the preparatory phase, which serves as both a benchmark for the observance of human rights and fundamental freedoms, and as an essential element of a democratic state governed by the rule of law.

II. Standards of The Council of Europe

The Council of Europe standard is based on three pillars: 1) the European Convention on Human Rights;[5] 2) the case law of the European Court of Human Rights; and 3) the recommendations of the Committee of Ministers of the Council of Europe.

The fundamental Convention standard is the right of the suspect to defence from the earliest stage of criminal proceedings. Article 6(3)(c) of the European Convention on Human Rights expressly states that everyone charged with a criminal offence has the right to defend himself, including the right to legal assistance of his own choosing, or, if he has insufficient means, to free legal assistance where the interests of justice so require. Within this context, three core components of this right are identified: 1) legal assistance must be ensured from the moment of the first interrogation or detention; 2) consultations between the suspect and legal counsel must be conducted confidentially; 3) the absence of legal counsel during the preparatory stage constitutes a violation of the right to a fair trial. In the judgment of *Salduz v. Turkey*, the European Court of Human Rights held that access to a lawyer must be granted from the initial stages of criminal proceedings, unless there are compelling, specific, and proportionate reasons to restrict this right-and even then, only temporarily.[6] A similar position was taken by the Court in *Ibrahim and Others v. the United Kingdom*.[7] Furthermore, in *Dayanan v. Turkey*, the Court emphasized that the presence of legal counsel at the stage of police custody is a fundamental safeguard against abuse by state authorities.[8]

The right to information holds fundamental importance in the preparatory stage of criminal proceedings-both for the suspect and for the victim. The legal basis

[5] Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).

[6] *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008).

[7] *Ibrahim and Others v United Kingdom* App nos 50541/08, 50571/08, 50573/08, 40351/09 (ECtHR, 13 September 2016).

[8] *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009).

for this right can be derived from two provisions of the European Convention on Human Rights. Article 5(2) ECHR provides that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Article 6(3)(a) ECHR further states that everyone charged with a criminal offence has the right to be informed promptly and in detail, in a language which he understands, of the nature and cause of the accusation against him. In the context of preparatory proceedings, these provisions apply in particular to the suspect. From them, the following core elements of the right to information can be inferred: 1) the right to be informed of the legal and factual grounds for deprivation of liberty (arrest or detention); 2) the information concerning the charges must be clear, detailed, and communicated in a language the suspect understands; 3) the right to information is intrinsically linked to the effective exercise of the right of defence. For example, in *Fox, Campbell and Hartley v. the United Kingdom*, the European Court of Human Rights held that a vague reference to "reasonable suspicion of involvement in terrorist activity" was insufficient to justify detention—real and concrete reasons must be provided by the authorities.[9] Other cases have affirmed that failure to inform a suspect of the reasons for their detention and the restriction of access to legal counsel constitute a clear violation of the suspect's fundamental procedural safeguards.[10]

Another key aspect concerns the lawfulness and judicial oversight of detention, derived from Article 5(1) of the European Convention on Human Rights, which prohibits deprivation of liberty except in cases prescribed by law and in accordance with a procedure established by law, and Article 5(3), which provides that everyone arrested shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release pending trial. Accordingly, detention must satisfy the following conditions: 1) compliance with both domestic and Convention law; 2) necessity and proportionality (e.g., to prevent flight, interference with evidence, or the commission of further offences); 3) prompt appearance before an independent court; 4) the right to challenge the lawfulness of detention before a judicial authority. This standard was affirmed in *Brogan v. the United Kingdom*, where the Court held that, regardless of the seriousness of the offence-even in the context of combating terrorism-a four-day detention without judicial control amounted to a violation of the Convention.[11] Similarly, in *Assenov v. Bulgaria*, the Court found that the lack of an effective remedy to

[9] *Fox, Campbell and Hartley v United Kingdom* App nos 12244/86, 12245/86, 12383/86 (ECtHR, 30 August 1990).

[10] *Murray v United Kingdom* App no 18731/91 (ECtHR, 8 February 1996); *Pélissier and Sassi v France* App no 25444/94 (ECtHR, 25 March 1999); *Simeonovi v Bulgaria* App no 21980/04 (ECtHR, 12 May 2017).

[11] *Brogan and Others v United Kingdom* App nos 1209/84, 11234/84, 11266/84, 11386/85 (ECtHR, 29 November 1988).

challenge the legality of detention was incompatible with the Convention; the state must ensure real and effective access to a court for detained persons.[12] In other judgments, the European Court of Human Rights has reiterated that the detained individual must be brought before a "judge or other officer authorised by law to exercise judicial power," who must be independent from the executive and competent to assess the legality of the detention and order release if appropriate.[13]

In preparatory proceedings, the right to remain silent and the privilege against self-incrimination are also binding principles.[14] These rights stem directly from the broadly understood right to a fair trial under Article 6(1) of the European Convention on Human Rights, as well as from the presumption of innocence guaranteed by Article 6(2) ECHR. As a result, a suspect is under no obligation to cooperate with law enforcement authorities if doing so would be detrimental to their legal position. Moreover, no individual may be coerced-whether physically or psychologically-into confessing guilt. Importantly, in a democratic state governed by the rule of law, the exercise of the right to remain silent must not be interpreted as evidence of guilt; it is the responsibility of the prosecution to provide objective evidence substantiating the charges. This standard was confirmed in *Funke v. France*, where the European Court of Human Rights held that compelling an individual to produce documents that could lead to their conviction constituted a violation of the right to a fair trial.[15] Likewise, in *Saunders v. the United Kingdom*, the authorities used statements made by the suspect under compulsion in a financial crime investigation, which the Court found incompatible with the privilege against self-incrimination.[16] The far-reaching nature of this right was further emphasized in *Jalloh v. Germany*, where the police forcibly administered an emetic to a detainee-against his will-in order to recover ingested narcotics as evidence. The Court ruled that such treatment, aimed at compelling the body to "produce evidence," violated both the privilege against self-incrimination and the right to physical integrity.[17]

Authorities conducting preparatory proceedings are under a duty to disclose evidence to the suspect, including both incriminating and exculpatory material. This obligation is derived from the right to a fair trial under Article 6(1) of the European Convention on Human Rights, as well as from the broadly construed

[12] *Assenov and Others v Bulgaria* App no 24760/94 (ECtHR, 28 October 1998).

[13] *A. and Others v United Kingdom* App no 3455/05 (ECtHR, 19 February 2009); *McKay v United Kingdom* App no 543/03 (ECtHR, 3 October 2006).

[14] *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000).

[15] *Funke v France* App no A 256-A (ECtHR, 25 February 1993).

[16] *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996).

[17] *Jalloh v Germany* App no 54810/00 (ECtHR, 11 August 2006).

right to defence under Article 6(3). Three essential components can be identified within this obligation: 1) the right of the suspect to be informed about the evidence collected by the prosecution; 2) the disclosure duty must be interpreted broadly-it applies to both incriminating and exculpatory evidence; 3) any restriction on the suspect's access to evidence must be exceptional (e.g., based on public security grounds), proportionate, and subject to judicial oversight. In *Edwards and Lewis v. the United Kingdom*, the European Court of Human Rights found that the refusal to disclose certain materials-specifically, evidence obtained through undercover agents-violated the right to a fair trial.[18] The undisclosed information related to the conduct of agent provocateurs, which could have had a significant bearing on the outcome of the proceedings and a possible acquittal. A similar position was adopted in *Rowe and Davis v. the United Kingdom*, where the Court held that the non-disclosure of evidence adversely affected the right of the defence and the principle of equality of arms, particularly where exculpatory materials were withheld.[19] While certain limitations on disclosure may be permitted, they must always be justified, proportionate, and subject to review by an independent and impartial judicial authority.[20]

Criminal proceedings, including the preparatory stage, must be concluded within a reasonable time, as reflected in the right to a fair trial under Article 6(1) of the European Convention on Human Rights. Undue delay in proceedings may have an adverse impact on the suspect's situation, particularly where pre-trial detention is involved, as well as causing psychological distress due to prolonged uncertainty. According to Convention standards, preparatory proceedings must be conducted without unnecessary delay. However, in assessing what constitutes a "reasonable time" for their completion, the following factors must be taken into account: the complexity of the case, the conduct of the investigative authorities, the conduct of the suspect, and the significance of the case for the suspect (e.g., where the individual is in pre-trial detention, heightened diligence is required). Excessive duration of criminal proceedings has been observed in the Polish justice system, as confirmed in *Kudła v. Poland*, where the suspect was held in pre-trial detention for an unreasonably long period. The Court found that the right to a hearing within a reasonable time was not respected, and that there was no effective remedy available to challenge the protracted length of the criminal proceedings.[21] However, this issue is not unique to Poland; it is also present in the justice systems of other European states.[22]

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[18] *Edwards and Lewis v United Kingdom* App nos 39647/98 and 40461/98 (ECtHR, 27 October 2004).

[19] *Rowe and Davis v United Kingdom* App no 28901/95 (ECtHR, 16 February 2000).

[20] *Fitt v United Kingdom* App no 29777/96 (ECtHR, 16 February 2000).

[21] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).

[22] *Boddaert v Belgium* App no 12919/87 (ECtHR, 12 October 1992); *Scordino v Italy* App no

In preparatory proceedings, the presumption of innocence-enshrined in Article 6(2) of the European Convention on Human Rights-constitutes a fundamental standard. This right becomes operative from the moment the proceedings are initiated and applies to the conduct of investigative authorities (such as the police, prosecution, and judiciary), public communications, and the treatment of the suspect by those authorities. It entails that no one shall be treated as guilty before a final conviction by a court of law. As a result, any public statements or conduct that could imply guilt must be avoided-even following arrest or the issuance of a decision to bring charges. This obligation extends to the media and, in particular, to statements made by political figures. Potential violations include not only prejudicial remarks but also actions such as parading the suspect in handcuffs before the media. An example of such a breach occurred in Switzerland, where a court's press release described the suspect as "guilty of the offence".[23] A similar violation was identified in France, where the Minister of the Interior publicly suggested that the suspect had committed murder prior to any judicial finding.[24] Comparable cases have arisen in countries such as Lithuania and Serbia,[25] where the European Court of Human Rights has reiterated that judicial authorities bear a positive obligation to protect the suspect's image and dignity.

As a rule, the purpose of preparatory proceedings is to establish the prohibited act and its perpetrator, to collect evidence, and to file an indictment with the court. However, the structure of such proceedings is also intended to prevent inhuman or degrading treatment during evidentiary actions aimed at establishing the truth. This obligation stems directly from Article 3 of the European Convention on Human Rights, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In the context of preparatory proceedings, this provision must be interpreted in light of the conditions of detention and arrest, methods of interrogation, the treatment of the suspect by public officials, as well as access to medical care and the fulfilment of basic needs. In practical terms, the standard extends to: 1) the right to be treated with dignity, regardless of the charges brought; 2) the prohibition of torture, threats, intimidation, and coercion to obtain statements; 3) the obligation to provide minimum standards of living for detained and remanded persons (e.g. overcrowding, lack of lighting, unsanitary conditions, no access to toilet facilities, or medical care); 4) the duty to investigate any allegations of such violations.

36813/97 (ECtHR, 29 March 2006); *Zimmermann and Steiner v Switzerland* App no 8737/79 (ECtHR, 13 July 1983).

[23] *Minelli v Switzerland* App no 8660/79 (ECtHR, 25 March 1983).

[24] *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995).

[25] *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000); *Matijašević v Serbia* App no 23037/04 (ECtHR, 19 September 2006).

An example of a breach of these standards is found in the case of *Selmouni v. France*, where a Moroccan national was subjected to brutal police interrogation, including beatings, insults, and sleep deprivation by the French authorities.[26] In another case in Greece, a suspect was held in an overcrowded, filthy cell without natural light and access to toilet facilities.[27] The Court also held in a case against Belgium that a police officer slapping a suspect constituted degrading treatment and a disproportionate infringement of the individual's physical integrity.[28]

The foregoing has outlined the elements of the standards applicable to preparatory proceedings in the member states of the Council of Europe. The analysis demonstrates that states are obliged to respect the provisions of the Convention and to ensure their proper implementation in order to prevent violations thereof. There is no requirement to introduce uniform legal provisions or institutions; however, it is essential that states fulfil their international obligations. There is no requirement to introduce uniform legal provisions or institutions; however, it is essential that states fulfil their international obligations.

III. Standards of European Union

When turning to the human rights protection system of the European Union, it should be noted that it is also based on the following pillars: 1) Primary law – the Treaty on European Union and the Treaty on the Functioning of the European Union[29]; 2) The Charter of Fundamental Rights,[30] as a legal instrument modelled on the European Convention on Human Rights; 3) The so-called "procedural rights package" adopted after the Treaty of Lisbon,[31] i.e., directives aimed at harmonizing minimum standards in criminal matters; 4) The case law of the Court of Justice of the European Union. The provisions of the Treaties and the Charter of Fundamental Rights serve as a "mirror reflection" of the provisions of the European Convention on Human Rights. Pursuant to Article 52(3) of the Charter of Fundamental Rights of the European Union (CFR), where the rights recognized by the Charter correspond to those guaranteed by the European Convention on Human Rights (ECHR), their meaning and scope shall be the same as those laid down by the Convention. This implies that: the EU institutions and national courts, when applying the Charter, are required to interpret

[26] *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999).

[27] *Peers v Greece* App no 28524/95 (ECtHR, 19 April 2001).

[28] *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015).

[29] Consolidated Version of the Treaty on European Union [2012] OJ C326/13; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[30] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[31] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

it in conformity with the ECHR and the case-law of the European Court of Human Rights (ECtHR) an EU law adopts the ECHR standard as the minimum level of protection, which must not be reduced or undermined.[32] Therefore, any case under analysis could be examined through the lens of the Charter's provisions. However, for the purpose of a more in-depth analysis, this segment will be based on selected directives.

The analysis should begin with the right to information in criminal proceedings, which is comprehensively regulated in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.[33] This right comprises the following elements: 1) the right to information about procedural rights (Article 3); 2) the right to receive a written Letter of Rights (Article 4); 3) the right to be informed of the accusation (Article 6); 4) the right of access to the case file (Article 7)[34]. On this basis, the right to information may be understood as the obligation to immediately inform the suspect of the reasons for their arrest-namely, why they have been deprived of liberty-and of their procedural rights (such as the right to a lawyer, the right to remain silent, and the right to an interpreter), as well as to provide a detailed description of the charges, including the alleged act and its legal classification, in order to enable the preparation of an effective defence.[35] An inherent component of the right to information is also the suspect's right of access to the case file, provided that such access does not prejudice the proper conduct of the investigation.[36]

A fundamental right under European Union law is the right of access to a lawyer.[37] As with Convention rights, access to a lawyer is guaranteed at the earliest

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[32] Example: Article 7 of the Charter of Fundamental Rights of the European Union (right to respect for private and family life) corresponds to Article 8 of the European Convention on Human Rights - they are interpreted in parallel. It should also be borne in mind that the European Union is not a party to the European Convention on Human Rights (despite Article 6(2) of the Treaty on European Union), which limits the direct interconnection between the two legal orders. See Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

[33] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

[34] Steven Cras and Luca De Matteis, 'The Directive on the Right to Information: Genesis and Description' (2013) 1 Eucrim 22.

[35] Case C-216/14 *Covaci* [2015] ECLI:EU:C:2015:686.

[36] Case C-615/15 *Kolev and Others* [2018] ECLI:EU:C:2018:392.

[37] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; See: Vincent Glerum, 'Directive 2013/48/EU and the Requested Person's Right to Appoint a Lawyer in the Issuing Member State in European Arrest Warrant Proceedings' (2020)

stage of proceedings-prior to the first interrogation, as well as before other investigative measures such as identity parades or searches.[38] Moreover, the lawyer has the right to be present during questioning and to actively participate, including by intervening during questioning, or advising the suspect on whether to answer questions or to remain silent.[39] In addition, the Directive provides for the confidentiality of communications between the suspect and their lawyer, both oral and written-meaning that investigative authorities may neither interfere with nor supervise such communications.[40] Through their legal representative, the suspect also has the right to have a third party informed of their detention, and to notify a consular authority or embassy where applicable.[41]

European Union law expressly provides for the right to interpretation and translation also during the preparatory stage of criminal proceedings.[42] This right includes the right to oral interpretation during interrogations, at trial hearings, and during communications with defence counsel, in order to ensure that the suspect understands the charges brought against them and is able to effectively exercise their right of defence.[43] It also applies to essential procedural documents, such as: the decision on arrest or detention, the statement of charges, indictments, and any other decisions issued by the court that are crucial to the conduct of the proceedings.[44] Furthermore, interpretation and translation assistance must be provided free of charge, must cover the entire duration of the proceedings, and may not be restricted for procedural or financial reasons.[45] At the same time, the State is under a duty to ensure the quality and accuracy of interpretation and translation, including the obligation to consider complaints regarding interpreters or interpretation-related procedural actions.[46]

41(2) *Review of European and Comparative Law* 7.

[38] Directive 2013/48/EU, art. 3.

[39] Case C-15/24 PPU *Stachev* [2024] ECLI:EU:C:2024:388.

[40] Directive 2013/48/EU, art. 4; See: Case C-819/21 *Staatsanwaltschaft Aachen* [2023] EU:C:2023:386.

[41] Directive 2013/48/EU, arts. 5-7.

[42] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; See: Magdalena Kotzurek, 'Directive 2010/64/EU on Translation and Interpretation Services in Criminal Proceedings: A New Quality Seal or a Missed Opportunity?' (*Eucrim*, 2019) <https://eucrim.eu/articles/directive-201064eu-on-translation-and-interpretation-services-in-criminal-proceedings-a-new-quality-seal-or-a-missed-opportunity/> accessed 2 June 2025.

[43] Directive 2010/64/EU, art. 2.

[44] Directive 2010/64/EU, art. 3.

[45] Directive 2010/64/EU, art. 4; See: Case C-338/20 *Prokuratura Rejonowa Łódź-Bałuty v D.P.* [2021] ECLI:EU:C:2021:805.

[46] Directive 2010/64/EU, art. 5.

A separate Directive sets out the presumption of innocence under European Union law.[47] To be specific, the presumption of innocence is understood in the same way as under the provisions of the European Convention on Human Rights, meaning that a suspect shall be considered innocent until proven guilty by a final judgment of a court of law.[48] This principle entails a prohibition on public statements made by public authorities that suggest the suspect's guilt, as well as a ban on the use of measures or practices that imply guilt before a final conviction.[49] An exception is made for the provision of information in a neutral manner, where such disclosure is strictly necessary for the purposes of the criminal investigation or in the interest of the public.[50]

The right to legal aid should be understood more broadly than the right of access to a lawyer.[51] It is triggered when the suspect lacks the financial means to retain legal counsel, in which case they are entitled to state-funded legal aid.[52] Crucially, such legal aid must be effective and genuine, not merely formal or illusory.[53] It must be available from the earliest stage of the proceedings, including the moment of arrest, and the legal assistance must be provided by a competent and active lawyer, capable of ensuring a real and substantive defence before the investigative authorities.[54] The decision on whether to grant legal aid should be prompt, transparent, and subject to judicial review, so as to avoid any infringement of the right of defence.[55] The relevant provisions also define the right to legal aid for persons subject to a European Arrest Warrant, ensuring access to legal assistance both in the executing Member State and in the issuing Member State, where the individual has been arrested or is awaiting surrender.[56]

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[47] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1; Steven Cras and Anže Erbežnik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial: Genesis and Description of the New EU Measure' (2016) 1 *Eucrim* 25.

[48] Directive (EU) 2016/343, art. 3; Case C-467/18 *Rayonna prokuratura Lom* (2019) ECLI:EU:C:2019:765.

[49] Directive (EU) 2016/343, arts. 4-5.

[50] Directive (EU) 2016/343, art. 8.

[51] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1; See: Tomasz Markiewicz, 'Access to a Lawyer for Suspects at the Police Station and During Detention Proceedings' (2020) [41](2) *Review of European and Comparative Law* 129.

[52] Directive (EU) 2016/1919, art. 4.

[53] Directive (EU) 2016/1919, art. 7.

[54] Directive (EU) 2016/1919, arts. 4-5; Case C-435/22 PPU *HF v Generalstaatsanwaltschaft München* [2022] ECLI:EU:C:2022:838.

[55] Directive (EU) 2016/1919, art. 6.

[56] Directive (EU) 2016/1919, art. 5.

A distinct segment of EU law concerns the protection of the rights of children in the preparatory stage of criminal proceedings. This area is governed by Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[57] This standard is broad in scope. It includes, among others, the child's right of access to a lawyer from the first interrogation onward.[58] Importantly, a child cannot waive this right independently. In practice, this constitutes both an extension and clarification of the general right of access to a lawyer.[59] Throughout procedural actions, parents or legal guardians have the right to be present with the child, which is essential for emotional support and oversight of the proceedings-though exceptions to this principle are permitted in specific circumstances.[60] The interrogation of a child must be conducted without undue delay, by personnel specially trained for this purpose, and in conditions that minimize stress and pressure, while ensuring the child's freedom of expression.[61] As a rule, interrogations should not be repeated, although the Directive provides for exceptions to this general principle.[62] The standard also includes protection of the child's privacy, notably through the safeguarding of personal data. Furthermore, the Directive addresses several additional rights and protections for children, including: 1) the assessment of the child's individual needs;[63] 2) the limited and exceptional use of detention;[64] 3) access to education and contact with family during deprivation of liberty;[65] and 4) appropriate conditions to ensure the child's effective participation in trial proceedings.[66]

Similar to the Convention system of the Council of Europe, the European Union's human rights protection framework also establishes standards regarding the privilege against self-incrimination and the right to remain silent.[67] The

[57] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1; Stephanie Rap and Daniella Zlotnik, 'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused. Reflections on the Directive on Procedural Safeguards for Children Who are Suspects or Accused Persons in Criminal Proceedings' (2018) *European Journal of Crime, Criminal Law and Criminal Justice* 26 110.

[58] Directive (EU) 2016/800, art. 6.

[59] Case C-603/22 *M.S. i in.* [2024] ECLI:EU:C:2024:632.

[60] Directive (EU) 2016/800, art. 15.

[61] Directive (EU) 2016/800, arts. 6, 8, 9, 20.

[62] Directive (EU) 2016/800, arts. 6, 8.

[63] Directive (EU) 2016/800, art. 7.

[64] Directive (EU) 2016/800, art. 12.

[65] ibid.

[66] Directive (EU) 2016/800, arts. 4, 16.

[67] Directive (EU) 2016/343; See: Anita Zsuzsanna Nagy, 'The Presumption of Innocence and the Right to Be Present at Trial in Criminal Proceedings in Directive (EU) 2016/343' (2016)

first element of this standard affirms that a suspect may not be compelled to provide explanations or to produce evidence that could be used against them.[68] Law enforcement authorities are obliged to respect and accept the suspect's decision to remain silent or to withhold self-incriminating material.[69] The second component emphasizes that a suspect's silence must not be interpreted as an admission of guilt, and a refusal to cooperate with investigative authorities must not adversely affect the assessment of the suspect's conduct either by the investigating body or by the court.[70] It is also worth noting Article 48 of the Charter of Fundamental Rights of the European Union, which enshrines these principles within the primary law of the EU.[71]

In the context of the European standard governing preparatory proceedings under EU law, the right of access to evidence must be duly addressed. Its implementation should be as broad as possible. For instance, the suspect should receive all documents necessary to understand and challenge the decision to bring charges. At the same time, full disclosure by the competent authorities entails providing access to both inculpatory and exculpatory evidence.[72] It is essential that all relevant documents be disclosed in a timely manner, to allow the suspect to prepare an effective defence.[73] This right, however, is not absolute—it may be subject to limited and exceptional restrictions, justified by the seriousness of the investigation, the protection of witnesses, or overriding public interest considerations.[74]

The presented standards of preparatory proceedings under EU law demonstrates a high degree of similarity and complementarity with the system of the Council of Europe. In practice, the provisions of the Charter of Fundamental Rights, as previously mentioned, are virtually identical to those of the European Convention on Human Rights.

IV. The judical factor in preparatory proceedings

A characteristic feature of the preparatory proceedings model in civil law countries is the involvement of the judicial factor in the preparatory stage. Moreover,

12(1) *European Integration Studies* 5.

[68] Directive (EU) 2016/343, art. 7.

[69] Case C-481/19 *DB v Commissione Nazionale per le Società e la Borsa (Consob)* [2021] EU:C:2021:84.

[70] Directive (EU) 2016/343, arts. 3-6; Case C-660/21 *K.B. i F.S. (C-660/21)* [2023] ECLI:EU:C:2023:498.

[71] Charter of Fundamental Rights of the European Union, art. 48.

[72] Case C-216/14 *Covaci* [2015] ECLI:EU:C:2015:686.

[73] Case C-612/15 *Kolev i in.* [2018] ECLI:EU:C:2018:392.

[74] Directive 2012/13/EU, arts. 10, 14, 27, 28, 41.

this is a standard that developed in the 19th century.[75] It has undergone certain evolution alongside other procedural institutions, but it still serves as a measure of the adherence to human rights and freedoms, reflecting the principles of a democratic rule of law.[76]

The legal systems of the Council of Europe and the European Union establish minimum standards to guarantee the involvement of the judicial factor in preparatory proceedings, while leaving the Member States the discretion to regulate this matter. It should be noted that, according to the theory of criminal procedure, judicial activities in preparatory proceedings can be classified into three types: 1) Decision-making activities – decisions taken by the judicial authority as a result of the legal and substantive review of the preparatory proceedings. These may be triggered by a request from the prosecutor, but this is not a rule;[77] 2) Supervisory activities – the review of certain decisions made by pre-trial authorities (prosecutor, police, and other bodies), examining their legality and the thoroughness of the actions taken;[78] 3) Evidentiary activities – procedural (evidentiary) actions reserved for the judicial authority.[79] The core of judicial powers typically includes a broad range of decision-making and supervisory activities, but the evidentiary component is also crucial, as in certain cases, it allows for the interrogation of specific participants in the criminal proceedings by an independent court.[80] It seems that it is not an overstatement to assert that the wide scope of judicial activities is a key indicator of the rule of law within a given model of preparatory proceedings and the entire criminal process.

A comprehensive discussion of all judicial activities in preparatory proceedings would exceed the scope of this analysis. Therefore, it is necessary to highlight the most significant elements derived from the provisions constituting the Council of Europe and European Union systems.

Article 5(3) of the European Convention on Human Rights (ECHR) is of fundamental importance, as it stipulates that any person arrested or detained shall

[75] Jarosław Zagrodnik, *Model interakcji postępowania przygotowawczego oraz postępowania głównego w procesie karnym* (CH Beck, 2013) 253.

[76] Stanisław Waltoś and Piotr Hofmański, *Proces karny – zarys systemu* (Wolters Kluwer Polska 2018) 514-515.

[77] Karolina Malinowska-Krutul, 'Czynności sądowe w postępowaniu przygotowawczym' [2008] 10 *Prokuratura i Prawo* 65.

[78] Cezary Kulesza, 'Postępowanie przygotowawcze. Rozwiązania modelowe' in Piotr Kruszyński (ed), *Nowe uregulowania prawne w kodeksie postępowania karnego z 1997 r.* (ABC 1997) 269.

[79] Jan Grajewski, Lech Krzysztof Paprzycki and Sławomir Steinborn, *Kodeks postępowania karnego. Komentarz t. I* (Wolters Kluwer 2006) 893.

[80] Marek Skwarcow, 'Sprawa zabójstwa w Lisewie Malborskim. Głos w dyskusji nad rozszerzeniem udziału czynnika sądowego w postępowaniu przygotowawczym' [2023] 11-12 *Przegląd Sądowy* 153.

be brought promptly before a judge or another officer authorized by law to exercise judicial power. This provision indicates the judicial review of the lawfulness and justification of detention-it cannot be solely an arbitrary decision made by law enforcement (extension of executive authority). The European Court of Human Rights emphasizes the importance of "independence and impartiality" of the reviewing body – this must be a judge, not a prosecutor.[81] Furthermore, the Court held that the detention of a suspect without judicial oversight violated Article 5(3) ECHR.[82] It was also stated that "judicial review" must be genuine, not merely formal.[83] At the same time, the ECtHR emphasized the necessity of full independence of the decision-making authority, which is guaranteed only by judicial independence. In another judgment, the ECtHR underlined that abuses in the use of coercive measures may violate human rights if they are not subject to effective judicial control.[84]

Turning to EU law, it is important to reference Articles 47 and 48 of the Charter of Fundamental Rights. The first provision establishes the right to an effective remedy before a court, meaning the right to appeal decisions made by law enforcement authorities to a court. The second provision emphasizes the respect for the right to defence, including the rights of the suspect. These provisions form the basis for judicial control over investigative and procedural actions by questioning decisions—such as searches, arrests, or the use of coercive measures. An independent judicial authority serves as a guarantee of the proportionality and legality of actions taken by the prosecution and the police. Completing these framework regulations are, among others, Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU on the right of access to a lawyer. These directives mandate that the suspect be informed of their right to a court, their right to legal counsel, and their right to appeal. While these directives do not explicitly mention the participation of the court in the preparatory proceedings, they imply the necessity of judicial oversight, as only such oversight can ensure the enforcement of these rights. In Case C-508/18, the CJEU held that a prosecutor does not meet the requirement of judicial independence if they are subject to executive power-therefore, decisions concerning the European Arrest Warrant (EAW) must be made by an independent judicial authority with the attribute of judicial independence.[85]

In conclusion, it should be stated that the involvement of the judicial factor is

[81] *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979).

[82] *Assenov and Others v Bulgaria* App no 24760/94 (ECtHR, 28 October 1998).

[83] *Mooren v Germany* App no 11364/03 (ECtHR, 9 July 2009).

[84] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).

[85] Joined Cases C508/18 and C82/19 PPU *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)* [2019] ECLI:EU:C:2019:456.

a requirement arising from both EU law and Council regulations. Its purpose is to protect against abuses and ensure the effective protection of individual rights. Therefore, this solution forms the basis of the European standard for fair preparatory proceedings and effective investigation.

V. Summary

The analysis presented above shows that European human rights protection systems-within the framework of the Council of Europe and the European Union-establish coherent and overlapping standards for preparatory proceedings. It should be noted that these systems are characterized by broad procedural guarantees for the parties involved in the proceedings, namely the victim and the suspect. On the other hand, they undergo a certain evolution and must respond to the challenges of a changing world, such as artificial intelligence.[86] An example of such an evolution is the process of moving away from the institution of the investigating judge in European preparatory models, a shift initiated by the Federal Republic of Germany and later followed by Italy, Austria, Switzerland, and Croatia.[87] Not all countries ultimately abandoned this model, including France, Spain, and Greece.[88] At the same time, it should be noted that this process is not uniform, as in some European countries, the model of preparatory proceedings without the investigating judge was forcefully imposed, such as in Poland, the Czech Republic, Slovakia, and Hungary.[89]

A procedural institution characteristic of the European standard of preparatory proceedings is the involvement of the judicial factor in the preparatory process and the judicial actions performed by an independent court.[90] This element is deeply rooted in the tradition of European preparatory models, as confirmed by historical regulations and literature.

The standards of preparatory proceedings and the scope of judicial involvement in preparatory procedures are not uniform. The regulations of the Council of Europe and the European Union, as well as the case law of the European Court

[86] Karolina Kiejnich-Kruk, 'Building blocks – strategia cyfryzacji wymiaru sprawiedliwości. Perspektywa estońska' (2025) 3 *Przegląd Sądowy* 86.

[87] Łukasz Wiśniewski, 'Sędzia dochodzenia w niemieckim postępowaniu karnym' (2011) 12 Państwo i Prawo 56.

[88] Cezary Kulesza, 'Ewolucja europejskich modeli postępowania przygotowawczego na przełomie wieków' in P. Kruszyński, Sz. Pawelec and M. Warchoł (eds), *Europejski kodeks postępowania karnego* (Stowarzyszenie Absolwentów Wydzialu Prawa i Administracji UW, 2010).

[89] Józef Koredczuk, 'Ewolucja modelu postępowania przygotowawczego w polskim prawie karnym procesowym' in Ryszard Andrzej Stefański (ed), *System Prawa Karnego Procesowego* (C.H. Beck 2016) 101-102.

[90] Rudolf von Gneist, *Vier Fragen zur Deutschen Strafprozeßordnung mit einem Schlußwort über die Schöffengerichte* (Springer 1874).

of Human Rights and the Court of Justice of the European Union, set minimum standards, such as the requirement for a court ruling on the detention of a suspect.[91] It is up to sovereign states to decide whether to implement broader standards, including a wider range of judicial actions in preparatory proceedings. In addition to the rigid standards, which are generally of a broad nature, there are also provisions and guidelines that are more detailed; however, sovereign states have the discretion to participate in a given mechanism, such as the European Public Prosecutor's Office within the European Union framework.[92] Noticeable trends and efforts to standardize and harmonize national legal systems are evident, but recently these efforts have been slowed down, for example, in the area of the European Criminal Procedure Code.[93] Nevertheless, this in no way undermines the European standards of preparatory proceedings, which remain crucial for the protection of human rights.

[91] Zagrodnik (n 75) 253.

[92] Gabriella Di Paolo, 'EPPO's Transformative Powers on Criminal Justice in the Member States: The Impact of International and European Law on Criminal Procedure' (2024) 33(5) *Studia Iuridica Lublinensia* 31.

[93] Piotr Kruszyński, Szymon Pawelec and Marcin Warchoł (eds), *Europejski kodeks postępowania karnego* (Stowarzyszenie Absolwentów Wydzialu Prawa i Administracji UW, 2010).