



## Infosheets on the Application of EU Procedural Rights Directives

### Executive summary

*This infosheet is part of the CrimiLAW project and aims to facilitate the understanding of how the procedural rights directives on access to a lawyer, the presumption of innocence and legal aid are implemented at national level in Spain.*

By way of introduction, Spanish criminal proceedings are, broadly speaking, divided into two phases: the investigatory and the trial phase. Although the trial phase has, *mutatis mutandis*, the same characteristics and features as in any other European country, the investigatory phase is different from the majority of them, because Spain retains, with a few exceptions, the model of an investigating judge, who governs and directs the inquiry. The public prosecutor is just a party who interacts in the proceedings, but is not in charge of the investigation.

Respect for procedural safeguards in Spanish criminal proceedings is high. There is an old [Criminal Procedural Act](#) from 1882, amended many times, and inspired by liberal ideology, which encompasses a wide range of guarantees that have been increased through legislative reforms and by the [1978 Constitution](#) and adherence to international instruments on human rights, such as the [International Covenant on Civil and Political Rights](#) and the [European Convention of Human Rights](#).

Of course, there is room for improvement in procedural safeguards issues in Spain and there are certain shortcomings that should be resolved. The three directives which are the subject of this infosheet have helped the Spanish system to improve and fix some of these shortcomings, despite the fact that only the directive on the right to access to a lawyer has been formally implemented through legislative reform in 2015.

*This infosheet has been prepared by **Dr. Salvador Guerrero Palomares**, Spanish Lawyer.*



# Right of access to a lawyer

## Directive 2013/48/EU

Directive 2013/48/EU was implemented in the Spanish procedural system by the Organic Act 13/2015, 5th October, which amended the [Criminal Procedural Act \(CPA\)](#), [Royal Act 14 september 1882](#), in order to strengthen procedural guarantees.

The implementation improved the legal regime of the right of access to a lawyer, which is inextricably linked to the right of defence and the right to equality of arms – in other words, the right to a fair trial – as the Spanish Constitutional Court has stated in many rulings, for instance [Ruling nº 5/2020](#), which states that the right to a defence is based on the need to ensure full equality of arms and the effective enforcement of the right to state the case for the defence, avoiding any risk of imbalance in the procedural position of the parties. This is a right that is recognised for the benefit of the defendant him- or herself, and is also a structural requirement of a criminal trial to guarantee its correct outcome

The improvements that the implementation of the directive has brought to Spanish criminal proceedings are the following:

- (a) to establish a clearer and more effective recognition of the rights of the suspect and accused in the scope of criminal proceedings, by means of codifying certain rights that were already applicable according to the case law of the Supreme and Constitutional Courts. This improvement in the right of defence cannot be fully understood without taking into account the implementation of Directive 2010/64/EU, on the right to interpretation and translation and 2012/13/EU, on the right to information, both implemented by [Organic Act 5/2015, 27th April](#).

According to the reform introduced to implement the directive which is the subject of this infosheet, Art. 118(1) CPA sets out that the suspect and accused may exercise the right to a defence from the moment that they are notified of their condition as suspect or accused, whether they have been arrested or have been subject to another precautionary measure or if their prosecution has been agreed, for which purpose, without undue delay, they will be instructed of the following rights:

- (i) the right to be informed about the acts ascribed to them and any relevant change in the subject of the investigation and the grounds on which the accusation was based - this information will be given with a sufficient amount of detail to enable effective exercise of the right to a defence;
- (ii) the right to examine the proceedings sufficiently in advance to safeguard the right to a defence and, at any event, prior to their statement being taken;
- (iii) the right to act in the criminal proceedings to exercise their right to a defence in accordance with the provisions of the law;
- (iv) the right to appoint a lawyer freely, without prejudice to the provisions of paragraph 1 a) of Art. 527 CPA;
- (v) the right to request free legal aid, the procedure for doing so and the conditions to obtain it;
- (vi) the right to translation and interpretation, free of charge, in accordance with the provisions of Arts. 123 and 127 CPA;
- (vii) the right to remain silent and not make a statement if they do not wish to do so and not to answer some or any of the questions put to them; and
- (viii) the right not to make a statement against themselves and not to confess guilt.

Also, the article states that the information referred to shall be provided in understandable, simple language.

For this purpose, the information will be adapted to the age of the recipient, their degree of maturity, disability and any other personal circumstance which may give rise to a modification to the capacity to understand the scope of the information being provided to them.

- (b) to set out specifically the timeframe for the exercise of the right of defence: from the attribution of the investigated punishable act until the very termination of the judgment (Art. 118.2 CPA).
- (c) to envisage the confidentiality of communication between the lawyer and the suspect or accused or detainee (Art. 118.4 CPA), with the only exception being that there are objective grounds for believing that the lawyer is participating in the crime alongside his or her client. The confidentiality of lawyer-client communication was already acknowledged by the Supreme Court in its ruling 79/2012, 9th February.
- (d) to set out new rights for the arrested person, namely:
  - (i) the right to communicate by phone or videoconference with the lawyer of their choice if the geographic distance makes in-person assistance impossible (Art. 520.2.c) CPA);
  - (ii) the right to communicate privately with their lawyer even before police questioning (Art. 118.2 CPA) - this solves an issue that arises many times in police stations when the lawyer seeks to interview their client before questioning;
  - (iii) the right to communicate by telephone with a third party of their choice (Art. 520.2.f) CPA), and
  - (iv) the right to communicate and be visited by consular authorities, in the case of foreign detainees or prisoners (Art. 520.2.g) CPA).
- (e) to introduce the same aforementioned rights for those detained within the scope of a crime committed at sea (Art. 520 ter CPA).
- (f) to clarify the circumstances in which the judge may render the detainee incommunicado (Art. 527 CPA).

Currently, the right to legal assistance in the Spanish system includes the following rights:

- (a) *Right to a defence* (Arts. 17.3 and 24.2 of the Spanish Constitution (SC). It cannot be waived. If the investigated or accused person does not appoint a lawyer, one shall be appointed *ex officio* (Arts. 118.3, 520.5, 767, 784.1 CPA). Exception: crime against traffic safety (but only at the time of arrest – Art. 520.8);
- (b) *Free choice of lawyer*, except in the cases listed in Art. 527 CPA (detainee incommunicado);
- (c) *The assistance of an ex officio lawyer* (art. 119 SC, and Directive 2016/1919, of October 26, relating to free legal assistance for suspects and accused in criminal proceedings);
- (d) *The right to a confidential interview with a lawyer both before and after a statement* (Art. 520.6.d CPA) - the conversations between lawyer and client are confidential (Art. 118.4 and SCR 79/2012, of 9 February);
- (e) *The right to submit a defence* (articles 6.3.c) European Convention on Human Rights (ECHR) and 14.3.d) International Covenant on civil and political rights (ICCPR) in two situations:
  - (i) in the absence of lawyer, only if procedural law allows it - in our system in proceedings to try certain minor crimes;
  - (ii) in the presence of a lawyer – in other words, the right to the last word (Constitutional Court Ruling (CCR) 35/2021).

# Right to be presumed innocent

## Directive (EU) 2016/343

Directive 2016/343 has not been implemented in our system.

There is no official explanation, but it is assumed that our law-makers consider that the presumption of innocence is already established in our system. This is true, but with some nuances.

The essential content of the presumption of innocence is fully recognised. The presumption of innocence is a fundamental right set out in Art. 24.2 of the Spanish Constitution, which has been defined by the Constitutional Court (CCR 18/2021, FJ 5) as one of the cardinal principles of contemporary criminal law (CCR 138/1992, FJ 1), considering it perhaps the main constitutional manifestation of the special need to protect a person against an unjustified State sanction (CCR 141/2006, FJ 3). As a *treatment rule*, the presumption of innocence prevents someone from being treated as guilty who has not been declared so after a previous fair trial (CCR 153/2009, FJ 5). And, as a *trial rule*, it appears as the right of the accused not to be convicted unless guilt has been established beyond any reasonable doubt (CCR 78/2013, FJ 2), with the burden of proof on the prosecution to prove all the elements of the charge (Art. 6.1 Directive 2016/343; CCR 105/1988, FJ 3). Our system recognises that the burden of the proof is on the prosecution (CCR 181/2020, FJ 2) and that the suspect or accused has the right not to incriminate themselves (Art. 118.1.g CPA, CCR 21/2021, FJ 4).

However, there are certain elements contained in the directive which are not currently recognised in Spanish law:

- (a) The extra-procedural dimension of the presumption of innocence, set out in Arts. 4 and 5 of the directive. Essentially, those articles mean that the presumption of innocence must be respected also outside the proceedings in the sense that, at least, public authorities cannot treat a person as guilty until a guilty judgment has been delivered. Thanks to the directive, Constitutional Court case law now takes this aspect of the right into account (CCR 106/2021, FJ 8, 8.3), but implementation of the directive is absolutely necessary.
- (b) The *in dubio pro reo* principle is not recognised in Spanish case law as a part of the presumption of innocence, and therefore does not possess the nature of a fundamental right. Following case law from the Supreme and Constitutional Courts - from the ruling 44/1989, FJ 2- presumption of innocence and *in dubio pro reo* are different rights. The *in dubio pro reo* principle operates only at the time of sentencing as a merely subjective criterion for interpreting the applicable evidence when, even though there is substantiated evidence of the charge, doubt remains in the mind of the judge. According to this way of handling it, the presumption of innocence - expressly referred to in Art. 24.2 of the Spanish Constitution '78 - enjoys constitutional protection, acquired as a subjective right by the defendant both in the extraordinary appeal of cassation and in amparo, while the *in dubio pro reo* does not (CCR 16/2000, FJ 4).

However, Art. 6.2 of the directive sets out the *in dubio pro reo* principle as one of the attributes of the presumption of innocence, and so the implementation of the directive should trigger a re-examination of the doctrine within Spain's highest courts.

- (c) The impossibility of using the right to remain silent against the suspect or accused, along with the right not to testify against oneself, as Art. 7.5 of the directive establishes. In Spain, the Constitutional and Supreme Courts' case law declares that the right to remain silent and not to testify against oneself comprise the following aspects (CCR 181/2020, FJ 2):
  - (i) that the suspect can freely exercise their right not to testify, that is, that they are not obliged to do so, including the prohibition of any form of violence, intimidation, coercion, suggestion or deception to obtain the testimony of the suspect or accused; and

- (ii) that no harm is derived from that conduct. The refusal to testify cannot be considered as an acknowledgment of guilt or of involvement in the facts, which would constitute a contravention of the right to the presumption of innocence derived from a reversal of the rules on the burden of proof which, in any case, belongs to the prosecution.

This last question is, however, controversial. Since [ECtHR Murray v. UK, 1996](#) (approved by 7 judges against 5), silence can operate against the accused if two circumstances arise:

- (i) that the evidence is evaluated by a judge, and not by a jury; and
- (ii) that there is prima facie proof of what happened, which requires an explanation that the accused should be able to give. It is the so-called "explanation test" which has been assumed by the Spanish Supreme Court and Constitutional Court (CCR 155/2002; SCR 658/2018, 4th December). This jurisprudence must nevertheless be reviewed, in our opinion, as a result of the literal wording of Art. 7.5 of Directive 2016/343.

## Right to legal aid

### Directive (EU) 2016/1919

The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU, by making available the assistance of a lawyer funded by the Member State for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA (requested persons).

This directive has not yet been implemented in Spain. The reason is the same as regarding the directive on presumption of innocence: Spanish law makers assume that Spain already complies with the minimum standards that the directive establishes.

That assumption is correct. Indeed, Spanish regulation goes beyond the directive (for instance, recognising the need for legal aid in any criminal proceedings, even for minor traffic offences; granting the right not only to suspects and accused but also to some victims; and granting legal aid even prior to an evaluation of means).

The full coverage of legal aid in Spanish systems is due to its constitutional codification (Art. 119 SC): *"Justice shall remain free when thus provided by law, and shall in any case be so in respect of those who have insufficient means to litigate"*. This right is developed in [Act nº 1/1996, 10 January, on legal aid](#), and in Regulation nº 141/2021, 9th March.

The beneficiaries of legal aid are (Art. 2 Act 1/1996):

- (a) Spanish citizens, nationals of other Member States of the European Union and foreigners who are in Spain;
- (b) The Management Entities and Common Services of Social Security;
- (c) The following legal persons:
  - (i) public utility associations, provided for in Art. 32 of Organic Law 1/2002, of March 22, regulating the Right of Association; and
  - (ii) foundations registered in the relevant public registry.

The material requirement to access the legal aid system is a lack of sufficient assets or resources to litigate. The definition of when it is considered that there is a lack of assets or resources are established in Act 1/1996 (art. 3):

- (i) victims of gender violence, terrorism and human trafficking in those proceedings that are linked to, derive from or are a consequence of their status as victims, as well as minors and people with disabilities (art. 2.g Act 1/1996);
- (ii) those who, due to an accident, can prove permanent consequences that totally prevent them from carrying out the tasks of their usual work or professional occupation and require the help of other people to carry out the most essential activities of daily life, when the object of the dispute is the claim for compensation for personal and moral damages suffered (Art. 2.h) Act 1/1996); and
- (iii) associations whose purpose is to promote and defend the rights of victims of terrorism, indicated in Law 29/2011, of September 22, on the recognition and comprehensive protection of victims of terrorism (Art. 2.i) Act 1/1996).

The content of the right comprises the following (Art. 6 Act 1/1996):

- (a) free advice and guidance prior to the proceedings for those who intend to claim judicial protection of their rights and interests, as well as information on the possibility of resorting to mediation or other extrajudicial means of conflict resolution, in cases not expressly prohibited by law, when they aim to avoid procedural conflict or analyse the viability of the claim;
- (b) access to a lawyer for the detainee, prisoner or defendant who has not appointed one, in any police procedure that is not a consequence of a criminal proceeding in progress or in their first appearance before a judicial body, or when this is carried out by means of judicial assistance and the detainee, prisoner or accused has not appointed a lawyer in the place where judicial assistance is provided. This legal assistance shall also apply to the person requested and detained as a result of a European arrest warrant who has not appointed a lawyer. It will not be necessary for the detainee, prisoner or defendant to prove in advance their lack of resources, without prejudice to the fact that if the right to free legal assistance is not recognised later, they must pay the lawyer the fees accrued for their intervention;
- (c) free defence and representation by a lawyer and *procurador* in judicial proceedings when the intervention of these professionals is legally mandatory or when, not being so, any of the following circumstances arise:
  - (i) their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings; or
  - (ii) in the case of minor crimes, the person against whom the criminal proceedings are directed has claimed the right to be assisted by a lawyer, which is agreed by the court or tribunal, in consideration of the category of the offence in question and the personal circumstances of the applicant in relation to legal assistance.
- (d) free insertion of announcements or edicts, in the course of the proceedings, which must be published in official newspapers;
- (e) exemption from the payment of legal fees, as well as the payment of deposits necessary for filing appeals;
- (f) free expert assistance in the proceedings by technical personnel assigned to relevant authorities, or, failing that, by officials, agencies or technical services dependent on public administrations;
- (g) obtaining free copies, evidence, instruments and notarial acts, in the terms provided in Art. 130 of the Notarial Regulations;
- (h) reduction by 80% of the fees that arise from the granting of public deeds and for obtaining copies and notarial evidence not contemplated in the previous number, when they are directly related to the proceedings and are required by the judicial body in the course of the same, or serve to substantiate the claim of the beneficiary of legal aid;
- (i) reduction by 80% of the fees that arise from obtaining notes, certifications, annotations, entries and registrations in the Property and Mercantile Registries, when they are directly related to the proceedings and are required by the judicial body in the course of the same, or serve to substantiate the claim of the beneficiary of legal aid.