



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 Hungary.

Generally, the 3 directives are quite well implemented in the Hungarian legal environment at the theoretical level. The benefits gained can be summarised as it follows:

- (1) the right of access to a lawyer in criminal proceedings is better protected, specifically with: a) new and precise rules granting access to a lawyer in a 'timely manner'; b) legal provisions aimed at ensuring the effectiveness of the defence and c) the introduction of the new notion and procedural status/position of 'person who could be reasonably accused of the commission of a crime', which enables full compliance with the directive's scope;
- (2) better compliance with the right to be presumed innocent, with clearer rules in the Criminal Procedure Code granting the application of the principle of presumption of innocence, indirectly also through the possible use of videoconferencing, and amendment of the internal law enforcement regulation on the rules of transporting detained persons;
- (3) improved application and quality of the right of legal aid, due to the directive's indirect effect on the newly introduced system of assigning public defenders and the new compulsory legal education for every lawyer to ensure good quality of services.

However, there are still discrepancies in everyday practice regarding compliance with the directives.

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Right of access to a lawyer

Directive 2013/48/EU

The rights guaranteed by the directive concerned had already been ensured – at least formally – in the Hungarian legal system prior to its implementation. Thus, Hungary reported that it had fully implemented the directive by the deadline of 27 November 2016, indicating [12 transposition measures](#), the vast majority of them aiming to clarify the previously applicable legal provisions and/or making them more concrete and precise in the light of the directive.

However, since then a new [Criminal Procedural Code](#), Act XC of 2017 on Criminal Procedure (hereafter referred to as: 'Be.') was introduced with effect from 1 July 2018. This new criminal procedural act guarantees the rights mentioned in the directive with clearer and more precise provisions – which will be discussed in the following paragraphs. On the same topic, and relating to the procedure to be followed for European Arrest Warrants, [Act CLXXX on Cooperation in Criminal Matters with the Member States of the EU](#) (hereafter referred to as 'EÜbvtv.') principally applies the rules of Be., and the separate provisions stipulate only where the rules derogate from Be.

The directive primarily defines minimum standards concerning the following matters:

A. The right of access to a lawyer in criminal proceedings (Art. 3, 4, 8, 9, 10);

Article 3 para. 1 of the Directive provides that '*suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively*'. The previous regulation had been widely criticised for being inadequate in ensuring compliance with the criteria of a 'practical' and 'effective' defence, as the 'timely manner' of access to a private lawyer/to a public defender was not guaranteed in practice.

In the light of this, to comply with the directive the new Be. made the applicable rules more precise, as follows:

- Section 113 para. 3-4 of the Be. stipulate rules for informing/summoning the participants in the criminal procedure about procedural steps and provide that:
 - i) primarily the notice should be sent to the concerned person at least 5 days prior to the procedural step, but
 - ii) during the investigation, if the urgency of the matter makes it reasonable, this deadline could be reduced to 24 hours, and
 - iii) in case of urgent procedural steps affecting the suspect/accused person, the notice could be sent to the defence lawyer only 2 hours before the procedural step.
- Section 39 para. 6 of the Be. stipulates that in order to ensure the actual applicability of the right to prepare a defence strategy and to consult privately with the suspect, the investigating authority, the court or the prosecutor's office shall postpone the enforcement of a procedural step/measure for at least 1 hour if the defence lawyer and the suspect did not have the opportunity - without any fault on their part – to exercise these rights prior to the procedural step/measure.

Considering these provisions, the 'timely manner' of accessing a lawyer seems to be ensured. However, from a practical point of view, the 2 hour deadline for notice to the defence lawyer prior to a procedural step, e. g. during the night, may fail to work. In addition to that, the participation of a defence lawyer during a suspect's interrogation while under investigation is not a compulsory legal requirement as the interview could go ahead even in the absence of the lawyer, provided that the defence counsel has been lawfully given prior notice of the interview.

To solve this problem, Section 387 para. 3 of the Be. provides that if the suspect indicates during his/her interrogation that he/she wants to appoint a defence lawyer or asks for a public defender, the authorities are obliged to notify immediately the defence lawyer (or to take the necessary steps to order a public defender) and shall suspend the enforcement of the suspect's interview until the defence counsel's appearance, waiting at least 2 hours. However, the suspect's interview can be continued if the defence counsel does not appear within the defined timeframe, or the suspect approves the continuation of the interview without the defence counsel's presence. It is quite debatable whether these provisions fully comply with Article 3 para. 6 defining the reasons justifying the temporary limitation of the right to access to a lawyer (urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or the immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings).

The previous Hungarian [Criminal Procedure Code](#) did not establish either the procedural position or the status of those who have not yet been accused and interrogated by the investigating authority (the starting point of being a 'suspect'). Yet the investigation was still focused on their suspicious activity, which was not in full compliance with the directive's provisions, i.e. Section 2. Therefore, the new Be. introduced the new notion of the 'person who could reasonably be accused of the commission of a crime'. Pursuant to Section 38 para. 3, under 'persons who could reasonably be accused of the commission of a crime', the target is those whose arrest/detention has been ordered or an arrest warrant has been issued against them or who have been summoned for interview as a suspect during the investigation – until the suspect's interview and the disclosure of the actual accusation against them. Section 386 of the Be. stipulates the rights of the 'persons who could reasonably be accused of the commission of a crime', which cover the following:

- 1) the right to request information about their procedural rights,
- 2) right to appoint a defence counsel or request a public defender,
- 3) the right to consult with their defence lawyer freely, without monitoring. Parallel to that, defence counsel are entitled to get in touch with these persons and to consult freely with them.

B. The right to have a third person informed of the deprivation of liberty (Art. 5,8 and Art. 10 para. 3);

C. The right to communicate with consular authorities (Art. 7 and Art. 10 para. 3).

The minimum standards set out by the directive concerning the right to have a third person informed of the deprivation of liberty, and the right to communicate with consular authorities, had been guaranteed by the previous criminal procedure code, too, and are ensured by the new Be.

Considering the above, the most relevant added value of the introduction of the directive into the Hungarian national legal system could be summarised as follows:

- 1) precise rules granting actual access to a lawyer (despite some practical concerns);
- 2) new rules to improve the 'timely manner' of accessing a lawyer;
- 3) clarified legal provisions aimed at ensuring the effectiveness of the defence, i.e. granting the possibility of postponing procedural steps to enable free consultation between the defence counsel and the suspect to prepare for the procedure;
- 4) a new notion and procedural status/position of 'person who could reasonably be accused of the commission of a crime', which enables full compliance with the directive's scope.

Accordingly, it can be concluded that the rights referred to in the directive, specifically aspects of the right of access to a lawyer in criminal proceedings, are better protected in our jurisdiction after the implementation measures.

Right to be presumed innocent

Directive (EU) 2016/343

The implementation date of the above directive was 1 April 2018, whilst the Member States were obliged first to provide data by 1 April 2020 about the enforcement of the directive's provisions, and after that every 3 years. The Commission was also obliged to submit a report about these data to the European Parliament and to the Council by 1 April 2021. Despite these obligations, the Commission's [report](#) mentions that – except for Austria – none of the Member States provided data about the implementation of the directive. Hungary [mentioned](#) all in all 23 transposition measures which had been introduced to ensure compliance with the directive by 1 April 2018. However, the vast majority of the legal instruments mentioned seems to have rather theoretical significance and/or relationship with the directive, not to mention the fundamental change in the legal environment due to the new Be. entering into effect on 1 July 2018.

The Commission reported that 'the approach to the Directive's implementation is different between the Member States. Some of the Member States – beside the legal or practical enforcement measures – have introduced concrete legal measures with the direct aim of the transposition of the rights mentioned in the Directive. Other Member States deemed that the already applicable provisions more or less comply with the criteria of the Directive, and decided not to take concrete measures for the Directive's implementation'. Hungary decided to choose a so-called middle way in implementation: several implementation measures have been formally indicated without actual effect and/or relationship with the directive.

Therefore, considering the lack of relevant data related to the actual enforcement of the directive's provisions and the change in the Hungarian legal framework, it is hard to estimate the actual effect of the directive, and so the basis of evaluation has to be 'everyday' legal practice.

The Commission's report lists the personal scope of the norm as the first problematic issue. Considering this, the Be.'s wording that 'nobody could be deemed guilty, until his/her culpability has been established by the court's final decision' complies with the directive's provisions. Moreover, the introduction of the new notion of 'person who could reasonably be accused of the commission of a crime' solves the problem of *de facto* suspects.

According to the Commission's report and to the author's experience, the most problematic issue concerning the rights referred to in the directive is the detrimental presentation of suspects and accused persons, specifically the unreasonable use of measures of physical restraint. This issue is rather connected to the transportation of suspects, as judges generally permit suspension of these measures during the trial. The formal legal provision of [Section 48 of Act XXXIV of 1994](#) on the police stipulates strict rules concerning the use of handcuffs, which can in principle be justified only for the following reasons: a) to avoid self-destruction, b) to avoid attack, c) to avoid escape, d) to break resistance. An amendment to the internal service regulation of the police in December 2015 limited the use of handcuffs – at least in theory – exclusively to these reasons.

Despite these rules, everyday practice is that the authorities generally apply handcuffs during the concerned person's transport and escort to events related to the proceedings. This also leads to the ambiguous situation that, even after an acquittal and/or termination of the previously applied coercive measure (e.g. preliminary detention), the concerned person has to travel back with the authority to the enforcement institution to gain immediate access to his/her deposited belongings, and during this journey – despite his/her innocence having been established – has to obey the authorities' measures, e. g. wear handcuffs due to the 'prevailing practical standards'. Further, pursuant to the internal law enforcement rules in effect in 2018, a so-called lunge (or leash) should be applied during the escort of even those detained persons with seriously reduced mobility (e. g. using walkers). Fortunately, this regulation was overruled in early 2021 by a [new internal regulation](#), which means that now, prior to transporting the detained person, the competent officer has to evaluate the concrete situation and the unique attributes of the detained person and has to make a case-by-case assessment on the use of coercive measures/instruments.

However, the new Be. introduced the use of videoconferencing during the hearing of suspects or accused persons, which seems to ease the above problem from a practical point of view, as in that case no transport will take place, and so neither will physical restraint be applied against the concerned person.

Considering the above, the most relevant added value of the introduction of the directive in the Hungarian national legal system could be summarised as follows:

- (1) clearer rules in the Criminal Procedure Code granting the application of the principle of presumption of innocence, indirectly also through the possible use of videoconferencing, and
- (2) amendment of the internal law enforcement regulation on the rules of transporting detained persons.

Accordingly, it can be concluded that the rights referred to in the directive are – definitely from a theoretical point of view, and more or less from a practical perspective – better protected in our jurisdiction as a result of the directive, but in practice full compliance with the directive's standards is not guaranteed.

Right to legal aid

Directive (EU) 2016/1919

The implementation date of the above directive was 25 May 2019, and the Member States were obliged to provide the first data by 25 May 2021 about the enforcement of the directive's provisions, and after that every 3 years. The Commission is obliged to submit a report based on the data provided by the Member States to the European Parliament and to the Council by 25 May 2022. Unfortunately, we have no information about the data allegedly provided by Hungary on the enforcement of the directive, whilst the Commission has almost one year left to prepare its report. Consequently, we have at present no access to reliable and objective data about the implementation and real enforcement of the directive's provisions.

Hungary [referred](#) to 28 transposition measures which had been introduced to ensure compliance with the directive by 25 May 2019. However, the vast majority of the legal instruments mentioned seem to have rather theoretical significance and/or a broad relationship with the directive. Moreover, there was a fundamental change in the legal environment due to the introduction of the new Criminal Procedure Code, beside the [new Civil Procedure Code](#) and [new Administrative Procedure Code](#). Therefore, the supplementary legal norms accompanying the new procedural codes, which define in detail the criteria for requesting (free) legal aid could be deemed the directive's most relevant transposition measures. It should also be considered that there is a strong relationship and interconnection between this directive and Directive 2013/48/EU – the latter being relatively well implemented in the Hungarian legal system, as discussed under point 1.

Evaluating the concrete implementation and effect of the directive, the vast majority of the rights defined in the directive are ensured in Hungary both on the level of formal legal provisions, and on the practical level. This means that the possibility of legal aid is granted both for suspects/accused and the requested persons in principle and in practice as well, whilst the preconditions for granting access to free legal aid are in compliance with the directive's standards.

The most problematic issue is related to the enforcement of Article 7 on the quality of legal aid and training. Prior to the new Criminal Procedure Code entering into force, the system of legal aid, e.g. the assignment of public defenders, was within the sole competence of the authorities concerned, meaning that the authorities had the opportunity to decide whom to assign as public defender, how often, and to which cases. This previous system was a basis of real abuse and/or discrimination. Moreover, prior to the new Be. and the reforms related to the new statute, there was no compulsory continuing legal education for lawyers. This meant that, once a lawyer passed the bar exam in Hungary, he/she could practise in all fields of law without any further training. The lack of proper continuing legal education might also have contributed to partial non-compliance with the directive's standards.

Considering the above, the introduction of the new Be. and the accompanying reforms could be deemed as milestones in the implementation of the standards of Article 7 of the directive. The new Be. introduced a whole new system for the assignment of public defenders which is meant to be independent from the authorities and is based on the concept that, following notification by the competent authorities, the regional bar has the right to assign a public defender to the case. Moreover, the Hungarian Bar [introduced](#) compulsory continuing legal education for every lawyer, which must be kept up every year in order to continue in practice. Therefore, these new instruments seem to tackle effectively the problems explained above.

However, the following issues should also be considered:

- a) in cases when the independently assigned public defender is not available, the authorities have the possibility to assign directly a so-called 'deputy' defender, meaning that the total independence of the public defender from the authorities may not be fully guaranteed, and

- b) despite the new system of assigning public defenders being controlled by the Bar, the remuneration for public defenders' services remains extremely low compared to average market prices, and not all the activities necessary for providing an effective defence are compensated (e.g. no compensation is provided for personal consultations with the client in the office, preparation of written submissions, etc.) which has a highly adverse effect on the quality of the defence provided.

Therefore, the most relevant added value of the introduction of the directive in the Hungarian national legal system lies in its indirect effect on the recently introduced new legal instruments mentioned above. In summary, the effects are the following:

- 1) a newly introduced system of assigning public defenders, which is in principle independent from the authorities, and
- 2) new compulsory legal education for every active lawyer to ensure good quality of services.

Accordingly, the rights referred to in the Directive are better protected in our jurisdiction as a result of the directive, specifically because the recently adopted new legal framework aims to ensure compliance with Article 7 as well as demanding good quality of legal aid services and proper continuing legal education of lawyers.