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EmpRiSe

Right to silence and related rights in pre-trial suspects' interrogations in the EU: Legal and Empirical study and promoting best practice

Report of the closing webinars

Organised by Maastricht University, 28-29 June 2021

Held online via Zoom platform

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About the project

The EmpRiSe project seeks to examine the issues surrounding the implementation - in law and in practice - of the right to silence (RTS) and other relevant rights, such as the right of access to a lawyer/legal aid, to information and access to material evidence, in the context of suspect interrogations at the investigative stage in four jurisdictions: Belgium, Ireland, Italy and the Netherlands. The countries were selected to ensure variety in the legal procedural systems and geopolitical situation. Additionally, the project aims to develop training materials and deliver training to criminal justice practitioners (judges and lawyers) in Belgium, Ireland and the Netherlands. The project is funded by DG Justice of the European Commission. For more information visit project website: www.empriseproject.org.

Webinar # 1: Silence is not empty: it is full of answers. Findings from comparative socio-legal research on the meaning and implications of the right to silence in police interrogations.[1] (28 June 2021, 14:00-17:00 ECT)

In this webinar, researchers from the four jurisdictions presented the findings from socio-legal research, which sought to address issues relevant to the use and implications of the right to remain silent at the investigative stage of the criminal proceedings in practice. The webinar explored the following questions:

- What is the meaning of the right to silence at police interrogations in the four jurisdictions?
- To what extent is it protected in their laws and day-to-day practices of judges, prosecutors, police and defence lawyers?
- What are the consequences of exercising the right to silence at the investigative stage of the proceedings?

[1] Note: Webinar # 1 was audiovisually recorded. The recording is available on YouTube under the URL: https://youtu.be/uj8taYY6O54.

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- What is the relationship, if any, between the right to silence and other procedural rights, such as the right to information or legal assistance? In this webinar, researchers from the four jurisdictions will present the findings from socio-legal research, which sought to address these and other questions relevant to the use and implications of the right to remain silent in practice.

The webinar was opened with a presentation of the findings from the **Netherlands** by Dr Anna Pivaty of Maastricht University and Nijmegen University. Anna focused on three major themes that were prominent, among others, in the empirical findings:

- The meaning and perceptions of the right to silence by criminal justice actors
- The role of suspect's silence or failure to provide a credible account in the determination of guilt
- Other possible consequences of the use of the right to silence.

The Dutch empirical study involved in-depth interviews and focus group interviews with 11 judges and 14 police officers and it was complemented with a study of 25 written case files.

The Netherlands, with its inquisitorial procedural tradition, has a tumultuous history with regard to the (full) recognition of the right to silence for suspects and accused in criminal proceedings. Traditionally the right to remain silent has been given a rather narrow interpretation grounded mostly in the rationale of preventing the use of excessive pressure to obtain self-incriminating statements. Similar views on the scope of the right to silence were reflected by the majority of respondents in the empirical study. This view is narrow, as it does not acknowledge that the right to silence can be legitimately used to safeguard personal autonomy, or to exercise control over own defence in the criminal proceedings. Most respondents viewed the use of the right to silence as a deliberate procedural strategy, which was mostly interpreted in a negative light. The use of the right to silence was associated with 'non-cooperation' in criminal proceedings, which can be legitimately sanctioned. Lawyers were believed to have significant influence on the suspect's decision to remain silent.

The exercise of the right to silence by the suspect, or the failure to provide an account which would be considered credible (when comparing it with the contents of the written *dossier*), including at the investigative stage, is likely to have negative consequences for the decision on innocence or guilt. This tendency can be observed in all types of cases, and not only those types of cases, where the Dutch Supreme Court has explicitly stated that the suspect's failure to provide a credible account can be mentioned as part of evidentiary reasoning (such as money laundering or joint enterprise cases). The 'lateness' of the suspect's statement, particularly after the suspect and the lawyer have been given access to the written *dossier*, is likely to significantly affect its credibility. Lawyer's advice to remain silent is viewed with suspicion: it is not considered a valid reason to delay giving a statement, as there is a concern that lawyers might advise silence in order to 'adjust' the statement of the suspect to the content of the *dossier*.

The use of the right to silence at the investigative stage is likely to have other, mostly negative consequences for suspects, both in law in and practice. These include: decisions to prolong pre-trial detention, sentencing decisions, decisions on out-of-court disposal, as well as the suspect's ability to obtain compensation for unlawful pre-trial detention, to get requests for further investigation by the defence granted, and to obtain a mental health assessment.

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Anna concluded the presentation with the following recommendations:

- Strengthen the legislative expression of the rationales for the right to silence (RTS), including participatory defence and personal autonomy;
- Improve safeguards where silence is taken into consideration when assessing evidence (define 'legitimate' reasons for silence; introduce greater procedural safeguards);
- Ensure better access to evidence for suspects and lawyers at the investigative stage;
- Clarify the meaning and consequences of 'non-cooperation' with the investigation/proceedings in relation to the exercise of RTS;
- Provide training to raise awareness of the reasons for invoking RTS and assumptions around truthful and false alibis;
- Provide training to raise awareness of the lawyer's role and challenges faced by lawyers when providing advice.

Professor Yvonne Daly of Dublin City University presented the findings from **Ireland**. The Irish jurisdiction stands apart from other EU jurisdictions covered in the project not only because it represents a common law system, but also because it did not opt in into the Directive 2016/343 on the presumption of innocence, and because it contains explicit statutory provisions authorising to draw negative inferences from suspect's silence in the determination of innocence or guilt (so-called 'adverse inferences' from silence).

In Ireland, Professor Daly and colleagues conducted 2 focus groups with 19 defence solicitors, 10 interviews with criminal barristers, 11 interviews with staff from the Office of the Director of Public Prosecutions (ODPP), 4 interviews with judges and 4 interviews with retired police offices.

Yvonne mentioned that according to Irish respondents, persons who are less likely to remain silent are those who have little experience with the criminal justice system and vulnerable individuals. Lawyers consider a range of factors when determining which kind of advice to provide at the investigative stage, including the level of disclosure of information about the evidence, the strength of the evidence, the nature of the offence, suspect characteristics and the future defence strategy. Lawyers do not advise silence no matter what, and unlike it was the case in the Netherlands, there was no sense among the respondents that the use of the right to silence has dramatically increased since lawyers have been allowed to attend clients at police stations.

In terms of police questions practices, there was a perception that there is a need to 'put' the case before the suspect at the police station and give them an opportunity to comment on it. Tactics used in interview as reported by respondents included building rapport and allyship, but also chats outside of the interview room, as well there were anecdotal accounts of threats (such as access to bail), selective disclosure of evidence, use of psychological pressure and undermining the solicitor. The Irish police has a new interview training model built on trying to obtain an account from the suspect and building rapport, as well as late disclosure to the suspect (with the view to obtain an 'uncontaminated story' from the suspect). Solicitors however advise clients to provide comments only following prior disclosure, and therefore the model works somewhat inefficiently, with suspects remaining silent throughout a large part of an interview, and police drip-feeding disclosure.

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Respondents from ODPP stated that where silence is not taken into account as part of adverse inferences, they consider it as 'non-evidence' (given that juries are not told that the suspect has remained silent, unless adverse inference provisions apply). However, suspect's silence may, in the view of ODPP respondent, reinforce their own perception of their guilt or confirm the 'guilty' interpretation of the prosecution case.

Overall, silence at the investigative stage does not seem to have a negative impact on bail decisions, as the decisive factor in such decisions is the strength of evidence. However, there was a suggestion that in lower courts judges are sometimes being told about cooperation or lack thereof at the police station.

In terms of how the inference from silence provisions operate in practice, the difference between England and Wales where inference provisions can be drawn from any interview, in Ireland specific 'inference interviews' are held at the end of the investigation process – with the use of a special 'right to silence caution' - only in selected cases. Inferences cannot be drawn from suspect's silence during other interviews. This constitutes good practice. There was an impression that the risk of invoking inferences provisions did not have a great effect on the suspect's decision to remain silent or to speak (unlike, for instance, disclosure of evidence). In ordinary criminal trials inferences do not seem to be drawn often. However, in cases heard by the Special Criminal Court (SCC) the use of inferences is much more prevalent. Offences heard by the SCC are for instance terrorism or membership in unlawful organization. This is problematic because persons at the periphery of criminal activity suspected of such offences might remain silent out of fear of repercussions.

Finally, waiving the right to silence can lead to benefits, such as mitigation of sentence.

Yvonne provided the following recommendations based on the EmpRiSe research findings:

- Retain the position whereby suspect's silence at the investigative stage is usually not mentioned at trial;
- Retain the 'inference interview' as a specific interview at the end of the investigative stage, where a special caution applies;
- All existing legislative inference provisions should explicitly mention the need for existing evidence to ground the request for an explanation from a suspect;
- Sufficient pre-interview disclosure should be given to suspects and lawyers to enable informed decision as to whether to speak or remain silent;
- Raise awareness of judges of other reasons for remaining silent other than those related to guilt;
- Create a joint working group including the national police and legal practitioners to discuss matters related to suspect interviewing.

Dr Angelo Marletta of ULB (formerly KU Leuven) and Professor Michele Panzavolta of KU Leuven and presented the findings from **Italy**. The Italian EmpRiSe team conducted 33 individual interviews with public prosecutors, (investigative and trial) judges, defence lawyers and police officers. The Italian jurisdiction is

peculiar, because it represents an adversarial jurisdiction with inquisitorial roots. Therefore, procedural rights of suspects, including the right to silence and the right to legal assistance are strongly protected on paper. Furthermore, in the Italian system, suspect interviews at the investigative stage are usually conducted by prosecutors and not police unlike in most other jurisdictions.

Respondents in Italy were of the opinion that silence is not common behavior for suspects, most suspects have an urge to speak. In contrast, suspects of organised crime are believed to tend to remain silent. There was a perception that the decision to remain silent is controlled by the lawyer: lawyer was referred to as the 'master of silence'. The main factor that influences this choice seems to be limited access to case-related information; other factors include for instance the personality of the suspect.

All respondents agreed that the right to silence is strongly embedded in the Italian legal culture, which is considered quintessential. The use of the right to silence as viewed as rational and strategic behavior of the suspect. There is however no ethical view around the use of the right to silence.

There was a perception that the importance of suspect interview is diminishing as public prosecutors resort (also) to other 'technical' investigative methods. The possibility of interview requested by the suspect in the end of the investigation after the contents of the case file have been disclosed to the defence seems to be used more often.

In terms of the influence of suspect's silence on practical decision-making, there seem to be three crucial points when this might happen: the determination of sentence, the decision on guilt and the decision on pre-trial detention. In terms of sentencing, it is rather that cooperation is being rewarded, which in practice means that non-cooperation or remaining silent is de facto sanctioned. As far as the determination of guilt is concerned, judges report that they are willing to use silence because there is no alternative explanation. This is perceived as a 'natural' consequence of silent behavior. Other judges considered that on top of that, silence can be used to corroborate and/or strengthen the prosecution case in various ways. In terms of impact on pre-trial detention, suspect's silence might corroborate the finding of a 'probable cause' (that the suspect has committed the crime, which is necessary for the decision on pre-trial detention), but it may also contribute to the finding of 'dangerousness' of the suspect.

Michele noted that the interviewed judges did not hold the same perceptions of the strength of evidence in the hypothetical cases put before them. This creates a problem because judges are likely to assess differently when the case 'clearly calls for an explanation' and when suspect's silence can or should be taken into account. Prosecutors and judges might also be exercising (implicit) pressure on suspects to convince them to waive silence when they believe that the evidence is strong.

Lawyers have furthermore noted that the police culture is (still) inquisitorial, aiming for a confession from a suspect. Moreover, prosecutors seem to be increasingly delegating interrogations to the police.

The Italian team has put forward the following recommendations:

- Consider introducing a clause in the Code of Criminal Procedure whereby silence can produce no further adverse consequences, other than that the suspect may be convicted because the prosecutor met the burden of proof and the suspect did not provide an alternative explanation;
- Repeal the provision whereby suspect's silence at the investigative stage may lead to a denial of financial compensation for unjust pre-trial detention;
- Consider introducing a provision on the right to silence with regard to unlocking an encrypted device;
- Increase awareness of judges and prosecutors about the use of inadvertent pressure to waive the right to silence and the lack of uniformity in the assessment of evidence;

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- Develop protocols and training for police and prosecutors in interviewing suspects.

The findings from **Belgium** were presented by **Ashlee Beazley** **of KU Leuven and Professor Miet Vanderhallen** **of Antwerp University and Maastricht University**. Ashlee has presented the legislative framework of the right to silence. She noted that the codification of the right to silence in Belgium was the direct consequence of the influence of the respective ECtHR case law and EU legislation. The right is codified in art. 47 bis CPC, which also codifies the rights to legal assistance and the right to information. Although Belgium seems to be prima facie compliant with the provisions of the right to silence of Directive 2016/343, Belgium has not yet expressly transposed the Directive (although the government considers its law compliant). It is unclear under Belgian legal regime as to how far the right not to cooperate with the investigation goes. The case law seems to move towards further restriction of the right, one example being the regime concerning the use of coercion to unlock encrypted devices. Both the Court of Cassation and the Constitutional Court consider that the privilege of self-incrimination does not apply, because the password presumably exists outside of the suspect's will.

Furthermore, Ashlee noted that the concept of 'interrogation' is not defined in Belgian law. There is also no separate information on procedural rights at the moment of arrest of suspect. There is furthermore no explicit provision on exclusion of evidence obtained in breach of the right to silence.

With regard to the adverse inferences regime, there is a consistent line of case law that prohibits to draw adverse inferences from suspect's silence. However, in practice courts seem to attach probative value to suspects' silence for instance, stating that suspects failed to explain a fact that clearly calls for it ('significant silence') or did not provide an alternative account of the incriminated events. Finally, there exists a 'grey area' in the law concerning to what suspects may be 'incenitivised' to provide an account, for instance by granting sentence mitigation for 'cooperative' behavior.

Miet has presented the empirical findings from Belgium. The Belgian empirical study consisted of observations of 24 videorecorded interviews with suspects, interviews with 11 police officers, 5 prosecutors and 5 judges.

Miet noted that the caution on the right to silence as a formality in the beginning of the interview. The right to silence was exercised by suspects in different ways, for instance, by literally invoking the right silence, to saying that they do not wish to answer. Respondents considered that suspects were more likely to invoke the right to silence when responding to crime-related questions. According to most respondents, suspects use they right to silence because they were advised so by the lawyer. However, in the observation study about half of suspects who remain fully or partially silent were not assisted by a lawyer. Police mostly accepted the use of the right to silence when the suspect remained fully silent, but when they remained only partially silent, police were more likely to persuade them to waive the right.

In terms of the influence of the use of the right to silence, there are potentially negative consequences at the prosecution stage (e.g. the use of mediation), decisions on pre-trial detention and the trial, where judges attach probative weight to silence or the lack of explanation, as well as sentencing (namely, affording mitigation for cooperative behavior).

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The Belgian team has wrapped up with the following recommendations:

- Afford a more prominent place to the right to silence in Belgian legislation, including by transposing Directive 2016/343;
- Ensure that the caution on the right to silence and other relevant rights is given (also) at the moment of the suspect's arrest;
- Provide stricter rules on evidence exclusion in case of breach of the right to silence;
- Introduce an explicit provision whereby judges may exclude evidence obtained as a result of manipulation during interrogation;
- Raise awareness of criminal justice practitioners the difficulties and possible adverse consequences of the use of the right to silence in practice;
- Introduce an explicit legal provision against consideration of defensive strategy at sentencing;
- Provide specialised training on the right to silence for judges, prosecutors, police and lawyers.

The country presentations were followed by **remarks from Professor Lonneke Stevens of Free University Amsterdam** who served as a discussant in Webinar # 1. She has put several provocative statements around the right to silence for discussion with the audience:

- It is mostly (or only?) the ones who really understand the possible strategic benefits of remaining silent are able to fully profit from using the right to remain silent, while the more 'vulnerable' suspects tend to waive their right to silence. However, criminal procedure intends to protect the more vulnerable. So does the law actually 'work' according to its purpose? Should not vulnerable suspects and suspects choose (or be advised to) remain silent more often?

- In the Netherlands, Italy and Belgium the drawing of inferences from silence seems more 'hidden', while Ireland has a more sophisticated legislation in this regard. However, we still do not know what evidentiary weight is exactly attached to silence in criminal proceedings. This calls for further research, because otherwise the discussion concerning whether or not adverse inferences should be drawn would always be led in abstract terms. Are inferences from silence 'rational' and therefore not especially problematic (provided that the burden of proof on the prosecutor is met)? And should suspects be explicitly cautioned about possible negative consequences of remaining silent? Would not a caution about inferences given in general terms only create more confusion?

- It is intriguing that in Italy the use of silence is accepted as a 'neutral' and legitimate procedural strategy, while in the Netherlands and to a lesser extent in Belgium it is considered in morally negative terms. The moral disapproval of the exercise of the right to silence appears problematic. There is a need for more research across jurisdictions and professional groups on the acceptance of the right to silence. Viewing the exercise of silence as neutral is key to the effective exercise of the right to silence. Therefore, judges and other practitioners should be educated about all the existing rationales for the right to remain silent and the importance of this procedural right.

The ensuing discussion revolved around the following issues:

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- The degree to which the problematic aspects around the use of the right to silence in practice can be addressed by changing laws? For instance, can law effectively address the attitudes regarding cooperation or non-cooperation in criminal proceedings?

- The (supposedly) changing position regarding the need for a suspect statement as part of evidence to convict the suspect. Is it true that the need for a statement is diminishing and therefore the right to silence is better protected in practice (which however may lead to lesser protection of privilege against self-incrimination because the authorities will search for alternative sources of evidence, e.g. surveillance measures)? An opposite view was expressed that the fact that access to 'technical' evidence has increased, there is a stronger moral expectation that suspects should speak, and more possibilities to pressurize suspects into waiving the right to silence.

- The extent to which is it possible to (objectively) assess at which point it is 'reasonable' to assess the expect an explanation from the suspect and to estimate exactly what probative weight or value silence has in a given case. Is it possible to arrive to a uniformly-shared conclusion concerning when the burden of proof is met in the particular circumstances? In Italy, for instance, the interviewed judges did not seem to agree on whether or not it was the case. At the same time, it was noted that differences in subjective opinions do not necessarily exclude the possibility of a uniform standard.

Webinar # 2: Towards an evidence-based approach to the right to silence in criminal proceedings: debunking myths and taking action.[2] (29 June 2021, 15:00-17:00 ECT)

In this webinar, academics, (European and national) policy-makers and practitioners reflected on various obstacles to the effective protection of the right to silence in criminal proceedings. They have also critically reflected on the various ways of action available on the European and domestic levels to improve the quality of discourse around the right to silence and its effectuation in practice.

It is commonly known that the right to silence in criminal proceedings is one of the most politically debated procedural rights. Its very existence is often brought into question, for instance, in respect of suspects of terrorism or organised crime. The legal and political discourse on the right to silence is dominated by myths, such as that "only the guilty remain silent" or that the "right to silence prevents effective investigations." The right to silence and other procedural rights of suspects are threatened by the drive towards efficiency in criminal legal systems. The increasing sensitivity of criminal justice systems to the interests of ensuring public safety and the concern of delivering 'the truth' to the victims also puts the right to silence under risk.

Anna Pivaty opened the webinar and provided an overview of the problematic issues around the protection of the right to silence at the investigative stage discussed during the previous day.

[2] Note: Webinar # 2 was NOT audiovisually recorded.

With regard to the protection of the right to silence at police stations, the issues around (the lack) of disclosure of case-related information seem to be most problematic. Other issues revolve around the lack of clear regulations of police interrogations and unclarities around the role and position of legal advice.

In terms of the influence of silence at the investigative stage on the subsequent decision-making, this constitutes a large 'grey area' in the jurisdictions under review. Adverse inferences from silence are sometimes implicit, like for instance in Belgium, Italy or the Netherlands, whereas in Ireland they are more explicit. However, in all jurisdictions it is unclear what kind of role silence has in practice, in particular with regard to assessment of existing evidence. Should silence be allowed to influence the assessment of evidence? Do we need clearer safeguards in this regard? Is there a need to further streamline this process?

Another issue raised what whether and what extent the change in the law can help, independently or as part of a 'package' of actions toward improving the practices around the right to silence. How do we change the attitudes/assumptions about silence? Can training help? If yes, then what kind of training?

And finally, the relationship between protection of right to silence combined with digital/technical evidence such as surveillance or mobile phone data was highlighted as a relevant issue.

The panel discussion was opened by **Dr Fabien Le Bot**, Legal Officer at DG Justice of the European Commission who is responsible for the Directive 2016/343 on the presumption of innocence. Fabien began by complimenting the project for the results achieved and stressed the importance of obtaining empirical data on the operation of the right to silence and other procedural rights in practice.

The Commission staff follows legislation at EU level and they try to follow developments at national level. However, due to limited capacity it is difficult for them to follow developments concerning the practical effects of EU legislation, and in this regard the project findings are very useful.

Fabien expressed agreement with the conclusion achieved by the project team that the RTS is a dangerous terrain to legislate on, because it is so complex and has many nuances, which are difficult to grasp with an EU level instrument.

He accepted that the Directive provisions are not perfect, however in his opinion the Directive has added value in that:

1. It introduces EU level legislation on RTS and the fact that it exists obliges Member States (MS) to implement the RTS and the privilege against self-incrimination;
2. The Directive provision on inferences from silence presents a clear added value as compared to the ECtHR case law on the matter.

Currently the Commission is looking into the implementation of the Directive by Member States. There are already a number of ECtHR cases mentioning the Directive itself – but not on the right to silence provisions yet – rather on art 4 and art 8. But it is very likely that preliminary references on the RTS will come (or that infringement proceedings before CJEU will be initiated), probably in relation to the scope and the relationship between art 2 and 7 of the Directive.

The Commission has also launched infringement proceedings against 11 MS for non-transposition of the Directive, as the deadline for transposition was 3 years ago. In parallel it started compliance assessment in MS bound by the Directive, relying on the work of an external contractor. Following the exercise, the Commission has considered that unfortunately the transposition of the Directive is still incomplete in 8 MS. They have sent reasoned opinions to 4 member states in October last year, namely Bulgaria, Romania, Cyprus, Croatia. They started new infringement proceedings in February this year aimed at Finland, Poland, Estonia for lack of full transposition of the Directive.

Regarding the provisions of the right to silence, there were no completeness issues. The next step however is to assess conformity of the national legislation with the Directives. This is also done via contractors as part of compliance assessment. They see that there are quite a lot of problems in relation to public references of guilt. There are difficulties with this right, and this will be one of their priorities with regard to initiating infringement proceedings for non-conformity.

In relation to the privilege against self-incrimination provisions there are also some issues, namely the fact that many MS seem to consider the right as a synonym of the RTS, which is obviously not the case. The rights are linked but have a different purpose, therefore it is important to have a correct distinction in the law between these rights.

In some MS there are difficulties with the practical protection of this right, especially at the investigating stage. This is also linked to the scope of the national legislation, if national legislation grants the right only to persons who are formally considered suspects or who are formally charged as accused person, but do not grant the rights who are person who are arrested or just arrested without any status in national proceedings.

Some MS expressly penalise the exercise of RTS, for instance when there is an obligation to expressly mention circumstances excluding criminal liability. Finally, in the Commission's opinion, the Directive goes a bit beyond the case law of the ECtHR on adverse inferences from silence, in that it states that silence cannot used as evidence in itself or as independent evidence of guilt. Some MS have too generic provisions in this regard, which potentially allows relying on inferences beyond what is authorised by the Directive. In some MS, the general provisions on admissibility of evidence are not sufficient to guarantee effective exercise of the RTS, or they are not broad enough to also apply to *de facto* suspects.

The Commission now needs to assess these grey areas within the MS' legislation, which is not always straightforward. They also need to better understand the national legislation in order to start infringement proceedings. Furthermore, such proceedings might also arise from deficient practical implementation of systemic nature. In this regard, the findings of the EmpRiSe project may be very valuable.

Finally, Fabien encouraged defence lawyers from EU Member States to pose questions for preliminary rulings with regard to the Directive provisions.

Emmanuelle Debouverie, Senior Legal Policy Officer from Fair Trials emphasised the importance of the right to silence at the first interview of the suspect in criminal proceedings. First suspect statements are key in the criminal proceedings, as they are perceived as more reliable and valid, which is especially true when they are

incriminating. They impact the direction of investigations and can influence decisions on pre-trail detention, but also the outcome of the trial. Changing or retracting the first statement is seen as quite suspicious and as a sign of guilt – it is therefore extremely difficult for suspects to change their narrative at a later point.

Emmanuelle discussed five main obstacles which in her view impede the effective enforcement of the right to remain silent across the EU jurisdictions:

1. Police pressure / coercion leading to waivers

Coercion is inherent to police custody, but it is rarely expressed explicitly or a direct threat. It is also inherent to interrogation techniques that can be deceptive and coercive, additionally violence that is used during arrest and custody can have a coercive effect. These phenomena which are to some extent inherent to police custody limit the suspects' ability to exercise procedural rights.

2. Poor or no information on the rights leading to waivers

These include: inaccessible language in letter of rights, inadequate verbal cautions, as well as translation or interpretation difficulties.

3. The practice of drawing adverse inferences from suspects' silence

4. The practice of conducting digital 'strip searches' vs. the privilege against self-incrimination

This concerns the practice of compelling people to give access to phones, computers and social media accounts. Some countries criminalize refusal to give access. There is great uncertainly in the scope of privilege, however recently a case on this matter was communicated to the ECtHR (*Minteh v France*), which may provide more clarity.

5. Discrimination of vulnerable, marginalized, racialized and ethnic groups

Suspects from these groups are less likely to understand or invoke their rights, they are more likely to experience police pressure/abuse, are more vulnerable to police pressure, and feel more pressure to defend themselves and waive the right to silence.

It furthermore appears that suspect interviewing did not become obsolete in relation of *all criminal offences*, and there exists widespread state practice of informational interviewing. Therefore, state authorities are still keen on suspect statements. There is furthermore increasing time, efficiency and systemic pressure on the police and other criminal justice actors, and this is likely to incentivise greater reliance on confessions and the use of confession driven interrogation techniques. This in combination with the increased reliance on trial waiver systems (TWS) increases the risk of false confessions and miscarriages of justice. TWS create further incentives to speak, 'cooperate' and 'admit' guilt. This results in shorter custody time, faster resolution of case, shorter or no PTD, and perceived reduced penalty. Therefore, a vicious circle is created encouraging suspects to forego their procedural rights.

The proposed solutions are:

- Adopt a holistic / systemic approach to enhance protection of procedural rights of suspects in practice;

- Limit the existing incentives to use coercion / system pressure;
- Right sizing the CJS to limit overburdening of the system and incentives to resolve cases quickly
- Introducing appropriate sanctions/remedies for rights violations, particularly effective exclusionary rules;
- Introduce better investigation techniques (see the recently-adopted Principles on Effective Interviewing for Investigation and Information Gathering);
- Enhance the ability of persons to invoke and exercise rights by bringing lawyers in the interrogation room and reducing the incentives to speak, more importantly by limiting resorting to (long) PTD for suspects who remain silent or fail to confess;
- Introduce effective procedural safeguards around TWS;
- Improve the information given on procedural rights, when to use them, why, and potential consequences.

In conclusion, Emmanuelle stressed the importance of the role of lawyers in safeguarding the right to silence. There are a number of research studies demonstrating that lawyers help suspects to invoke the right to silence and that the presence of a lawyer in the interrogation room reduces the risk of coercion.

However, guaranteeing formal access to legal assistance is not a panacea, lawyers need to get adequate compensation, and they need to be able to give effective advice and assistance, which includes adequate legal provisions, training, adequate access to the information on charges/case files, and time and facilities to provide this assistance.

In the third panel intervention, **Dr Dorris de Vocht** of Maastricht University, who is also a part-time judge at the Limburg court in the Netherlands, provided an academic perspective on the problematic issues around the enforcement of the right to silence in judicial practice. In her observations she has mostly relied on the example of the Netherlands (NL).

In NL, article 29 of CPC constitutes a solid, unconditional basis of RTS. Nevertheless, the law in practice is more complex and nuanced than the law in the books.

RTS is already complex from a theoretical level, the right is mostly theoretical in nature, it is more of a legal principle than a formal procedural right, and therefore it is difficult to determine what to do to make this right work in practice. The relationship between RTS and other related rights and principles, notably presumption of innocence, burden of proof and nemo-tenetur is not very clear. RTS has a number of underlying rationales, but there is a lack of consensus in case law and national/European level on what is/are the most important rationale(s) such as preventing undue pressure, ensuring reliability of truth-finding or granting autonomy to the suspect during criminal proceedings as part of fair trial.

There are at least three contemporary challenges to the effective protection of the right to silence, which lie in: criminal justice policy, evidence gathering, and the judicial perspective / case law and judicial practice.

1. Criminal justice policy:

Western legal systems have been and are dominated by a trend to accelerate criminal proceedings to reduce cost and speed, and efficiency is a key goal of criminal proceedings which comes at the cost of suspects' procedural rights. In NL, ASAP proceedings lead to demands on the suspect to work on the case against him. In this context RTS is hardly seen as a right of the suspect but rather as an obstacle towards promoting efficiency.

Also, there is a clear focus on victims in recent times, who play a prominent role in serious cases. This tension is also voiced by professionals such as lawyers, for instance, some well-known defence lawyers in NL consider that suspects' silence disrespects victims, and argue that therefore the right to silence should not exist.

2. Evidence gathering:

For decades oral testimony has been seen as a very important, or the most important source of evidence. But more and more other types of 'technical' evidence are available, such as digital data, surveillance data and so on. This means that in some cases police do not need to rely on oral statements anymore – people can be mistaken or lie – therefore some believe that these 'objective' sources of information are more reliable. So, do we need suspect statements? In practice we still see that a lot of weight is placed on the statement of the suspect, particularly from the moral point of view: e.g. confession as an expression of remorse and 'respect' for the victim. The more incriminating information is presented to the suspect, the more pressing the need for answers would become. Furthermore, so-called 'technical evidence' can be quite indirect, and dots still need to connected, and therefore one still needs/wants input of the suspect.

3. The judicial perspective:

Do judges really know what happens in the interrogation room?

The centre of gravity of criminal proceedings is clearly on the pre-trial stage, fact-finding in court is often limited to what is in the case file. A large body of national research criticizes the content of police interrogation reports: for instance, on average less than 25% of spoken words in interrogation are documented. Yet Dutch judges show a high degree of trust in police reports (also seemingly because they have limited means to verify them).

Are there effective remedies for breaches of procedural rights? In NL there are no rules in admissibility of evidence, instead the principle of free selection and evaluation of evidence applies. Exclusion of evidence happens rarely in practice. It is also difficult for defence to prove that breach of RTS took place, as judges rely heavily on written records. Even if defence proves a violation, then motions are still difficult to win, because courts have much discretion in interpreting it and deciding on a sentence. Often this leads to sentence reduction rather than evidence exclusion.

There is furthermore emerging case law from the Dutch Supreme Court that allows taking silence into account as part of evidentiary constructions. Namely, it authorises taking silence into account when something 'screams for explanation' and no alternative scenario is given. Initially this reasoning applied only to financial crimes, but it is spilling over to many other types of criminal cases, and thus failing to give alternative account may become relevant in any case.

The following solutions were proposed to the problems outlined above:

- Expansion of the right to legal assistance at the investigative stage;
- Stricter approach of courts to the use of excessive pressure at interrogations: for instance, the Dutch Supreme Court is being critical of certain investigation methods such as the Mr Big method of undercover questioning.
- Develop a 'futureproof shared understanding of the RTS'. Does it only protect the innocent? Are they the only people worth protecting? Must we rather focus on fair trials a such? A source in human dignity, but we lose sight of principle of autonomy, promoting autonomy as a procedural value of fairness. Respecting autonomy is more important than ever, irrespective of guilt or not.
- The law can and should make a difference. Some of the identified problems are clearly connected to gaps in legal framework, like the case law on taking silence into account in relation to evidence, the law does not state anything on this and courts/judges have so much discretion, these situations are often not interpreted in favour of the defendant, so we need to think on how far we want this to go and can we implement safeguards here? More legal guidance could be given on pressure during interrogation.
- However, more important than changing the law is fostering change in police and legal practice. Protection of RTS takes place on the ground, by means of professional ethics and attitudes. We should foster awareness and ethical change mainly within police and the judiciary.
- Finally, although the Dutch legal system is built on written records prepared by police, one can achieve change in how the judge evaluates these records, which might ultimately improve their quality.

The fourth panelist, **Shalom Binchy** from Shalom Binchy & Co. Solicitors, a prominent criminal defence solicitor in Ireland and member of the national Policing Authority, covered the perspective of a criminal defence lawyer on the issues raised in the second webinar.

She firstly noted that in the recent years, the maximum police detention periods have rapidly risen in Ireland. While previously the maximum authorised period of police custody was 20 hours, nowadays the time that suspects spend in custody may easily add up to 7 days. Furthermore, in her view latterly the inference provisions are used more frequently.

On the other hand, the introduction of videorecording of suspect interviews has significantly helped lawyers in their role and has been a game changer for suspects. Furthermore, it is also viewed as beneficial by police, as it helps to refute allegations of physical brutality and coerced confessions.

Another crucial development was introducing a solicitor present in the interrogation room. This practice, which however so far has no statutory basis in Ireland, makes an enormous difference as far as the exercise of the right to silence at police interrogation is concerned, in Shalom's opinion. Remaining silent must have been extremely difficult without a lawyer present in the past. She gives an example of her own case, where her client had an intellectual disability, they agreed on silence, but he started talking during an interrogation, as he perceived police to be his 'friends'. She stopped the interview for a private consultation and even after he still continued talking. Over the course of hundreds of questions, she had to remind him at every question of her advice to make no comment. Whilst this amount of lawyer intervening during an interview is normally not tolerated by police, she had to reason with the police that this was a very vulnerable client. Without her presence she doubts he would have given truthful answers, as he was highly suggestible and compliant.

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There are a number of reasons why solicitors may advise clients to remain silent which are not necessarily linked to avoiding self-incrimination or admitting guilt:

- Lawyers do not have insight in what is held against us to make a robust denial about the arrest.
- Revealing information may embarrass or damage suspect or someone close to them.
- Answering questions may put the suspect in danger.
- Suspects may want a consultation with lawyer first.
- Innocent suspects may be vulnerable, suggestible or inarticulate – they may give an inaccurate or incoherent narrative which can harm them along the way.

Shalom has further listed a considerable number of what she considers to be obstacles to the effective exercise of the right to silence from the criminal lawyers' perspective in the Irish context:

- The existence of provisions on inferences from silence and 'inference interviews' which are usually done after a number of interviews where the suspect has remained silent;
- Access to lawyer (in remote areas in Ireland);
- Remote advice during COVID19;
- No formal waiver procedure for the right to legal assistance – which is therefore open to pressure from police– especially if it is not properly recorded how suspects were informed about the right (e.g. whether they were told that 'it will take longer if you take a lawyer'). Sometimes police actively discourage people from engaging certain lawyers and promote engaging other lawyers ('in house' lawyers);
- Police relying on 'in house' lawyers who are likely to be less confrontational;
- Lack of training for lawyers in police station legal assistance;
- Poor quality of translators;
- Lack of clear criteria for fitness to be questioned, psychiatrists have little understanding of the interview process, which constitutes a problem;
- Lengthy detention periods including questioning overnight in some cases – exhausted people are more suggestible, more prone to speaking;
- Minimum mandatory sentences (misuse of drugs cases), huge pressure in these situations to make statements early as this is the only way to avoid 10-year sentences;
- Lack of disclosure of case-related from the police;
- Need to provide an early notification of the defence, especially in sexual offences and assault cases;
- Adverse impact of silence on bail – prosecution can explicitly refer to the suspect's failure to cooperate with investigation;
- Silence resulting in non-application of mitigation at sentencing stage – credit is given for early cooperation only;
- 'Robust' police questioning that is more aimed at confessions is tolerated by Irish courts, despite the existence of the 'new model' of interrogation based on information-gathering principles (the GSIM model);
- Seizure of devices like phones effectively breaches the right to silence – phones, computer, however it is tolerated by law.

However, the main problems in her view remain the existence of the inference from silence provisions and the lack of disclosure by the police. Although some legal safeguards around inferences exist, such as the provision of a special 'caution', they are not always effective: a caution for instance can be confusing, as most suspects do not grasp what the inferences may mean.

In relation to disclosure: there is no legislative provision to mandate police to provide disclosure. Therefore, it is left to the police discretion, and the latter are not interested in disclosure.

Finally, Shalom noted that Ireland has not opted into the Directive 2013/48 on the right of access to a lawyer in criminal proceedings, which enables it to take certain liberties as far as this right is concerned. For instance, according to a new proposed bill ('The general scheme of Garda Siochana powers'), the period between when the suspect requested a lawyer and the lawyer's arrival of lawyer will be excluded from the police custody period. This might put pressure on suspects, as they will actually remain in custody/detention longer whilst waiting for the lawyer to arrive, and this can be used by the police to pressure suspects into waiving the right. Secondly, the bill includes a provision whereby a lawyer can be removed from the interview at a very low threshold.

In the concluding part of the webinar, **Yvonne Daly** shared the experiences of the 'train the trainer' program for criminal defence solicitors developed and delivered by the EmpRiSe project in Ireland. Elements of the training program included roleplays aimed, for instance, at having the participants experience remaining silent in the role of the suspect and how challenging and unnatural it is. Lawyers also were guided to reflect on such questions as: under what circumstances do they give advice to remain silent? Do they themselves and their clients understand the inference provisions? Although the training took place in a digital format, participants evaluated it very highly. The podcast of Yvonne's presentation can be found here: https://empriseproject.org/training.