



# RESEARCH NOTE

## FROM THE RESEARCH AND DOCUMENTATION DIRECTORATE

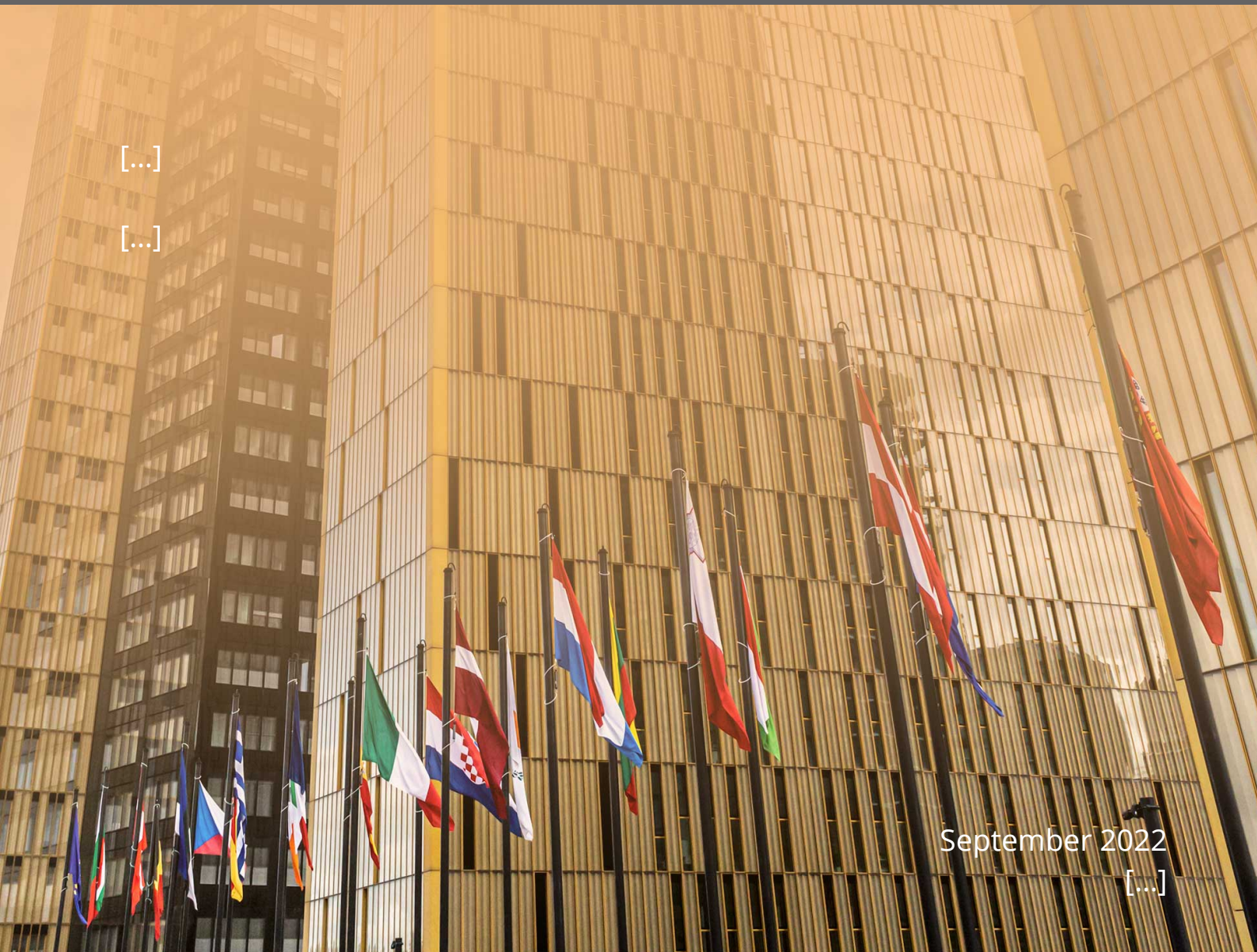
Role of the criminal court in the event of a breach of the accused person's right to be informed of his or her procedural rights

[...]

[...]

September 2022

[...]





## SUMMARY

### INTRODUCTION

1. The Research and Documentation Directorate (DRD) received a request for a research note on the following questions:
  - At the trial of an accused person, is the possibility for that person to raise a plea alleging a breach of the right to be informed of his or her procedural rights, in particular the right to remain silent, subject to procedural limitations, in particular the requirement that such a plea must be raised before any defence on the merits (*in limine litis*) or at another specific point in the proceedings?
  - Does the criminal court have the discretion, or is the court obliged, to raise of its own motion, prior to and/or at the trial, a plea alleging a breach of the accused person's right to be informed of his or her procedural rights, in particular the right to remain silent? If so, what are the conditions for such discretion or obligation, particularly in relation to the assistance of the person concerned by a lawyer?
2. This research note covers the rights of 19 Member States, namely **Austria, Belgium, Bulgaria, Cyprus, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Spain and Sweden.** <sup>1</sup>
3. Its scope is limited to cases in which the breach of the accused person's right to be informed of his or her procedural rights ('the right to information') occurred during the preparatory phase of the criminal proceedings, that is to say, before the referral of the case to the trial court. <sup>2</sup> It also only covers the solutions applied in the principal criminal procedures in force in the legal systems examined. <sup>3</sup>

### I. OVERVIEW

4. Criminal proceedings, governed in principle by Codes of Criminal Procedure ('CCP'), <sup>4</sup> contain, as a general rule, numerous provisions that grant various rights to the accused person, <sup>5</sup> above all with a view to compensating for the weaker position of the accused person in relation to the public authorities conducting the criminal proceedings. <sup>6</sup>
5. Certain specific rules of criminal procedure granting such rights have been harmonised at EU level. This is particularly the case with the right to information, enshrined in Articles 3 and 4 of

---

<sup>1</sup> [...]

<sup>2</sup> This thus excludes cases of ignorance of the obligation to inform the accused person of his or her procedural rights by the trial court.

<sup>3</sup> In particular, simplified procedures concerning minor offences or proceedings before specialised courts, such as youth courts, are not covered.

<sup>4</sup> All references to legislative texts, including those referring to national CCPs, concern the Codes that are currently in force, unless otherwise specified in the text.

<sup>5</sup> For the sake of simplicity, the term 'accused person' will be used in this note as a generic term to describe the person whose criminal liability for an offence is the subject of criminal proceedings, both during the preparatory phase and during the trial phase (*phase décisive* (decisive phase)), regardless of the term used in national law (such as, for example, suspect, *le témoin assisté* (witness under caution, in the capacity as a potential suspect, afforded the right to be assisted by a lawyer and other rights), accused person, defendant, accused, person charged).

<sup>6</sup> Rassat, M.-L., *Procédure pénale*, 3<sup>rd</sup> ed., 2017, Ellipses, Paris, p. 17.

Directive 2012/13.<sup>7</sup> However, EU law does not harmonise national criminal procedures as a whole; for example, it does not provide for uniform consequences for a breach of the right to information, nor does it determine the scope of the jurisdiction of the court<sup>8</sup> which has established such a breach during criminal proceedings. In that respect, Article 8(2) of Directive 2012/13 merely imposes an obligation on Member States to ensure that accused persons have the right to challenge, in accordance with the procedures under national law, the possible failure or refusal of the competent authorities to provide information in accordance with that Directive.

6. In that regard, in order to answer the questions raised in this research note, it would seem appropriate to examine the rights of the accused person and the duty of the criminal court in relation to the measures available under the procedures of national law that may be applicable in the event that a breach of the right to information is established by the accused person and in the event of such a finding by the criminal court. Separate assessments of (II) pre-trial measures and (III) measures applicable at trial will be carried out to consider the second question addressed by this research note.

## II. PRE-TRIAL MEASURES

7. A breach of an accused person's right to information, where it occurs during the preparatory phase of criminal proceedings, may be reviewed by a court before the trial (whilst still during the preparatory phase,<sup>9</sup> or during the so-called 'intermediate' phase). It may lead to the decision to invalidate a procedural act, or even to dismiss the charge(s). Some legal systems do not, in that respect, (A) have recourse to a mechanism invalidating procedural acts, whereas (B), in other systems, such a review is exercised by means of such a mechanism.

### A. LEGAL SYSTEMS WITHOUT RECOURSE TO A MECHANISM INVALIDATING PROCEDURAL ACTS

8. In some legal systems, a thorough review of the preparatory phase is carried out by the court as part of the preliminary examination of the charge(s), without recourse to an invalidation mechanism.
9. In that respect, **German** law provides for an 'intermediate' phase in criminal proceedings (*Zwischenverfahren*), situated between the preparatory phase and the trial phase,<sup>10</sup> during which the court seised with the case is called upon to examine whether the charges brought by the public prosecutor against the accused person are sufficient to make conviction likely.<sup>11</sup> As part of

---

<sup>7</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ([OJ L 142, 2012, p. 1](#)).

<sup>8</sup> For the sake of simplicity, the word 'court' will be used in this research note as the equivalent to the court having jurisdiction in the matter, whatever its composition.

<sup>9</sup> With regard to the preparatory phase, two main models of judicial intervention are applied in the Member States examined: that of the *juge d'instruction* (Investigating Judge) in charge of investigations and dealing with judicial issues (in particular **Belgium, France, Luxembourg, Spain**) and that of the judge intervening only to deal with judicial issues (Pradel, J., *Droit pénal comparé*, 4<sup>th</sup> ed., 2016, Dalloz, Paris, pp. 226-227) (such as whether pre-trial detention of the accused person should be ordered) or in order to manage certain evidence (with a view, in particular, to preserving it for the hearing when it cannot be produced there).

<sup>10</sup> Müller, E., Schlothauer, R., Knauer, C., *Münchener Anwaltshandbuch Strafverteidigung*, 3<sup>rd</sup> ed., 2022, C.H. Beck, Munich, paragraph 5.

<sup>11</sup> See Paragraph 203 of the German CCP.

its examination, the court must – according to case-law <sup>12</sup> – take into account, of its own motion, the possibility that the evidence on which the charges are based may not be admissible, and it must, where appropriate, disregard that evidence when assessing the likelihood of a conviction before referring the case to the main hearing for judgment or before dismissing the case. <sup>13</sup>

10. Under **Bulgarian** law, during the preliminary hearing, the court verifies, of its own motion, whether, during the preparatory phase, there have been any breaches of essential procedural requirements that can be remedied, which have limited the procedural rights of the accused person, the victim or those entitled to benefit from those rights. <sup>14</sup> That review may result in the court declaring a stay of proceedings and in the case being referred back to the prosecutor, who may then remedy any procedural breaches found by the court. <sup>15</sup> Where a substantial procedural defect took place in the taking of evidence, the record (report) is considered invalid and may not be used as evidence. Where the act performed falls within the category of acts that may be repeated, the procedural defect is remedied, and the act is repeated in accordance with the rules of the Bulgarian CCP. However, where the act committed in breach of essential procedural requirements cannot be carried out again, for example, in the case of a search or seizure, the prosecutor must take the necessary steps to prove, by other means, the facts set out in the invalid record.

---

<sup>12</sup> See Bundesgerichtshof (Federal Court of Justice, Germany), order of 1 December 2016, 3 StR 230/16, ECLI:DE:BGH:2016:011216B3STR230.16.0, paragraph 14. In that respect, it should be noted that case-law relating to the court's obligation to take into account the inadmissibility of evidence, at the 'intermediate' phase of the proceedings, may raise two questions with regard to the fact that, during the subsequent phase, namely at the hearing, it is for the accused person to object to the use of such evidence (see footnote 32 below). Having regard to that obligation on the part of the court during the 'intermediate' phase of the proceedings, it may be necessary, first, to consider why inadmissible evidence may be presented at the hearing and why such evidence has not already been excluded during the preceding phase of the proceedings. On that point, it appears that, during the 'intermediate' phase of the proceedings, the court does not systematically examine the circumstances in which evidence was gathered during the inquiry, which may, depending on those circumstances, render that evidence inadmissible (see, in that respect, Eisenberg, U., *Beweisrecht der StPO. Spezialkommentar*, 10<sup>th</sup> ed., C.H. Beck, Munich, 2017, paragraphs 749 et seq.). As a result, evidence that is inadmissible because of the circumstances surrounding how it was gathered may elude exclusion during the 'intermediate' phase, meaning that the accused person must challenge its admissibility at the hearing. Second, one might ask why the inadmissibility of evidence must be taken into account by the court of its own motion during the 'intermediate' phase of the proceedings, while at the hearing it is for the accused person to argue that it is inadmissible. In that regard, it should be noted, first of all, that case-law requiring the accused person to object to the use of inadmissible evidence has been criticised by legal literature, in particular, for being inconsistent (see Eisenberg, op.cit. paragraphs 429 et seq.; and Kuhn, B., 'Die Widerspruchslösung', *Juristische Arbeitsblätter* 2010, p. 891). It should also be noted that, even if the accused person must be heard during the 'intermediate' phase, the court's examination is carried out, principally, by means of written documents, including, in particular, the prosecution's indictment and case file. At the hearing, on the other hand, everything is debated orally in the presence of the accused person, which makes it easier for the latter to exercise his or her right to object, where appropriate, to the use of evidence obtained in breach of his or her right to be informed of his or her rights.

<sup>13</sup> See Paragraph 199 of the German CCP. Should the case be dismissed, Section 211 of the German CCP would only allow the proceedings to be reopened and a fresh indictment for the same charges if there were new facts or evidence.

<sup>14</sup> Article 248(1) point 3 of the Bulgarian CCP.

<sup>15</sup> Article 249(2) of the Bulgarian CCP.



## B. LEGAL SYSTEMS WITH RECOURSE TO A MECHANISM INVALIDATING PROCEDURAL ACTS

### 1. GENERAL OBSERVATIONS

11. In legal systems with a mechanism invalidating procedural acts, a finding that an act is invalid has the effect of annulment. An act vitiated by invalidity has no effect and cannot constitute a source of information on the facts.
12. Research carried out in the legal systems examined shows that a breach of an accused person's right to information during the preparatory phase is likely to render acts of that phase invalid (in particular, any statements given by the accused person), under **Belgian**,<sup>16</sup> **French**,<sup>17</sup> **Greek**,<sup>18</sup> **Luxembourg** and **Romanian** law.<sup>19 20</sup>
13. In those legal systems, a procedural act in the preparatory phase may be declared invalid in a separate decision delivered by a court (*juge d'instruction* (Investigating Judge), *chambre de l'instruction* (Examining Chamber), *chambre de la mise en accusation* (Indictment Chamber), *chambre préliminaire* (Pre-Trial Chamber), etc.) before the case is referred to the trial court (**Belgium, France, Luxembourg, Romania**). That solution means that information obtained in breach of the right to information is unavailable to the trial court, particularly where the annulment entails the removal of the documents bearing the annulled act from the case file (**Belgium, France, Luxembourg, Romania**). It also contributes to the smooth-running of proceedings in so far as, even before the hearing, the parties are aware that it will not be possible to rely on certain acts established during the preparatory phase.

### 2. LIMITATIONS ON THE POSSIBILITY FOR THE ACCUSED PERSON TO RAISE INVALIDITY CLAIMS

14. In so far as the decision on the invalidity of a procedural act must be handed down before the case is referred to the trial court, the above-mentioned legal systems often provide that applications by parties alleging the invalidity of a procedural act may only be submitted up to a particular stage in the proceedings. Thus, in **French** law, during the preparatory investigation, which is mandatory in criminal cases, 'although the parties may raise invalidity claims during the course of the investigation, they are, in return, required to do so before the court closes its

---

<sup>16</sup> For 'invalidity of evidence'.

<sup>17</sup> For invalidity of 'private interest'. With regard, more specifically, to a breach of the accused person's right to information, the **French** Cour de cassation (Court of Cassation) currently considers that such a breach will inevitably infringe that person's interests, except in 'insurmountable circumstances'. In that case, there is therefore a presumption of a grievance. See Guerrin, M., 'Nullités de procédure', *Répertoire de droit pénale et de procédure pénale*, Dalloz, June 2015, paragraph 38.

<sup>18</sup> As an 'absolute nullity'. See, in that regard, Πλαγάκος, Γ., *Ο Ανακριτής, Εκδόσεις Σάκκουλας ΑΕ, Αθήνα-Θεσσαλονίκη*, 2021, pp. 478-481, available at [sakkoulas-online](http://sakkoulas-online). Κωνσταντινίδης, Α., *Ποινικό Δικονομικό Δίκαιο*, 4η έκδ., Εκδόσεις Σάκκουλας ΑΕ, Αθήνα-Θεσσαλονίκη, 2020, p. 135, available at [sakkoulas-online](http://sakkoulas-online).

<sup>19</sup> As a 'relative nullity' (Article 282, read in the light of Article 281 of the Romanian CCP).

<sup>20</sup> Invalidity mechanisms also exist in other national criminal procedures (**Austria, Italy, the Netherlands, Spain**), but do not appear to apply to the cases covered by this research note. Under **Spanish** law, an application for the annulment of a procedural act (*incidental de nulidad de actuaciones*), provided for under Article 241 of the Ley Orgánica del Poder Judicial (Organic (Framework) Law 6/85 on the Judicial System) ('the OLJS') of 1 July 1985 (BOE No 157, of 2 July 1985, p. 20632), may be submitted to declare procedural acts that have breached one of the fundamental rights enshrined in Article 53(2) of the Spanish Constitution invalid, including the right to information (Article 17(3) of the Constitution) and the right to effective judicial protection (Article 24 of the Constitution). It is nevertheless an exceptional application, brought in the alternative, that may be submitted, provided, first, that it is not possible to raise the claim for the breach of the fundamental right at issue before the closing judgment and, second, that that judgment cannot be subject to appeal. See, in that respect, Carrasco Durán, M., 'El incidente de nulidad de actuaciones: problemas y algunas soluciones', *Revista Aranzadi Doctrinal*, no 3/2013, Estudios.

investigation with an order that wipes out any defects from the previous proceedings'.<sup>21</sup> Under **Greek** law, an 'absolute nullity' resulting from a breach of the rights of the accused person or a breach of the procedure during the preparatory phase may be raised by the person concerned, until the accused person is referred to the hearing and cannot subsequently be raised at the hearing.<sup>22</sup> Under **Luxembourg** law, if a preparatory judicial investigation has been opened on the basis of the inquiry, an application for a declaration of invalidity may be lodged by the accused person before the Chambre du conseil du Tribunal d'arrondissement (Investigation Chamber of the District Court) within five working days of being charged.<sup>23</sup> In the event of an investigation procedure, the application must be lodged in the course of the investigation itself, within five working days of service of the act concerned.<sup>24</sup> Under **Romanian** law, in the event of a breach occurring during the preparatory phase, a 'relative nullity' must be raised during or immediately after the act has been carried out or, at the latest before the conclusion of the proceedings before the Pre-Trial Chamber.<sup>25</sup>

### 3. COURT'S OWN MOTION TO DECLARE THE INVALIDITY OF PROCEDURAL ACTS

15. The above-mentioned legal systems do not preclude the courts that are competent to rule on the invalidity of procedural acts prior to trial from declaring, of their own motion, invalidities as a result of a breach of the right to information during the preparatory phase.
16. Under **Belgian** law, the Chambre des mises en accusation (Indictment Chamber) examines, at the request of the public prosecutor or one of the parties, and in other cases of referral, the regularity of the proceedings before it and may do so of its own motion.<sup>26</sup> In doing so, where the court examines the proper conduct of the proceedings of its own motion and where there may be grounds for invalidity, it orders the re-opening of the oral proceedings.<sup>27</sup> Where it finds that there has been an irregularity, an omission, grounds for certain types of invalidity, or grounds for inadmissibility or termination of the criminal proceedings, it declares, as appropriate, the procedural act in question and all or part of the subsequent proceedings invalid.<sup>28</sup> Under **French** law, the chambre de l'instruction de la cour d'appel (Investigation Chamber of the Court of Appeal) may raise, of its own motion, any ground of invalidity when examining procedural correctness.<sup>29</sup> The same is true under **Greek** law in relation to the jurisdiction of conseils

<sup>21</sup> Guerrin, M., see footnote 17, paragraph 179; Article 179 of the French CCP.

<sup>22</sup> Article 174(1) of the Greek CCP. Παπαδαμάκης, Α., *Ποινική Δικονομία*, 10η έκδ., Εκδόσεις Σάκκουλας ΑΕ, Αθήνα-Θεσσαλονίκη, 2021, p. 294, available at [sakkoulas-online](http://sakkoulas-online).

<sup>23</sup> Article 48-2 of the Luxembourg CCP.

<sup>24</sup> Article 126(3) of the Luxembourg CCP.

<sup>25</sup> Articles 282(3) and 282(4)(a) of the Romanian CCP.

<sup>26</sup> Article 235bis(1) and (2) of the Belgian code d'instruction criminelle (Criminal Procedure Rules) As regards the Chambre du Conseil (Investigation Chamber), see Article 131 of the Belgian code d'instruction criminelle (Criminal Procedure Rules). It should be noted that the investigating courts take into account the provisions of Article 32 of the titre préliminaire (Preliminary Title) of the CCP, in the light of the *Antigone* case-law from the Cour de cassation (Court of Cassation) with regard to improperly obtained evidence. See Meese, J. 'Onrechtmatig verkregen bewijs in strafzaken', *Bewijsnood na het vernieuwde bewijsrecht*, Vanlerberghe, B., Rutten, S. and Rozie, J. (eds.), Brussels, Intersentia, 2020, 61-97, p. 86. The *Antigone* judgment of the Cour de cassation (Court of Cassation) [Cass. (2<sup>nd</sup> ch.) 14 October 2003, RG P.03.0762.N, 14] is 'anchored' in trial court legislation contained in Article 32 of the titre préliminaire (Preliminary Title) of the CCP, cited below in footnote 34. Article 32 of the titre préliminaire (Preliminary Title) of the CCP provides for only a limited number of grounds for inadmissibility of improperly obtained evidence.

<sup>27</sup> Article 235bis(1) and (2) of the Belgian code d'instruction criminelle (Criminal Procedure Rules).

<sup>28</sup> Article 235bis(6) of the Belgian code d'instruction criminelle (Criminal Procedure Rules).

<sup>29</sup> See Article 206 of the French CCP, which states: 'Subject to the provisions of Articles 173-1,174 and 175, the chambre d'instruction (Investigating Chamber) examines the correctness of the proceedings submitted to it. If it should discover a ground for invalidity, it will declare the act vitiated by it invalid and, if appropriate, will also declare all or part of the

juridictionnels (Judicial Councils).<sup>30</sup> In **Romanian** law, the Curtea Constituțională (Constitutional Court) has ruled that it is unconstitutional for a court not to raise a 'relative nullity' of its own motion.<sup>31</sup>

### III. MEASURES APPLICABLE AT TRIAL

17. A defect in a procedural act in the preparatory phase is likely to affect (A) the admissibility of the evidence obtained through that act, and (B) the decision on the merits.

#### A. EXCLUSION OF EVIDENCE OBTAINED IN BREACH OF THE RIGHT TO INFORMATION

18. The evidence that is likely to be excluded in the case of a breach of the right to information is, first and foremost, the statement of the accused person, particularly where it contains self-incriminating remarks. Second, a question may arise as to the admissibility of indirect evidence based on statements made by the accused person (such as witness statements) and evidence obtained from information contained in that statement (such as objects found during a search).

In theory, there are different mechanisms, during a trial, for excluding evidence obtained in breach of procedural rights: first, the rules on the exclusion of evidence; second, the rules on the admissibility of evidence; third, the invalidity of procedural acts; and fourth, the overall evaluation of the trial, left to the court's discretion.<sup>32</sup> Recourse to one of those mechanisms does not preclude the application of the others. Very often, several mechanisms are applied in the context of the same proceedings, but at different stages.<sup>33</sup> In particular, recourse to a mechanism invalidating procedural acts does not always preclude cohabitation with the rules on the exclusion of evidence, as is the case under **Belgian**<sup>34</sup> and **Luxembourg** law.<sup>35</sup>

---

subsequent proceedings invalid. After annulment, the chambre d'instruction (Investigating Chamber) may either raise the matter and proceed in accordance with Articles 201, 202 and 204, or refer the case back to the same investigating magistrate or to another one, in order to continue the investigation'.

<sup>30</sup> Article 174(1) of the Greek CCP.

<sup>31</sup> [Decision no 554](#) of 19 September 2017 (*Monitorul Oficial al României*, Part I, no 1013 of 21 December 2017).

<sup>32</sup> Kuczyńska, H., 'Mechanisms of Elimination of Undesired Evidence from Criminal Trial: A Comparative Approach', *Revista Brasileira de Direito Processual Penal*, vol. 7, no 1, January-April 2021, pp. 43-92. HeinOnline, p. 51.

<sup>33</sup> *Ibidem*.

<sup>34</sup> In that respect, Article 32 of the titre préliminaire (Preliminary Title) of the Belgian CCP provides that a decision to exclude inadmissible improperly obtained evidence is to be taken only if compliance with the formal requirements concerned is required on pain of invalidity, if the irregularity committed has put into question the reliability of the evidence, or if the use of the evidence would be contrary to the right to a fair trial. The obligation to inform of the right to remain silent is not required on pain of invalidity under Belgian law. Consequently, the first criterion of Article 32 of the titre préliminaire (Preliminary Title) of the CCP cannot be applied in the event of a breach of the obligation to provide information on this right, which means that, with regards to a review of the grounds for invalidity under Article 32 of the titre préliminaire (Preliminary Title) of the CCP, in the event of a breach of the obligation to provide information on the right to remain silent, there remain only other two criteria under Article 32 of the titre préliminaire (Preliminary Title) of the CCP (Tersago, P. 'De voorlichting van verdachten over hun procedurele rechten als fundamentele waarborg voor het recht op een eerlijk proces', *Politie en recht*, 2018 p. 183, annotation by Corr. West-Vlaanderen, afdeling Bruge, 9 February 2018. That author, discussing the obligation to inform of the right to remain silent, observes that, as soon as specific questions are put to a person as a suspect, that person has the right to remain silent, a right which must be communicated to that person before questioning and that, although this legally required information which must be given before questioning is not required on pain of invalidity and does not fall within the rules on sanctions laid down in the sixth paragraph of Article 47bis of the Code d'instruction criminelle (Criminal Procedure Code), the obligation to inform of the right to remain silent is nevertheless essential from the point of view of the right to a fair trial).

<sup>35</sup> See Luxembourg Cour de cassation (Court of Cassation) judgment [no 57/2007](#) of 22 November 2007, which states that the trial court may set aside evidence obtained unlawfully not only where compliance with certain formal requirements is laid down on pain of inadmissibility, but also where the irregularity committed has put into question the credibility of the evidence or where the use of the evidence is contrary to the right to a fair trial.



19. Thus, in order to answer the questions raised in this research note, it is necessary to analyse the general rules in force in the legal systems examined regarding the exclusion of evidence, which may be applied in the event of a breach of the right to information. To that end, it would seem appropriate to examine separately (1) the legal systems of the Romano-Germanic family that do not have recourse to a mechanism invalidating procedural acts to sanction a breach of that right, (2) the legal systems of that family which do have recourse to an invalidity mechanism to penalise such a breach, and (3) the common law legal systems.

#### 1. LEGAL SYSTEMS WITHOUT RECOURSE TO A MECHANISM INVALIDATING PROCEDURAL ACTS

20. As a preliminary point, it should be noted that some of the legal systems belonging to the group examined in this section (**Austria, Bulgaria, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Spain, Sweden**) provide for specific procedural consequences in the event of a breach of the right to information.
21. In that respect, under **Austrian** law, where the accused person is not informed of his or her right to remain silent or to consult a lawyer, the questioning of that accused person must be regarded as information (*Erkundigung*) and not as evidence of a statement (*Vernehmung*).<sup>36</sup> It follows that, in principle, the court is prohibited from using it as evidence. The use of information by the court to justify conviction may constitute a procedural defect in the decisive phase.<sup>37</sup>
22. Under **Hungarian** law, a statement made by an accused person who has not been informed of his or her right to remain silent should not be taken into account except in two situations: first when the accused person was informed of his or her right to remain silent earlier in the proceedings and his or her lawyer was present during questioning, and second, when the accused person stood by his or her statement after being informed of his or her right to remain silent.<sup>38</sup>
23. Under **Italian** law, statements made by an accused person obtained in breach of the right to be informed of the right to remain silent, and thereby in breach of the right to information, are 'unusable'.<sup>39</sup> An objection to the use of such statements may be raised by the accused person at any stage of the proceedings and the court is required to raise an objection of its own motion.<sup>40</sup>
24. Furthermore, the legal systems of the group examined in this section do not seem to provide for automatic procedural consequences linked to that breach (the breach does not produce procedural effects *ipso jure*).<sup>41</sup> Rarely do those legal systems expressly determine the range of

---

<sup>36</sup> Paragraphs 151 and 152 of the Austrian CCP. The position is different, however, where the accused person is aware of his or her rights and of the offence of which he or she is suspected. See, in that regard, Paragraph 152(1) of the Austrian CCP; legal rule (*Rechtssatz*) of the Oberster Gerichtshof (Supreme Court) [RS0129599](#); Oberster Gerichtshof (Supreme Court), judgment of 4 April 2017, 14 Os 68/16f; Kirchbacher/Keglevic in Fuchs/Ratz, WK CCP, Manz, Wien, 2021, Paragraph 152(1).

<sup>37</sup> See, in that regard, paragraph 34 of the Summary.

<sup>38</sup> Sections 185(3) and 185(4) of the Hungarian CCP, as well as judgments BH1994.177, ÍH 2005.136, BH1996.353. Indeed, the presence of a lawyer during the questioning of an accused person is a guarantee of compliance with procedural rules, as the Alkotmánybíróság (Constitutional Court) has already found [Decision 8/2013 (III.1.) AB].

<sup>39</sup> Article 64(3)(b) and Article 64(3-bis) of the Italian CCP.

<sup>40</sup> Article 191(2) of the Italian CCP.

<sup>41</sup> In that respect, by way of example, as regards **German** law, it is clear from the case-law of the Bundesgerichtshof (Federal Court of Justice) that there is no general principle in that legal system according to which any breach of a procedural rule in the taking of evidence always renders that evidence inadmissible in criminal proceedings; the question of whether evidence should not be used because of such a breach must be decided on the particular circumstances of the case and, in particular, taking into account the nature of the rule breached and the seriousness of the breach, balancing the conflicting interests involved. From that point of view, prohibition on the use of evidence must be regarded as an exception to the rule, an

measures to be applied in that situation (**the Netherlands** does do so, however <sup>42</sup>). In those legal systems, however, evidence obtained in breach of the right to information may need to be excluded depending on the circumstances of the case.

25. For example, under **German** law, the Bundesgerichtshof (Federal Court of Justice) has ruled that statements made by an accused person who has not been informed of his or her right to remain silent must not be used against him or her. However, that limitation does not apply where the accused person knew, at the start of questioning, that he or she was entitled to remain silent or where the accused person subsequently gave express consent, before the trial court, to the use of his or her statement by that court. <sup>43</sup> Furthermore, case-law requires, in principle, that a causal link be established between the breach of the accused person's procedural rights and the accused person's statement. Thus, in criminal matters, the German Supreme Court has ruled that a failure by the police to inform the accused person of the charge against him or her does not mean that the statement made by that accused person to the police should not be used for the purposes of his or her criminal conviction where there are grounds to presume that the breach in question did not have an impact on the conduct of the accused person during questioning. <sup>44</sup>
26. Under **Spanish** law, Article 11 of the OLJS provides that evidence obtained, directly or indirectly, in breach of fundamental rights or freedoms is inadmissible. That has been tempered, however, by the recent case-law of the Tribunal Constitucional (Constitutional Court), according to which, in order to rule on the exclusion of evidence, the court is required to weigh up the rights affected according to the circumstances of the specific case. <sup>45</sup> That approach can also be found in the case-law of other legal systems. <sup>46</sup>
27. It would therefore appear that, in the legal systems of the group analysed in this section, except for the situations in which the consequences of a breach of the right to information are expressly provided for, it is possible to start from the principle that it is essentially for the trial court to decide on a case-by-case basis whether the consequences of a breach of the right to information require that a specific measure be applied, including the exclusion of evidence. <sup>47</sup>

---

exception which can only be allowed for extraordinary, compelling reasons (see the Bundesgerichtshof (Federal Court of Justice) judgment of 11 November 1998, 3 StR 181/98, paragraph 10 and the case-law cited). Under **Polish** law, differing opinions exist in legal literature concerning whether the statements of an accused person, who has not been informed of his or her right to remain silent, can be used as evidence (for an overview, see Kurowski, M., *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, (ed.) D. Świecki, LEX/el. 2022, Article 175(7).

<sup>42</sup> Section 359a of the Dutch CCP sets out the consequences of breaches of procedural requirements during the preparatory phase in general, and lists three measures that may be applied by the court of first instance and the court of appeal: sentencing reduction (see section III.B.), the exclusion of evidence (this section) and the inadmissibility of the prosecution's case (literally, in Dutch, 'the prosecution is inadmissible') (see section III.B.).

<sup>43</sup> Bundesgerichtshof (Federal Court of Justice), order of 27 February 1992, 5 StR 190/91.

<sup>44</sup> Bundesgerichtshof (Federal Court of Justice), order of 6 March 2012, 1 StR 623/11.

<sup>45</sup> Judgment of the Tribunal Supremo (Supreme Court) 97/2019, of 16 July 2019, ECLI:ES:TC:2019:97. See also Picó i Junoy, J.: 'La prueba ilícita: un concepto todavía por definir', *La administración de justicia en España y América*, 2021, pp. 1589-1606.

<sup>46</sup> For example, for **Estonian** law, see the Riigikohus (Supreme Court) judgments of 3 March 2021, [1-17-2359](#), EE:RK:2021:1.17.2359.2093, paragraph 48; of 18 June 2021, [1-16-6179](#), EE:RK:2021:1.16.6179.10403, paragraph 58; of 14 June 2022, [1-20-1208](#), EE:RK:2022:1.20.1208.9094, paragraph 32.

<sup>47</sup> It should be noted, in that regard, that criminal proceedings often include provisions under which the application of certain consequences is subject to a finding that the breach of a procedural rule has had an impact on the outcome of the trial. For example, the need to establish such a link between a breach and the judgment is relevant under **Estonian** law [see Paragraph 339(2) of the Estonian CCP, and Pikamäe, P., *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne*, Kergandberg, E. and Pikamäe, P. (eds.), Tallinn 2012, Paragraph 339(6)]. Similarly, under **Polish** law, Article 438(2) of the Polish CCP states that the judgment of the first-instance court shall be amended or set aside by the court of second instance on the grounds of breach of procedural rules where that breach may have had an impact on the judgment under appeal. That also applies to

28. That decision may form part of the trial court's final judgment.<sup>48</sup> Unlike the common law system, in the Romano-Germanic family, as a general rule, except in cases where special provisions prohibit its use and require it to be excluded before it is submitted, evidence is put before the court and is then subject to its holistic analysis.<sup>49</sup> The fact that the court has already assessed evidence at the hearing<sup>50</sup> does not deprive the parties of the right to request that it be excluded so that that evidence does not form the basis of the judgment.

a) LIMITATIONS ON THE POSSIBILITY FOR THE ACCUSED PERSON TO RAISE PLEAS ALLEGING BREACH OF THE RIGHT TO INFORMATION

29. As a preliminary point, it should be noted that, unlike the legal systems with recourse to an invalidity mechanism, in the legal systems belonging to the group examined in this section, which also allow for an in-depth review of the preparatory phase prior to trial (**Bulgaria, Germany**, see section II.A.), the failure to find a procedural defect as part of that review does not mean that the accused person is precluded from raising pleas alleging that defect before the trial court.
30. Second, it is apparent from the research carried out in the context of preparing this research note that most of the legal systems without recourse to a mechanism invalidating procedural acts do not provide for any specific limitations on the possibility for the accused person to raise pleas at trial seeking the exclusion of evidence obtained in breach of the right to information.
31. By way of exception, **Austrian** and **German** criminal proceedings make the right to raise certain pleas alleging breach of a procedural right subject to a specific act by the accused person, directed against the use of evidence.
32. Thus, under **German law**, it is for the accused person to raise the breach of his or her right to information and to object to the use of any evidence so obtained.<sup>51</sup> An objection to the use of evidence to convict the accused person must be lodged at the criminal court during the hearing<sup>52</sup> and made, at the latest, after the production of evidence, as part of the remarks which the accused person may make on that evidence.<sup>53</sup> An objection must be accompanied by a statement of reasons that explains, at least briefly, why the accused person considers that the

---

defects from the preparatory phase that have passed to the decisive phase and have not been cured during that phase [S. Zabłocki, *Kodeks postępowania karnego. Tom IV. Komentarz do art. 425–467*, R. A. Stefański (ed.), Wolters Kluwer Polska, Warsaw 2021, Article 438].

<sup>48</sup> Under **Spanish law**, that possibility was raised by the prosecutor before the Tribunal Supremo (Supreme Court), which stated, in its judgment 106/2017, of 21 February 2017 (ECLI:ES:TS:2017:674), that the time for a declaration of evidence inadmissibility is a matter to be resolved on a case-by-case basis, and that it is for the court to take that decision in the light of the specific circumstances of the case. Nevertheless, in most cases, the annulment of evidence for a breach of a fundamental right is declared by the trial court in its decision on the admission of evidence at the beginning of the oral phase (Article 659 of the Spanish CCP) (for more information on when the court assesses the admissibility of evidence, see: Del Moral Garcia, A.: '¿Cuándo debe declararse la inutilizabilidad de un medio de prueba de vulneración de derechos fundamentales? Reflexiones al hilo de la STS 106/2017', *Revista de Jurisprudencia*, 15 March 2017). Under **Bulgarian law**, the fact that the courts are not required to rule on the validity of records during the trial and that the parties learn of the courts' decision in that regard from the final judgment has been criticised by legal literature (Tchinova, M., Mitov, G., *Kratak lektzionen kurs po nakazatelno-protsesualno pravo*, pp. 325–326).

<sup>49</sup> Kuczyńska, H., see footnote 32, p. 56.

<sup>50</sup> Cases where evidence was excluded at the outset are not relevant here, since the effect of the exclusion is that the consequences of the breach of the right to information have already been removed by the court.

<sup>51</sup> Bundesgerichtshof (Federal Court of Justice), order of 27 February 1992, 5 StR 190/91.

<sup>52</sup> Bundesgerichtshof (Federal Court of Justice), order of 17 June 1997, 4 StR 243/97.

<sup>53</sup> Bundesgerichtshof (Federal Court of Justice), order of 27 February 1992, 5 StR 190/91; judgments of 12 January 1996, 5 StR 756/94; and of 19 March 1996, 1 StR 497/95, as well as order of 9 November 2005.

use of the evidence in question is inadmissible.<sup>54</sup> Once that moment has passed, the accused person loses the right to raise the breach of his or her right to information, not only in the current proceedings, but also in a possible appeal against the first instance judgment before a higher court.<sup>55</sup>

33. However, the Bundesgerichtshof (Federal Court of Justice) has noted that the rule that the accused person must exercise his or her right to object no later than that specific moment in the hearing, failing which the right to object will be out-of-time, applies only on condition either that that person is assisted, at the hearing, by a lawyer or that he or she has been informed by the court of the right to object to the use of evidence.<sup>56</sup> The fact that case-law requires the court to inform the accused person of the right to object only when that person does not have a lawyer is explained by the premiss that a lawyer is expected to know his or her client's procedural rights and, therefore, be able to recognise the right and need to raise a challenge, on behalf of his or her client, when a breach has taken place, even in the absence of information from the court in that regard. On the other hand, an accused person without a lawyer, who is not informed by the court of his or her right to object may still, in principle, raise the breach of his or her procedural rights at a later stage, or even, for the first time, in the context of an appeal before a higher court.
34. Under **Austrian** law, in order to reserve the right to bring an appeal on the grounds of invalidity (*Nichtigkeitsbeschwerde*<sup>57</sup>) because the statement of the accused person obtained at the preparatory phase was wrongly taken into account as a basis for the judgment, the accused person must first raise an objection to the presentation of that evidence.<sup>58</sup> In that respect, the accused person can only rely on the grounds of inadmissibility when the use of that evidence would have a detrimental effect on the judgment against him or her.<sup>59</sup> Where the accused person is not represented by a lawyer, he or she is required to raise the objection himself or herself.<sup>60</sup> However, in such a case, the court must guide that person.<sup>61</sup> Having established that there has been a breach of the right to information, the court may inform the accused person accordingly and ask whether he or she agrees with the reading of the record of the questioning concerned. If the accused person agrees with the reading of the record, the evidence is no longer

---

<sup>54</sup> Bundesgerichtshof (Federal Court of Justice), order of 11 September 2007, 1 StR 273/07, paragraph 17.

<sup>55</sup> See Oberlandesgericht Stuttgart (Higher Regional Court of Stuttgart), judgment of 4 March 1997, 4 Ss 1/97, ECLI:DE:OLGSTUT:1997:0304.4SS1.97.0A.

<sup>56</sup> Bundesgerichtshof (Federal Court of Justice), order of 27 February 1992, 5 StR 190/91, 1 StR 447/05.

<sup>57</sup> This is one of the appeals that can be lodged against a first instance judgment alongside an appeal against a sentence (*Strafberufung*) and an appeal against a guilty verdict (*Schuldberufung*). All three can be combined. The Oberster Gerichtshof (Supreme Court) is the only court with jurisdiction to hear appeals on the grounds of invalidity.

<sup>58</sup> Koller in Schmölzer/Mühlbacher, *StPO Strafprozessordnung – Kommentar*, Lexisnexis, Wien, 2<sup>nd</sup> edition, 2021, Paragraph 152 (12). Paragraph 281(1) point 2 of the Austrian CCP provides, in essence, that an appeal on the grounds of invalidity may be based on the fact that a written record of a piece of information or other evidence from the inquiry proceedings which is vitiated by inadmissibility, is read during the hearing and therefore becomes an integral part of those proceedings when the applicant had objected to that reading. However, where the accused person was not present at the hearing, he or she may lodge an appeal without having objected to the reading. Such proceedings are possible where the offence in question is punishable by a term of imprisonment of less than three years (Paragraph 281(1) point 3 in conjunction with Paragraph 427 of the Austrian CCP).

<sup>59</sup> Ratz, Eckart, *Zur Sanierung von Verfahrensmängeln – zugleich ein Beitrag zu den Beweisverboten*, ÖJZ 2019/79, Manz, Wien, p. 654; see, in that regard, Paragraph 281(3) of the Austrian CCP, which provides, in essence, that the grounds for invalidity in Paragraph 281(1) points (2) to (4) of the Austrian CCP may not be invoked where the breach concerned does not result in any detriment to the accused person in the judgment ('relative grounds for nullity', 'relative Nichtigkeitsgründe').

<sup>60</sup> Paragraphs 457 and 488(2) of the Austrian CCP.

<sup>61</sup> Paragraph 6(2) of the Austrian CCP; legal rule (*Rechtssatz*) of the Oberster Gerichtshof (Supreme Court) [RS0096346](#); legal rule (*Rechtssatz*) of the Oberster Gerichtshof (Supreme Court)

vitiated on the grounds of inadmissibility and the court may read the said record and base its judgment on the same.<sup>62</sup>

35. With regard to appeals against decisions of the courts of first instance, except in the aforementioned cases under **Austrian** and **German** law, it does not appear that the legal systems examined impose on the parties any particular limitations on the right to raise a breach of the right to information as a ground for excluding evidence.

b) THE COURT RAISING OF ITS OWN MOTION A PLEA ALLEGING BREACH OF THE RIGHT TO INFORMATION

36. As a general rule, the research carried out does not indicate that the legal systems examined in this section prohibit courts from raising of their own motion a breach of the right to information or from deciding to exclude evidence obtained as a result of such a breach.
37. It would appear that, in those legal systems, the court, whilst it is obliged to respect the principle that both sides must be heard, is also required to ensure that the procedural rules and procedural rights of the accused person are observed. It follows that a court which has found of its own motion that there has been a breach of a procedural rule has an obligation to examine the impact of that breach on the trial in the light of the right to a fair trial.<sup>63</sup>
38. Even in a legal system in which it is emphasised that it is always for the defence and not for the court to raise claims alleging such breaches (**the Netherlands**<sup>64</sup>), it is nevertheless considered that, where a procedural breach has been established, the court should take that into account<sup>65</sup> and, in the event of a breach of the right to information, it should raise it of its own motion,<sup>66</sup> whether or not the accused person is assisted by a lawyer.
39. With the exception of the limitations laid down in **German** and **Austrian** law, as set out in the previous section, this last observation would also seem to apply to courts hearing appeals against first instance judgments, provided that the raising of a court's own motion does not go beyond the scope of the proceedings before that court.

2. LEGAL SYSTEMS WITHOUT RECOURSE TO A MECHANISM INVALIDATING PROCEDURAL ACTS

40. In the legal systems that have recourse to a mechanism invalidating procedural acts, which may be applied in the event of a breach of the right to information (**Belgium, France, Greece,**

---

<sup>62</sup> Legal rule (*Rechtssatz*) of the Oberster Gerichtshof (Supreme Court) [RS0116040](#), ECLI: AT: OGH0002: 2002: RS0116040.

<sup>63</sup> With regards to **Latvian** law, see, in that regard, in particular, D. Gurevičs, 'Procesuālo pārkāpumu ietekme uz pierādījumu pieļaujamību kriminālprocesā: pamattiesību perspektīva', *Jurista Vārds*, 29 March 2022, no 13 (1227).

<sup>64</sup> It is considered that a substantive obligation on the part of the criminal court to examine breaches of procedural requirements of its own motion would appear to be incompatible with the requirements for the defence to prepare an effective defence. Indeed, such an obligation would mean that the defence would be relieved of its responsibility to present a clear and reasoned defence ([R. Kuiper, Vormfouten. Juridische consequenties van vormverzuimen in strafzaken, Deventer, Wolters Kluwers 2014, p. 303](#)).

<sup>65</sup> In that regard, it follows from the case-law of the Hoge Raad (Supreme Court, the Netherlands) that the court, where it is apparent from the procedural acts that there are serious and direct grounds to suspect that evidence must be excluded or that the prosecution's case is inadmissible (literally, in Dutch, 'the prosecution is inadmissible'), is required to show that it has examined those grounds for suspicion (conclusion of the Advocate General in the Hoge Raad (Supreme Court) judgment of 28 September 2010, 08/00875, [ECLI:NL:PHR:2010:BM6656](#) and [R. Kuiper, see footnote 64, p. 304](#)).

<sup>66</sup> Boksum, J., 'Commentaar op art. 29 WvSv, Zwijgrecht', *T&C Strafvordering*, online (last updated 1 January 2024), and Naeyé, J., '20. Het verhoor', in Boksum, J., *et al.* (ed.), *Handboek Strafzaken*, Deventer, Wolters Kluwer 2000, and see the judgment of the Rechtbank Rotterdam (Court of Rotterdam) of 20 February 2020, 10/271799, [ECLI:NL:RBROT:2020:1583](#).



**Luxembourg, Romania**), the exclusion of evidence by the trial court may arise from the invalidity of the act it concerns. However, the situation varies depending on whether or not it was possible to declare the preparatory phase act invalid prior to the trial.

a) LIMITATIONS ON THE POSSIBILITY FOR THE ACCUSED PERSON TO RAISE INVALIDITY CLAIMS

41. In proceedings in which the invalidity of an act has been established prior to the trial, under **French** law, in the case of pre-trial judicial investigation, the invalidities are ‘purged’ on expiry of a period of one month or three months (depending on whether the accused person is in custody or at liberty) from the date on which the notice of the end of the investigation is sent and may no longer, in principle, be raised before the trial court.<sup>67</sup>
42. Under **Romanian** law, a ‘relative nullity’ shall be disregarded when: (a) the interested party has not raised a claim for invalidity within the time limit provided for by law; (b) the interested party has expressly waived any claim for invalidity.<sup>68</sup> In that respect, the Curtea Constituțională (Constitutional Court) has ruled that the time limit on the finding of invalidity corresponds to the new structure for criminal proceedings, which now includes the pre-trial chamber stage, a stage which constitutes a filtering procedure, at the end of which it is no longer possible to refer the case back to the public prosecutor.<sup>69</sup>
43. Under **Greek law**, in principle, ‘absolute nullities’ not raised and not raised automatically before referral to the hearing shall be disregarded.<sup>70</sup>
44. Other legal systems that have recourse to an invalidity mechanism seem to frame it less strictly. Under **Belgian** law, the restriction on the trial court to rule on invalidities from the preparatory phase is limited to irregularities that have effectively been examined before the *Chambre des mises en accusation* (Indictment Chamber) (the limitation thus does not apply to all irregularities which, objectively, could have been examined by that court).<sup>71</sup>
45. As a general rule, it is nevertheless apparent that, in the situations described above, invalidities arising during the preparatory phase cannot be raised by the parties during the trial.
46. The situation is different for proceedings in which the invalidity of an act could not have been established prior to the trial, since the intervention of the court at that stage is not provided for. That is the case, for example, under **French** law, where there has been no pre-trial judicial investigation (which is not mandatory in the case of *matière contraventionnelle* (summary cases for minor offences heard before the *tribunal de police* (Local Criminal Court)) or *matière correctionnelle* (‘intermediate’ offence cases heard before the *tribunal correctionnel* (Criminal Court))). In those situations, only the trial court may declare the invalidity of an act.<sup>72</sup> The legal

---

<sup>67</sup> The fourth paragraph of Article 175 of the French CCP. In addition to that provision, Article 173-1 of the French CCP lays down another limitation period, applicable to challenges to the correctness of the earliest investigative acts. Within six months of notification of the judicial investigation against him or her, the accused person may file an application for a declaration of invalidity in respect of acts carried out before his or her first appearance before the court or the first hearing of the civil party, except where he or she could not have been aware of the irregularity concerned.

<sup>68</sup> Article 282(5) of the Romanian CCP.

<sup>69</sup> [Decision no 840](#) of 8 December 2015 (*Monitorul Oficial al României*, Part I, no 120 of 16 February 2016), paragraph 22; [Decision no 462](#) of 5 July 2018 (*Monitorul Oficial al României*, Part I, no 991 of 22 November 2018), paragraph 29.

<sup>70</sup> Articles 174 and 175 of the Greek CCP. However, see paragraph 52 of the Summary below.

<sup>71</sup> Article 235bis(5) of the Belgian code d’instruction criminelle (Criminal Procedure Rules).

<sup>72</sup> Guerrin, M., see footnote 17, paragraph 194.

systems that have recourse to an invalidity mechanism adopt different approaches in that respect.

47. Certain criminal procedures impose restrictions on the possibility of raising claims of invalidity before the trial court. Under **French** law, claims for invalidities that occurred during the preparatory phase must be raised *in limine litis*, that is to say, before any defence on the merits, on pain of inadmissibility.<sup>73</sup> Thereafter, no plea of invalidity not properly raised before the tribunal correctionnel (Criminal Court) (provided that the substance of the case has been debated before that court) may be presented for the first time before the cour d'appel (Court of Appeal),<sup>74</sup> or the Cour de cassation (Court of Cassation). Under **Luxembourg** law, if no preliminary judicial investigation was opened on the basis of the inquiry, an application on the grounds of invalidity may be submitted by the accused person at trial, failing which it will be time-barred, before any application, defence or objection other than pleas alleging lack of jurisdiction.<sup>75</sup> Under **Romanian** law, when a case is referred to the trial court on the basis of a preliminary admission of guilt, a 'relative nullity' that has arisen during the preparatory phase must be raised at the latest before the first hearing, once the parties have been summoned to appear.<sup>76</sup> Under **French** and **Romanian** law, the failure to submit an application or raise a plea for a declaration of invalidity within the time limits set out above wipes out the invalidities from the preparatory phase.
48. It should nevertheless be noted, in that regard, that the **French** Cour de cassation (Court of Cassation), ruling on the system for purging invalidities from the investigation stage in accordance with the Constitution, observed that, in the absence of a finding of invalidity, the accused person still retains the power to discuss the probative value of the documents in the proceedings before the trial court.<sup>77</sup>

b) COURT'S OWN MOTION TO RAISE THE INVALIDITY OF PROCEDURAL ACTS

49. Under **French** law, it is prohibited for the trial court to raise the invalidity of procedural acts of its own motion. With the exception of a plea for lack of jurisdiction, courts may not raise of their own motion any claim for invalidity arising from the summons or the earlier proceedings.<sup>78</sup> The same seems to be true in **Romanian law**.<sup>79</sup>
50. Other legal systems do not appear to apply the invalidity regime as rigorously as under **French** and **Romanian** law. In particular, other legal systems do not seem to rule out the possibility of the trial court excluding evidence regardless of the invalidity regime in force, either at the request of the parties or of its own motion (**Belgium, Greece, Luxembourg**).

---

<sup>73</sup> The sixth paragraph of Article 385 of the French CCP.

<sup>74</sup> Cour de cassation (Court of Cassation), Crim., judgment of 14 March 2012, [11-85.827](#), Bull. crim. 2012, no 73; Cour de cassation (Court of Cassation), Crim., judgment of 23 January 2008, [06-87.787](#), Bull. crim. 2008, no 18, p. 58.

<sup>75</sup> Article 48-2 of the Luxembourg CCP.

<sup>76</sup> Article 282(4)(b) of the Romanian CCP.

<sup>77</sup> Cour de cassation (Court of Cassation), Crim., judgment of 8 January 2013, [12-86.591](#), not published.

<sup>78</sup> Cour de cassation (Court of Cassation), Crim., judgment of 10 October 2006, [06-81.833](#), Bull. crim. 2006, no 246, p. 872. In a relatively recent judgment, the chambre criminelle de la Cour de cassation (Criminal Division of the Court of Cassation) held that the proscription on a court's declaration of invalidities of its own motion is consistent with the rights of the defence and the right to a fair trial, guaranteed by Article 16 of the Declaration of the Rights of Man of 1789, which has constitutional value (Cour de cassation (Court of Cassation), Crim., judgment of 6 February 2018, [17-82.826](#)).

<sup>79</sup> A 'relative nullity' arising from earlier proceedings may no longer be invoked by the trial court, as it was not raised within the time limits laid down by the Romanian CCP and is thus to be disregarded.

51. In that respect, under **Belgian** law, a breach of the right to information during the preparatory phase may result in a finding of invalidity of a piece of evidence by the trial court.<sup>80</sup> Proscription on the possibility of raising claims before the trial court against irregularities that have been examined before the *Chambre des mises en accusation* (Indictment Chamber) does not extend to pleas relating to the assessment of evidence.<sup>81</sup> It is apparent from the case-law of the Belgian *Cour de cassation* (Court of Cassation) that, whenever the court is confronted with evidence obtained unlawfully, it is required to verify specifically, in so far as compliance with the formal conditions in question is not prescribed on pain of inadmissibility, whether the irregularity found puts into question the reliability of the evidence, or whether the use of that evidence is contrary to the right to a fair trial.<sup>82</sup> Under **Greek** law, according to legal literature, within the scope of 'absolute nullity', where evidence obtained in breach of rights is taken into account during the hearing as a basis to convict an accused person, a new case of 'absolute nullity' would thereby arise at the hearing.<sup>83</sup> That breach may even be raised before the *Arieos Pagos* (Court of Cassation) as a ground of appeal seeking to have a judgment<sup>84</sup> set aside, or will be raised of its own motion by the *Arieos Pagos* (Court of Cassation) in the context of the automatic examination of a series of grounds for annulment provided for by the Greek CCP, which includes all of the 'absolute nullities' that have occurred during the hearing,<sup>85</sup> that is to say, even in the absence of a plea to that effect put forward by the accused person. Under **Luxembourg** law, besides exclusion of evidence on the grounds of invalidity for a breach of a procedural requirement, evidence may be excluded on the basis of irregularity, where the irregularity has put into question the credibility of the evidence or the use of the evidence is contrary to the right to a fair trial.<sup>86</sup>

### 3. COMMON LAW SYSTEMS

52. In the Member States of the common law family (**Cyprus, Ireland**), where evidence is mainly provided during the hearing (before the court, which will be called upon to deliver a judgment on the merits),<sup>87</sup> evidence may be excluded as a result of the way in which it was obtained, following an assessment of its admissibility carried out by the court prior to the production of evidence. This is an *a priori* assessment.<sup>88</sup>

---

<sup>80</sup> Second and third indents of Article 32 of the *titre préliminaire* (Preliminary Title) of the Belgian CCP. See footnote 34.

<sup>81</sup> Article 235bis(5) of the Belgian *code d'instruction criminelle* (Criminal Procedure Rules).

<sup>82</sup> See judgments from the Belgian *Cour de cassation* (Court of Cassation) of 22 May 2018, RG P.17.0994.N (D.K.C.A. / N.S.S.B., M.A.S.M.), ECLI:BE:CASS:2018:ARR.20180522.3; of 6 September 2016, RG P.15.1105.N, Pas. 2016, no 459; of 14 May 2014, RG P.14.0186.F (in the judgment of 14 May 2014, the Court of Cassation held that courts must disregard evidence if it falls under one of the three cases provided for by Article 32 of the *titre préliminaire* (Preliminary Title) of the CCP and must admit evidence in other cases) and Meese, J., 'Onrechtmatig verkregen bewijs in strafzaken', *Bewijsnood na het vernieuwde bewijsrecht*, J. Rozie, S. Rutten and B. Vanlerberghe (eds), Brussels, Intersentia, 2020, 61-97, see p. 68.

<sup>83</sup> Παπαδαμάκης, A., see footnote 22, p. 296. Such an example is provided by the unlawful reading, during the hearing, and then the use as evidence of a witness statement taken during the preliminary questioning of the accused person in breach of certain provisions providing for that person's rights.

<sup>84</sup> Article 510(1)(a) of the Greek CCP.

<sup>85</sup> Articles 510(1)(a) and 511 of the Greek CCP.

<sup>86</sup> See judgment of the *Cour de cassation* (Court of Cassation) no 57/2007 of 22 November 2007, footnote 35.

<sup>87</sup> Pradel, J., see footnote 9, p. 270.

<sup>88</sup> Kuczyńska, H., see footnote 32, p. 56.

53. The decision to exclude evidence (such as the statement of the accused person) obtained by a prosecuting authority is a matter for the discretion of the **Cypriot** and **Irish** courts.<sup>89</sup> One of the essential criteria for the admissibility of a statement by an accused person is that it was made voluntarily<sup>90</sup> and through the use of fair procedures.<sup>91</sup> In practice, the **Cypriot** courts tend not to admit statements of an accused person obtained in substantial breach of the 1964 Rules governing the taking of statements,<sup>92</sup> considering the exclusion of evidence obtained improperly, or 'in suspicious circumstances', as an axiom of the trial in the Cypriot legal system, a consequence of the right to a fair trial,<sup>93</sup> and a manifestation of the Cypriot courts' commitment to the protection of human rights and the rule of law<sup>94</sup> and against unacceptable police practices.<sup>95</sup> The **Cypriot** courts have thus excluded statements made in breach of an accused person's right to be informed of his or her right to remain silent, considering that the possible admissibility of such statements as evidence would breach the fundamental right to a fair trial.<sup>96</sup>

a) LIMITATIONS ON THE POSSIBILITY FOR THE ACCUSED PERSON TO RAISE PLEAS ALLEGING BREACH OF THE RIGHT TO INFORMATION

54. Common law criminal proceedings follow the adversarial model, in which the parties present evidence to the court. Such proceedings resemble civil proceedings or a duel between two parties.<sup>97</sup> The court acts as an arbiter between the opposing parties and its powers to act of its own motion are limited. Therefore, in principle, the court only analyses the admissibility of the evidence proposed by one party at the initiative of the opposing party.<sup>98</sup>

55. In order to challenge the admissibility of evidence presented by the prosecution, the accused person must request that a special procedure be carried out. This is a stand-alone procedure that runs parallel to the main proceedings [side-trial, trial-within-a-trial or voir dire (δίκη εντός δίκης)], which takes place before the same court (that is to say, the trial court), which shares, with certain exceptions, the characteristics of the main proceedings.<sup>99</sup> In **Ireland**, under new legislation<sup>100</sup>

---

<sup>89</sup> Under **Irish** law, the rule concerning the admissibility of illegally obtained evidence provides that the trial court must balance the public interest in the detection and prevention of crime with the public interest in the repression of illegal or improper investigative methods by the *Gardaí* (the Irish police force). In practice, since *DPP v JC* [2015] IESC 31, evidence is currently being admitted instead ([Defence Rights in Evidentiary Procedures: Domestic Research Report Ireland, Irish Council for Civil Liberties, 2021](#), section 4.2, pp. 23-25).

<sup>90</sup> See, to that effect, for **Cyprus**: Anotato Dikastirio (Supreme Court), judgment of 16 June 1986, *Fournides v. The Republic* (1986) [2 C.L.R. 73](#); for **Ireland**: *Attorney General v McCabe* [1927] IR 129 (CCA), *McCarrick v Leavy* [1964] IR 225 (SC).

<sup>91</sup> For **Ireland**, see *People v Shaw* [1982] IR 1, paragraph 123.

<sup>92</sup> Anotato Dikastirio (Supreme Court), judgments of 26 September 1967, *Kokkinos v. The Police* (1967), [2 C.L.R. 217](#); of 6 February 1968, *Petri v. The Police* (1968) [2 CLR 40](#), and of 17 June 1971, *The Republic v. Pierides* (1971) [2 CLR 181](#). These are the [Practice Note \(Judges' Rules\) \[1964\] 1 WLR 152](#), adopted by the United Kingdom on 27 January 1964, which apply to statements obtained by the police in Cyprus in the same way as they apply in England and Wales.

<sup>93</sup> Anotato Dikastirio (Supreme Court), judgment of 29 September 2000, *Dimitris P. Sakkos v. Dimokratias* (2000) [2 AAD 510](#).

<sup>94</sup> Anotato Dikastirio (Supreme Court), judgment of 16 June 1986, *Fournides v. The Republic* (1986) [2 C.L.R. 73](#).

<sup>95</sup> See, to that effect, Anotato Dikastirio (Supreme Court), judgments of 6 February 1968, *Petri v. The Police* (1968) [2 CLR 40](#), and of 25 June 1968, *Ioannides v. The Republic* (1968) [2 CLR 169](#).

<sup>96</sup> Monimo Kakourgiodikeio Paphou (Paphos Assize Court), judgment of 12 October 2007, *Dimokratia v. Andrea Pavlou Efstathiou et al.*, [application number 17179/06](#), ECLI:CY:KDLEF:2007:5. See also, Eparchiako Dikastirio Lefkosias (Nicosie District Court), judgment of 26 March 2010, *Astynomikos Diefthintis Lefkosias v. Antoni Charalambous*, [application number 14906/08](#), ECLI:CY:EDLEF:2010:B45.

<sup>97</sup> Pradel, J., see footnote 9, p. 284.

<sup>98</sup> Kuczyńska, H., see footnote 32, p. 68.

<sup>99</sup> Πικίης, Γ., *Ποινική Δικονομία στην Κύπρο*, 2013, p. 248.

<sup>100</sup> Criminal Procedure Act 2021.

that entered into force in 2022,<sup>101</sup> a preliminary trial hearing for that purpose may still take place before the trial commences.

56. In any event, under **Cypriot** law, where a statement is admitted as evidence in the main proceedings without challenge by the accused person, an appeal by the accused person challenging the admissibility of the evidence has no prospect of success.<sup>102</sup>

b) THE COURT RAISING OF ITS OWN MOTION A PLEA ALLEGING BREACH OF THE RIGHT TO INFORMATION

57. As already noted above, in principle, a common law court only analyses the admissibility of evidence proposed by a party at the initiative of the opposing party.
58. In that regard, the Anotato Dikastirio Kyprou (Supreme Court of **Cyprus**) held that a court's exclusion of its own motion of a statement by an accused person would have been arbitrary and would have potentially afforded the accused person the right to raise a 'grievance for the uncalled for exclusion' of the material evidence concerned.<sup>103</sup> Under **Irish** law, it seems that the trial court may exclude evidence of its own motion if it considers that it may prejudice the fairness of the trial,<sup>104</sup> in accordance with its primary duty to ensure the fairness of the trial, pursuant to Article 38(1) of the Irish Constitution. However, such a decision would only be possible in exceptional cases.<sup>105</sup>
59. As to whether the decision resulting from that parallel procedure is final, **Cypriot** case-law tends to answer in the affirmative, despite the existence of case-law to the contrary (that is to say, in favour of the possibility of the trial court reconsidering the admissibility of a statement in the main proceedings). Furthermore, it is still open to the court to modify its decision resulting from the parallel procedure at the end of the main trial if, in the light of all the evidence gathered during the proceedings, it is subsequently demonstrated that the statement was not made voluntarily.<sup>106</sup> The **Cypriot** courts have also held that the trial court may order the opening of a parallel trial, even of its own motion, if the circumstances so require.<sup>107</sup> According to legal literature, that is all the more the case where a statement appears, prima facie, inadmissible and where the accused person is not represented by a lawyer.<sup>108</sup> Under **Irish** law, the court also has the discretion to exclude prosecution evidence that would, in principle, be admissible if, in its

<sup>101</sup> Criminal Procedure Act 2021 (Commencement) Order 2022), S.I. no 79/22.

<sup>102</sup> Ηλιάδης, Τ. και Σάντης, Ν., *Το Δίκαιο της Απόδειξης: Δικονομικές και Ουσιαστικές Πτυχές*, Hippasus Publishing, Λευκωσία, 2014, p. 901.

<sup>103</sup> See, in that regard, Anotato Dikastirio (Supreme Court), judgment of 16 June 1986, *Fournides v. The Republic* (1986) [2 C.L.R. 73](#).

<sup>104</sup> [Defence Rights in Evidentiary Procedures: Domestic Research Report Ireland, Irish Council for Civil Liberties](#), 2021, part 5, p. 30.

<sup>105</sup> 'In the most limited circumstances', according to the expression used in the judgment in *DPP v Doherty* [2009] IECCA 17, paragraph 42.

<sup>106</sup> See, to that effect, Anotato Dikastirio (Supreme Court), judgment of 30 September 1999, *Georgios P. Mavros, allos Hadjis v. Dimokratias* (1999) [2 AAA 466](#); Eparchiako Dikastirio Larnakas (Larnaka District Court), judgment of 20 September 2016, *Astynomikos Diefthintis Larnakas v. Mohamed Ahmad et al.*, application number 2484/14, [ECLI:CY:EDLAR:2016:B81:2016:B81](#), and of 8 September 2016, *Astynomikos Diefthintis Larnakas v. Victo Victov*, application number 630/16, [ECLI:CY:EDLAR:2016:B78](#).

<sup>107</sup> Eparchiako Dikastirio Larnakas (Larnaka District Court), judgment of 20 September 2016, *Astynomikos Diefthintis Larnakas v. Mohamed Ahmad et al.*, application number 2484/14, [ECLI:CY:EDLAR:2016:B81](#); Ηλιάδης, Τ. και Σάντης, Ν., see footnote 102, p. 900 and, by analogy, Court of Appeal of England and Wales, judgment of 9 June 2010, *R. v Dhorajiwala* [2010] [EWCA Crim 1237](#).

<sup>108</sup> Ηλιάδης, Τ. και Σάντης, Ν., see footnote 102, p. 900.



view, its prejudicial effect on the jury would outweigh its true probative value.<sup>109</sup> In addition, in exceptional cases, it appears that the **Irish** court may, of his own motion, initiate an examination in the absence of the jury (a voir dire), in order to ascertain whether a statement was made voluntarily.<sup>110</sup>

60. In **Cypriot** law, the appeals court may examine a plea alleging that the court of first instance erroneously deemed a statement to be admissible in the course of the parallel procedure. However, the court cannot rule on the credibility of witnesses who have given evidence on the making or veracity of that statement.<sup>111</sup> The answer to the question of whether the appeals court could raise of its own motion a breach of the right to information is not obvious. It could be argued under **Irish** law that, pursuant to the court's overriding duty to ensure a fair trial under Article 38(1) of the Constitution, it is not prohibited.
61. In any event, it should be emphasised that a decision on the admissibility of evidence does not determine its probative value. In that regard, under **Irish** law, it has been noted that, in the case of the admissibility of a declaration of guilt of an accused person, where that evidence has not been corroborated, the trial court must give the jury a corroboration warning.<sup>112</sup> Under **Cypriot** law, even where an incriminating statement has been admitted as evidence, the trial court may take into consideration the circumstances surrounding the taking of that statement in order to determine the probative value to be attributed to it.<sup>113</sup>

## B. DECISION ON THE MERITS

62. Contemporary criminal proceedings, both those within the Romano-Germanic family and those within the common law family, reject the système de la preuve légale (system where admissible evidence and its probative value is regulated under law) (which implies conviction if it exists) and recognise the système de la liberté de la preuve (system based on the free evaluation of evidence). Under that system, the court is free to assess the evidence, since any criminal conviction is the result of the court's conviction that the accused person is guilty. This is known as *l'intime conviction* (inner conviction) or *l'impression sur la raison* (impression made on reason) in the legal systems of the Romano-Germanic family,<sup>114</sup> and what essentially corresponds to the common law requirement that the prosecutor is to prove all the elements of the offence as well as the identity of the perpetrator beyond reasonable doubt.<sup>115</sup>

---

<sup>109</sup> *DPP v Meleady* (No 3) [2001] 4 IR 16, paragraph 54: 'A judge, as part of his inherent power, has an overriding duty in every case to ensure that the accused receives a fair trial and always has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value'.

<sup>110</sup> *DPP v McDonald* [2022] IESC 29, judgment of Mr Justice Charleton, paragraph 25, 'Hence, unusually, a trial judge may conduct an examination in the absence of the jury, a voir dire [...] in order to interrogate the circumstances in which a confession was taken'.

<sup>111</sup> See, to that effect, Anotato Dikastirio (Supreme Court), judgment of 30 September 1999, *Georgios P. Mavros, allos Hadjis v. Dimokratias* (1999) [2 AAD 466](#).

<sup>112</sup> Article 10, Criminal Procedure Act 1993; *DPP v Connolly* [2003] 2 IR1.

<sup>113</sup> To that end, the accused person may examine witnesses on the circumstances in which the statement was taken, even in the main proceedings [Assize Court of Famagusta, Judgment of 28 June 1972, *The Republic v. Panikos Andrea Zaccheou and Others* (1973) JSC 517; see, also, Πικής Γ., *Ποινική Δικονομία στην Κύπρο*, 2013, p. 251].

<sup>114</sup> Pradel, J., see footnote 9, p. 411. For example, see Section 261 of the German CCP, Paragraph 61 of the Estonian CCP, Article 20(5) of the Lithuanian CCP, Section 167(4) of the Hungarian CCP, Article 7 of the Polish CCP, Chapter 35, Section 1 of the Swedish Rättegångsbalken (Swedish Code of Judicial Procedure).

<sup>115</sup> Pradel, J., see footnote 9, p. 411. On the relationship (equivalence) between these two concepts, see Pradel, J., see footnote 9, p. 412.

63. Thus, if evidence is not formally excluded by the court, a procedural defect that occurred in the taking of that evidence may still be taken into account in the decision on the merits.
64. In that respect, under **Dutch law**, the court seised of the case may rule that a charge is inadmissible where a breach of procedural requirements means that the proceedings in the case in question are contrary to the proper administration of justice. In applying that rule, the court must take into account the interest served by the breached regulation, the seriousness of the breach and the detriment caused.<sup>116</sup> As already noted above, even if it is considered that, in principle, having noted a breach of procedural requirement, the court should take that into account, in the case of a breach of the right to information, it should raise this of its own motion, whether or not the accused person is assisted by a lawyer.<sup>117</sup> It should be mentioned that the court may apply the measure in question only in an extremely exceptional case, namely where there is an irremediable breach of the right to a fair trial, which cannot be compensated for in a manner that meets the requirements of a good and effective defence.
65. Additionally, of the legal systems examined, two provide for the possibility, for the criminal court, to recognise the breach of the procedural rights of the accused person when determining the sentence imposed in the event of conviction.
66. Under **Dutch law**, where a breach of procedural rules is found during the preparatory phase, including a breach of the right to information,<sup>118</sup> both the trial court and the appeals court<sup>119</sup> have the right to reduce a sentence, provided that the detriment caused by the breach of procedural rules can be offset in this way.<sup>120</sup> The rules concerning the raising of a plea of a breach of its own motion apply as set out above.<sup>121</sup>
67. Swedish law also provides for the possibility of mitigation at sentencing in the case of a breach of procedural law.<sup>122</sup>

## CONCLUSION

68. In the legal systems examined, breach of the right to information, enshrined in Articles 3 and 4 of Directive 2012/13, during the preparatory phase of the criminal trial may have various consequences. It may be penalised, in particular, by procedural measures, such as the annulment of procedural acts and the exclusion of evidence, or by substantive measures, such as sentencing reduction.

---

<sup>116</sup> Section 359a(2) of the Dutch CCP.

<sup>117</sup> See footnotes 65 and 66.

<sup>118</sup> Boksum, J., 'Commentaar op art. 29 WvSv. Zwijgrecht', *T&C Strafvordering*, online (last updated 1 January 2024), and see, for example, Hoge Raad (Supreme Court) judgment of 16 April 2013, 11/04486 J, ECLI:NL:HR:2013:BY5706; Boksum, J., 'Commentaar op art. 27c WvSv. Mededelen rechten aan verdachte', *T&C Strafvordering*, online (last updated 1 January 2024).

<sup>119</sup> See Section 415 of the Dutch CCP, which states that Section 359a of the Dutch CCP applies *mutatis mutandis* to appeals within the Court of Appeal. The same applies to cases in which the Politierechtbank (Police Court), the Rechtbank, sector Kanton (formerly kantonrechter) (District Court (Cantonal Sector)) and the Enkelvoudige kamer in appel (Single Judge in Appeal) (see, respectively, Sections 367, 398 and 425(1) of the Dutch CCP), called upon to rule on a few specific cases, are seised. See, in that respect: <https://www.rechtspraak.nl/Organisatie-en-contact/Rechtsgebieden/Strafrecht/Paginas/Soorten-strafrechters.aspx>.

<sup>120</sup> Section 359a of the Dutch CCP.

<sup>121</sup> See paragraph 35 of the Summary.

<sup>122</sup> See, in particular, NJA 2011 p. 638, and, for an example to the contrary, RH 2010:62.

69. The research carried out in the preparation of this research note has made it possible to identify the legal systems where the possibility for an accused person to raise pleas alleging a breach of the right to information during the preparatory phase and seek the application of measures available under national law is not subject to limitations and those legal systems in which it is.
70. First, the legal systems of the Romano-Germanic family that do not have recourse to an invalidity mechanism do not appear to envisage any particular limitations on the possibility for the accused person to raise pleas alleging a breach of the right to information which occurred during the preparatory phase, such as the possibility, in particular, of requesting the exclusion of evidence obtained as a result of that breach. By way of exception, such limitations do exist in **Austrian** and **German** law, where, in order to challenge the trial court's use of evidence obtained during the preparatory phase in breach of a procedural right, the accused person is required to raise an objection against the use of the evidence. Where the accused person is not assisted by a lawyer, the court is obliged to inform that accused person of the possibility of raising an objection.
71. Second, significant limitations are provided for in some of the legal systems that have recourse to an invalidity mechanism as a measure capable of penalising the breach of the right to information. Indeed, in at least some of the procedures providing for the intervention of the court prior to the trial, applications by the parties to set aside an act of the preparatory phase may only be made within a specific time limit and, in principle, before the case is referred to the trial court (**France, Greece, Luxembourg, Romania**). The consequences of the failure to raise a claim for invalidity at this stage vary from one legal system to another. In some of them, the effect of this is that all invalidities are purged, which means that objections on the grounds of invalidity cannot be raised before the trial court (**France, Romania**). In the legal systems in that group, in proceedings where no provision is made for intervention by the court prior to the trial, objections on the grounds of invalidity must be raised before the trial court, *in limine litis*, before any defence on the merits, failing which they will be time-barred (**France, Luxembourg, Romania**). Nevertheless, there are legal systems that have recourse to an invalidity mechanism in which such limitations are less extensive (**Belgium**).
72. Finally, in the legal systems of the common law family (**Cyprus, Ireland**), where a breach of the right to information may lead to the exclusion of certain evidence, the parties are required to object to the use of evidence proposed by the opposing party in order for it to be excluded. Under **Cypriot** law, where a statement is admitted as evidence in the main trial without challenge by the accused person, an appeal by the accused person to challenge the admissibility of the evidence has no prospect of success.
73. It would seem appropriate to emphasise that, in some of the legal systems referred to above, case-law nevertheless highlights that procedural limitations on the possibility of applying the measures available under national law do not preclude the possibility of the accused person challenging the probative value of evidence (for example, **Cyprus, France and Ireland**).
74. The question of whether the court has the power, or even whether the court is obliged, to raise, of its own motion, pleas alleging breach of the right to information must be answered separately for each of the three groups defined above.
75. First, in the legal systems of the Romano-Germanic family that do not have recourse to an invalidity mechanism, as a general rule, the courts are not prevented from raising of their own motion pleas alleging breach of the right to information.

76. Where a legal system belonging to that group provides for a thorough review of the prosecution's case by the court prior to the trial, the court competent to carry out this review is obliged to raise of its own motion any irregularities from the preparatory phase (**Bulgaria, Germany**). That review does not, however, have the effect of purging defects from the preparatory phase.
77. During the trial phase, some of the legal systems provide for an automatic penalty in the event of a breach of a procedural right. Under **Austrian** law, failure to provide information on the right to remain silent has the effect that the questioning of the accused person cannot be regarded as evidence of a statement but only as information. **Italian** law provides that a statement given by an accused person who has not been informed of his or her right to remain silent cannot be used as evidence. The same is true under **Hungarian** law, unless the accused person has been informed in advance of his or her right to remain silent and has been assisted by a lawyer. It is therefore possible to argue that, in those situations, the court is obliged to raise, of its own motion, a plea alleging that breach in so far as a lack of reaction on the part of the court (including the use of evidence or, as the case may be, failure to take steps to rectify the defect in question) may result in a procedural defect during the trial phase.
78. Where a legal system of the group analysed does not provide for such concrete consequences resulting from the breach of the right to information, it seems that the court which found the breach of its own motion is nevertheless obliged to examine the impact of that breach on the evidence obtained and on the trial of the accused person, and depending on the result of that examination process, to decide whether or not to apply a penalty, such as, inter alia, the exclusion of evidence. That requirement stems from the court's obligation to ensure that the procedural rights of the accused person are respected, including, in particular, his or her right to a fair trial.
79. Second, the legal systems with recourse to an invalidity mechanism provide that the court with jurisdiction to review the correctness of the preparatory phase prior to the trial may raise of its own motion the invalidities that have arisen during that phase (**Belgium, France, Greece, Romania**). In some of them, that means that the trial court is prohibited from raising invalidities of its own motion, whether or not a provision has been made for intervention by a court prior to the trial (**France, Romania**). **Belgian** law, on the other hand, takes a less strict approach. Under **Greek** law, the use by the trial court of evidence vitiated by invalidity due to a breach of the right to information would seem to constitute a new case of invalidity arising during the hearing, which would seem to imply an obligation on the part of the court to raise that breach of its own motion and to refrain from using evidence vitiated by invalidity.
80. Third, in the legal systems of the common law family (**Cyprus, Ireland**), where a breach of the right to information may justify the exclusion of evidence, in particular the accused person's statement to police officers, the trial court is, in principle, prohibited from excluding evidence without the initiative of the parties. Even if the court cannot rule out the possibility of raising of its own motion a plea alleging breach of the right to information, it would be rather exceptional. In that respect, the fact that the accused person is not assisted by a lawyer is one of the circumstances that may justify a trial judge commencing, of its own motion, a parallel procedure concerning the exclusion of evidence.
81. Irrespective of the restrictions imposed on the court to raise of its own motion the procedural means provided for under national law in order to penalise a breach of the right to information, it seems worth noting that, in the system based on the free evaluation of evidence enshrined in the

legal systems examined, the production of evidence at trial does not in itself determine its probative value or the content of the decision on the merits.

[...]