



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 Cyprus.

Generally, there have been varying levels of importance and value added through the implementation of the directives in question. It must be noted that the Directive on the right of access to a lawyer (Directive 2013/48/EU), has not been implemented fully. Under Cypriot law, the right is only safeguarded for arrested persons or persons deprived of their liberty. Under the directive, the right is provided for suspects, from the moment they are notified that they are suspected persons. This is an important omission.

The Directive on the right to legal aid (Directive (EU) 2016/1919) is the directive which has had the biggest impact on the national system, as it has led to the amendment of existing Cypriot legislation in a manner whereby arrested persons now have a right to legal aid, prior to being brought before a competent criminal court and before being interrogated or any evidence-gathering acts by the investigative authorities.

The Directive on the right to presumption of innocence (Directive (EU) 2016/343) has had the lowest impact on the national system, as this was a right which has always been safeguarded by the Constitution and the national case-law which adopts the relevant provisions of the ECHR.

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Right of access to a lawyer

Directive 2013/48/EU

In the Republic of Cyprus, the general right to have access to a lawyer was protected from the establishment of the Republic, by way of [Article 11.4](#) of the Constitution, which provides for the right of an arrested person to have access to a lawyer of their choice. A similar protection is afforded to defendants before criminal courts, by way of [Article 12.5\(c\)](#) of the Constitution.

Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in EAW proceedings and on the right to have a third party informed upon deprivation of liberty, has been introduced into the Cypriot national legal system by amendments made to [Law 163\(I\)/2005](#), titled the "Rights of Suspects, Persons Arrested or Deprived of Their Liberty Law" as well as to [Law 133\(I\)/2004](#), titled the "European Arrest Warrants and Extradition of Wanted Persons Between Member States of the European Union Procedures Law".

Various rights protected by the said directive are introduced into the national system by those two Cypriot laws. The rights of suspects who are deprived of liberty are protected by [Law 163/2005](#), whereas Law 133/2004 protects those wanted by way of a European Arrest Warrant.

[Law 163/2005](#) applies only to persons who have been **arrested or are deprived of their liberty**. The directive, however, clearly states that it is to apply to suspects or accused persons from the moment they are made aware that they are suspected or accused of having committed a criminal offence. Therefore, the harmonisation process by the Cypriot Parliament has not been completed in a manner which is consistent with the directive itself. In fact, the only amendment made in respect of persons who are suspected of having committed a criminal offence has been to the **title** of the law. Specifically, whilst the title of the law includes suspects (not yet arrested or deprived of liberty), nonetheless the text of the law remains unaltered. This, in the author's opinion, is a very important omission on the Cypriot Parliament's behalf.

Nonetheless, there is much added value to the national legal system due to the introduction of the directive. First, [Law 163/2005](#) afforded only limited protection to suspects deprived of their liberty. For example, prior to the amendments made to the Cypriot law, there was no right of a suspect to come in contact with family members, nor was there any provision allowing a suspect of foreign nationality to contact the consular authorities of his or her country in the Republic. These are welcome additions that are of huge value - especially the latter, as it is often very difficult for a foreign national to exercise rights comprehensively. The fact that there is a right to inform and seek help from consular authorities will no doubt boost mutual trust between Member States in each other's criminal justice systems.

[Law 163/2005](#) has of course, since its amendment, expanded the rights afforded to arrested persons, granting them rights to have access to a lawyer before any evidence-gathering acts by the police authorities as well as access to a lawyer before being interrogated by an officer. Additionally, the law has been amended so as to allow a personal meeting between an arrested person and the lawyer of their choice. The arrested person also has the right to have their lawyer present during evidence-gathering acts by the investigative authorities, as well as to have the lawyer take part by way of clarifications in the interrogation of an arrested person. This is important as it is very often that a suspect being interrogated will be in a state of stress and confusion. The presence of a defence lawyer, clarifying certain points, will no doubt aid suspects in that respect.

The added value of the directive is high. Whilst the provisions of the Cypriot Constitution, the relevant Supreme Court case-law, Article 6 of the European Convention on Human Rights (ECHR) and the relevant European Court of Human Rights (ECtHR) case-law overlap with the directive at various points, nonetheless, in Cyprus at least, there needed to be a specific list of rights for those who are arrested or suspected of having committed a criminal offence.

Indeed, whilst most of the rights are not new, investigative officers were frequently unaware of the relevant Supreme Court case law, meaning there were many cases in which arrested persons would argue that their constitutional rights were violated during the investigative phase of proceedings and would seek to have relevant evidence deemed inadmissible. With the implementation of this directive however, the police authorities now follow strict “checklists”, which they have drawn up based on the amended laws. Thus, arrested persons are usually afforded most of the rights provided for by the directive, which are clear and unambiguous, given the legal certainty now in place.

Undoubtedly, the rights protected under the directive are much better protected in light of the implementation of the directive into national law. Apart from the obvious reasons which can be drawn from what has already been mentioned above, the added factor of a potential ruling by the Court of Justice of the European Union (CJEU) on a point of law means that Cypriot courts have to be very careful when examining complaints of a violation of a right protected by the directive. Unfortunately, there are times in Cyprus where the courts might prefer to “overlook” certain procedural mis-steps, rather than see the “criminal” exonerated. With the added value of a CJEU ruling on a specific point, if and when a point of law is argued based on a European legal instrument, then of course there is little scope for such occurrences.

Thus, the added procedural protection afforded by EU legislation is of significant value.

Right to be presumed innocent

Directive (EU) 2016/343

This directive has been implemented by way of amendments made to the [Criminal Procedure Law \(Cap. 155\)](#) and also to [Law 163/2005](#). Specifically, 3 new articles were added to the Criminal Procedure Law, [Articles 3A, 3B and 3C](#). They deal with the [right to be presumed innocent \(3A\)](#), the [prohibition of public references to the guilt of a suspect or accused person \(3B\)](#) and the [right against self-incrimination \(3C\)](#). These rights were, of course, already safeguarded by the Constitution of Cyprus ([Article 12.1 & 30](#)) and the relevant provisions of the ECHR.

As regards the right of an accused to be present at his or her trial, this right was already safeguarded by [Article 63 of the Criminal Procedure Law](#). Cyprus, being a common law jurisdiction, has a very different attitude, regarding it, mostly, to be a necessity that an accused be present at his or her trial. In fact, very few cases are ever heard or proceed in the absence of an accused person, with most cases adjourned and/or discontinued where an accused is not present. Some cases are actually dismissed by judges where the prosecution has been unable to locate and arrest the accused and bring him or her before the court. Only recently have these rules been relaxed somewhat, with trial in absence warnings being issued to accused persons. This is the way in cases dealing with minor offences, however, which are punishable with monetary sentences.

Further, given the fact that only very few cases are ever dealt with in the absence of an accused, there has never been a need for a mechanism which deals with the “re-opening” of cases and the procedural guarantee provided for in Article 9 of the directive. Nonetheless, given that some minor cases do now proceed in the absence of the accused, such a mechanism is desirable. To date however, it is unfortunately missing from the Cypriot criminal justice system. One can, in fact, only seek leave to appeal to the Supreme Court in such cases, with a very low success rate based on the relevant case-law.

Therefore, in light of the above, whilst added procedural guarantees from EU legislative acts are always welcome, the reality is that the directive and its implementation have not made a noticeable difference to the criminal justice system in Cyprus, as these rights were already well protected under the Constitution and the Criminal Procedure Law. The added value, therefore, of the directive in the national legal system is negligible, given the structure of the criminal justice system in place in the Republic.

In spite of the above, one cannot deny that the added protection at EU law level certainly does enhance the level of protection. The importance of a Union legal instrument is undeniable. Therefore, the right of having a point of law decided by the CJEU is an important one, as it allows an accused person who complains of a violation of a procedural safeguard provided for by the directive to have the point decided at the highest possible level of justice.

Right to legal aid

Directive (EU) 2016/1919

The Directive on the right to legal aid has doubtless had the biggest impact on the national system. Whilst there already was an adequate legal aid system in Cyprus prior to the implementation of the directive, it has, nonetheless, both expanded and improved the legal aid procedure in Cyprus.

The directive has been implemented by way of amendments to existing legislation. Amendments were made to [Law 163/2005](#) and also to the [Legal Aid Law \(Law 165\(I\)/2002\)](#).

[Law 163/2005](#) has been amended so that where a person has been arrested, they may apply for legal aid at the police station and have free access to a lawyer **before** being presented before a court. This is of vital importance as it allows an arrested person or a person deprived of their liberty the opportunity to access a lawyer through legal aid at the earliest possible opportunity and of course, prior to any interrogations or evidence-gathering acts on behalf of the police.

In spite of the above, [Article 3A of Law 163/2005](#) provides that where the arrested person is brought before a competent court within 24 hours of their arrest, the legal aid application is finally determined and approved by the competent court. It is unclear what the situation might be where an application is then turned down by the court and what happens to the legal representation of the arrested person, or indeed if the lawyer is allowed to claim expenses for having visited the arrested person prior to the latter being brought before a competent court.

Further, the Legal Aid Law referred to above has been amended so that those who are subject to European Arrest Warrant Proceedings are also entitled to apply for legal aid ([Article 4A](#)). What is especially important is that the right of a requested person to legal aid in the Republic of Cyprus, in cases where it is the Republic that is the requesting state, is also recognised.

The Cypriot Legal Aid Law provides that a person who is eligible for legal aid may appoint the lawyer of their choice. The court will only appoint a lawyer where the suspect, arrested or accused person, does not opt to choose a lawyer.

Courts in Cyprus usually apply the means test to determine eligibility for legal aid. However, there has always been a power vested in criminal courts to appoint a lawyer for an accused person, where the interests of justice so require. This power has been in the Criminal Procedure Law since its creation and of course predates the directive. Thus, there is in place a merits test, as per the directive.

All in all, the added value of the Legal Aid Directive has been significant, as it has expanded legal aid to cover requested persons by way of European Arrest Warrants, where the Republic of Cyprus is both the issuing and the requesting state. Additionally, it has led to the amendment of [Law 163/2005](#), whereby arrested persons can have access to legal aid lawyers **immediately** and before being brought before a competent court, which means they are able to fully exercise their right to legal representation before any evidence-gathering acts, as per the directive.

What is disappointing, at this stage at least, is the lack of any implementation of the articles of the directive which provide for the quality of legal services provided, and of course training for those involved in the decision-making process. Indeed, a common problem in the determination of legal aid applications is where it is determined that the applicant has **some** source of income. In those situations, it is often the case that applications are rejected, without the courts taking into consideration the standard and cost of living in Cyprus, other expenses the applicant may have and the other considerations provided for in the means test of the directive. This is likely a consequence of lack of training on the part of those involved in the decision-making process and illustrates that the directive's provisions concerning adequate training are of vital importance.

Overall, however, and despite the fact that certain provisions of the directive have not been implemented fully, it is clear that the right to legal aid has been enhanced to an important degree by the directive, especially in the case of arrested persons and their right to legal aid (and consequently the right to legal representation) before any evidence-gathering acts or interrogations. Likewise, the enhanced right to legal aid in European Arrest Warrant proceedings, in cases where Cyprus is both the issuing or requesting state, is of huge value. If the general spirit of the directive can also be implemented through rigorous training of judges and those involved in the determination of legal aid applications, then the Cypriot criminal justice system will further benefit.