Poland

Infosheets on the Application of EU Procedural Rights Directives

Executive summary

These infosheets are part of the CrimiLAW project and aim at facilitating 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.

None of the three EU directives in question has been properly and fully implemented in the Polish domestic legal system. Amendments to criminal procedural law, introduced in Poland in the last decade, brought many national solutions closer to the requirements set out in the minimum standards created at EU level in the field of criminal procedural safeguards. This also occurred in the area regulated by the three directives discussed in this study.

At least some of solutions from those three directives made it possible to create new legal qualities in Poland, of added value to the Polish legal system, and bringing it closer to the EU pattern. However, there is still a lot to improve and develop to achieve the minimum standards level. It is not only about necessary and appropriate modifications in the sphere of domestic legal solutions, but also about changes to a very important dimension of law enforcement and judicial authorities' practice, i.e. on how to interpret and apply national provisions which are already in force.

It is also important to remind those who apply the law that they must accept direct application of provisions of the three EU directives in an area which is not properly regulated. Inadequacies in the transposition of the three directives have been remarked upon in the Polish doctrine on criminal procedural law, in opinions and analyses, and in official presentations of the Polish Ombudsman. However these views on the inadequacies are not shared by current political decision-makers.

*This infosheet has been prepared by **Dr. Piotr Chrzczonowicz**, Polish Attorney-at-Law.*

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Right of access to a lawyer
Directive 2013/48/EU

Although Directive 2013/48/EU has not been fully implemented in Poland, the view that this instrument has not been implemented at all seems unjustified. Many solutions in Polish law harmonise with certain requirements of the directive (they are inspired by the provisions of the directive), but in the area of the right of access to a lawyer there is still a lot to improve, in theory and in practice, in order to achieve the required minimum standard.

Implementation of the directive had an impact on the provisions concerning the right to defence in two codes i.e. the Code of Criminal Proceedings of the 6 June 1997 (hereinafter CCP) as well as the Code on Proceedings on Petty Offences of the 24 August 2001 (hereinafter CPPO). Necessary amendments of these two codes brought important changes to the right of access to a lawyer. But current regulations do not fully overlap with the legal standard proposed by the directive.

To illustrate this, a few remarks and observations are worth being made:

- The right to defence in the light of the Constitution of the Republic of Poland of the 2 of April 1997 (*see:* Art. 42 section 2) and the judgments of both the Constitutional Tribunal and the Supreme Court is vested even in those who are not formal suspects or accused, but also in those who are potential suspects with very high probability that they become formal suspects.

- In the light of provisions of Polish procedural law, the right to defence (connected to the professional activity of a lawyer as a defender) is guaranteed for a suspect and for an accused person. A person who is not formally suspected though suspected in fact (his or her current role is a witness) could have a proxy who is a lawyer (*see:* Art. 87 para. 2 CCP). A participation of such a professional representative in criminal proceedings may be stopped by a proper decision of a public prosecutor or by a court (if these subjects individually consider that there is no need to protect the interests of the person mentioned above – *see:* Art. 87 para. 3 CCP).

- The right of access to lawyer is – according to Polish procedural provisions – a right of detainees (potentially suspected) and also – within the framework of the right to defence - of suspects and accused persons.

- In Polish criminal proceedings, there is a lack of precise and exhaustive rules concerning the issue of admissibility of questioning a suspect without full access to a lawyer. Such rules – as exceptions – seem to be needed. Also, in this context, precise provisions on the issue of temporary derogations need to be prepared to satisfy the EU standard.

- Taking into account the circumstances in which temporary derogations are granted, they should be exceptional and dictated by the interest of the preparatory proceedings. 'Particularly motivated situation' may arise out of a suspicion that contacts between a suspect and his or her lawyer (or their correspondence) might be used for illegal purposes (to obstruct justice). 'The interest of the preparatory proceedings' means that the reservations are only available if they are necessary to reach the aims of preparatory proceedings (like detection and apprehension of other offenders or obtaining and securing the evidence in a criminal case). In the view of commentators on Polish criminal proceedings law, the principle of proportionality should be fully respected. It seems that - as a rule - practice in Poland keeps to the standard of exceptional circumstances as well as of the interest of the preparatory proceedings, but it is possible to observe some shortcomings and abuses. Temporary derogations (if they were provided by specific regulations on the grounds of the CCP) are granted in preparatory proceedings (therefore, at the pre-trial stage).

- The rules of the CPPO concerning the interrogation of a person during an investigation in the case of a petty offence (*see* Art. 54 para. 6) do not provide for the participation of a lawyer during interrogation.

- Decisions concerning the application of derogations are not submitted to judicial review. However, decisions on derogations should be, as it seems, duly reasoned and attached to files of the proceedings (*see:* Art.s 73 para. 2 and para. 3, 245 para. 1 and 317 para. 2 CCP). Unfortunately, there is no common practical standard in criminal proceedings for giving reasons for the decisions. It is possible to observe the existence of motives for decisions which are general, brief and which 'repeat' the premises indicated in the provisions themselves. Interpretation of Art. 46 para. 4 CPPO leads to the belief that it is not necessary to give due reasons. This regulation does not indicate the time limitation of a derogation and even does not require 'particular motivation' of the derogation. This could contravene especially the condition of proportionality and necessity and, in consequence, the principle of the fairness of proceedings.

- A detainee shall have, on his or her demand, the possibility to contact - in an accessible form –a lawyer as well as to communicate (to talk) with that lawyer directly (*see:* Art. 46 para. 4 of the CPPO). A detention authority can impose a condition that its representative will be present during this communication. Unfortunately, neither the mentioned regulation of the CPPO (nor any other one in the same code) introduces any reasons for such a condition. In the code, the Polish law-maker has not indicated the time limits for such a condition. It means that, in practice, the presence of a representative of the authority during the conversation between a detainee and his or her defence lawyer is possible not only exceptionally, and this condition is not limited in time.

- According to the rule in Art. 217 para. 1 of the Criminal Enforcement Code of the 6 June, 1997 (hereinafter CEC), a person in pre-trial detention has the opportunity of a visit from others (also from the person closest to him or her) by courtesy of the proper authority. According to Art. 217 para. 1a CEC, a person in a pre-trial detention is entitled to have, at least, one visit from his or her closest person per month. In turn, Art. 217 para. 1b CEC states that refusal of consent to such a visit is exceptional, and is based on the reasoned fear that the visit (a form of communication) would be used in order illegally to obstruct the criminal proceedings, or to commit a crime (especially to abetting to a crime)

- The right to challenge a decision about refusal of consent to visit a person in a pre-trial detention by a person closest to him or her is guaranteed for a person in pre-trial detention and for the person closest to him or her who applies for the visit. Unfortunately, it is not expressly stated that the right to visit (to communicate) with a person closest to a person in a pre-trial detention (a relative) should be possible without undue delay. The visit from a relative is just one aspect of communication with such a third person and the other aspects are excluded through the silence of the provisions.

- There are no specific regulations in the CCP concerning the right of access to a lawyer for a requested person under a European Arrest Warrant if Poland is the issuing Member State. Proper regulation in this field is needed.

- In the CCP, there are no regulations determining the duty of the proper Polish authority under a European Arrest Warrant if Poland is the executing Member State so as to inform a detainee, immediately after deprivation of liberty, about his or her right to instruct a lawyer in the issuing Member State.

Here are some particular recommendations in order to improve the current level of implementation of the directive in Poland (in the sphere of legal regulations as well as in practice):

- Consider changing current forms of the model letters of rights and obligations in order to ensure that their language will be clearer and more understandable for detainees or suspects. The model letter for a witness should include information on the possibility of appointing a representative (a lawyer) who could take part in the interrogation (pursuant to Art. 87 CCP).

- Procedural provisions should clearly indicate the possibility of access to a lawyer in relation to various procedural activities for persons who are potential suspects and are very probably going to become formal suspects.

- Procedural rules should provide for the possibility to repeat the act of interrogation of a person in the presence of his or her lawyer if this act was carried out previously in violation of his or her right of access to a lawyer.

- In proceedings on petty offences, which are punishable by a custodial sentence, provisions should clearly indicate that a lawyer should be present when a person is interrogated by an authority during investigation proceedings.

- It is necessary to diagnose those situations in criminal procedure when regulations provide for the possibility of limiting rights contained in the directive. The existence of such exceptions must be subject to appropriate procedural guarantees resulting, *inter alia*, from Art. 3 sections 5 and 6 and Art. 8 of the directive. Nowadays, the possible refusal of access to a lawyer does not take the form of a procedural decision that would be a subject to judicial review.

- Under Polish law, the right of detainees and those in pre-trial detention to confidential contact and communication with a lawyer can be restricted in proceedings, without any procedural guarantees, but the directive (Art. 4) does not provide for such limitations. This is an area requiring specific legal modifications.

- In practice, in many cases, the lack of access to a lawyer is a simple consequence of the way that the legal aid (*ex officio*) system functions in Poland. Sometimes, a public defender (also called here *ex officio* defence lawyer) is appointed after a few or a dozen days, especially in large cities (due to the number of cases in a specific court). Such situation seems to be unacceptable and not in line with the directive. It is also necessary to think about amending the wording of Art. 80 CCP in order to create a wider scope of mandatory defence (this provision currently specifies that mandatory defence is available to a defendant in proceedings before the district court if he or she is charged with a felony).

- Polish procedural provisions do not regulate the procedure for waiving the right of access to a lawyer. Such a waiver usually takes the form of not requesting contact with a lawyer (it is a so-called implied waiver of the right of access to a lawyer). The creation of procedures for limiting the right of access to a lawyer and for waiving this right may be necessary in order to ensure proper implementation of the obligation arising from Art. 12 of the directive, expressing the need to ensuring an effective remedy if there has been a breach of the right of access to a lawyer in these circumstances.

- Regardless of specific amendments to the law, it is necessary to introduce changes to the organisation of police stations, prosecutors' offices and bar councils, which will increase the accessibility of lawyers in criminal proceedings and proceedings for petty offences (in particular, it is necessary to consider the organisational aspects of police stations and public prosecutors' offices to ensure that, without any obstacles, proper lists of lawyers acting 'on call', especially in accelerated criminal proceedings, can be easily accessed).

- In police stations and prosecutors' offices, there should be conditions allowing detainees, possible suspects (suspects in fact) and suspects (formal suspects) to communicate with their lawyers without the presence of a third person, to ensure the requirement of confidentiality is achieved. Procedural law should include a rule to oblige the recording of interrogations conducted without the presence of a lawyer.

Shortcomings and inadequacies in the proper implementation of the directive – not only in the legislative sphere (already signalled here), but especially in the sphere of practice – have been denounced through a complaint for breach of EU law lodged by the Helsinki Foundation for Human Rights with the European Commission in February 2020. It has been supplemented by new allegations in June 2020. The complaint concerns amendments to certain provisions of Polish criminal procedure - in connection with the COVID-19 pandemic - which directly violate the standard of quality of the right of access to a lawyer arising from the directive (these allegations refer to certain amendments within Arts. 250 and 374 CCP).

The implementation process concerning the directive has undoubtedly raised awareness of the importance of the right of access to a lawyer in situations of detention as well as at the earliest stage of criminal proceedings, especially in situations in which a pre-trial detention could be applied. This awareness is shared not only by those who may be and are involved in criminal proceedings as persons entitled to certain procedural safeguards, but also by lawyers themselves. It is to be hoped that, just as "a drop drills a rock", through modifications in criminal proceedings and in proceedings on petty offences connected with the implementation of the directive into the national legal order, the awareness of authorities responsible for conducting proceedings in these fields, regarding the need of modifying their practice towards meeting the standards of the directive, will also increase. This, in turn, requires clarification of various procedural provisions, possible introduction of new ones (e.g. obliging police officers to provide lists with contact details of lawyers to persons detained in police stations), training activities, changing of certain inappropriate and harmful habits in interpreting the law and performing official duties. The issue of amending procedural provisions in connection with the need to implement the directive is obviously not finished. It is an ongoing process.

Right to be presumed innocent
Directive (EU) 2016/343

From the perspective of the legal situation in Poland, which is shaped by the current legal regulations in the matter to which Directive 2016/343/EU refers, the solutions of this legal instrument appear, at times, quite innovative.

The directive has so far not been the subject of a separate, comprehensive implementation process in Poland. The issue has simply been passed over in silence. In connection with the approaching deadline for the implementation of the minimum standards arising from the directive into the national legal order (which expired on the 1 April 2018), the Ombudsman of the Republic of Poland sent a message to the Minister of Justice, indicating the urgent need for necessary changes in Polish law in order to implement the directive. In response, the Ombudsman received a clear opinion of the Minister of Justice in the light of which the current criminal law regulations were considered sufficient for fulfillment of international obligations, and therefore no legislative work is planned.

First, it must be emphasised that legal standards expressed in the content of the principle of presumption of innocence, arising from European law regualtions, *inter alia* from Directive 2016/343/EU, bind various players. In particular, they apply to prosecutors and judges. Second, it is worth presenting the current legal situation in Poland regarding relevant issues indicated in the directive:

- In Poland, the presumption of innocence is a constitutional principle developed by legislation. It is guaranteed in Art. 42(3) of the Polish Constitution of 2 April, 1997. This provision states that 'Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court'. According to the case law of the Constitutional Tribunal, the presumption of innocence constitutes one of the fundamental and universally recognised principles of the rule of law. Further, the Constitutional Tribunal unequivocally indicated that this principle - as a constitutional norm that orders the upholding and monitoring of certain rules of proceedings - is addressed to everyone, and in particular its addressees are public authorities.

- The principle of the presumption of innocence should extend and does extend to the whole of society, and thus to all extrajudicial authorities, i.e. state and local government bodies, employers, the press, social organisations and even all individuals. So, everyone has a duty to refrain from taking adverse actions against suspects or accused persons before the guilt of such persons has been proven in the final judgment of a court.

- The constitutional principle mentioned is reiterated in Art. 5 para. 1 of the Code of Criminal Proceedings of the 6 June, 1997 (hereinafter CCP). This provision states that: 'An accused shall be presumed innocent until his guilt has been proven and confirmed by a final judgment'. Furthermore, Art. 5 para. 2 CCP indicates that doubts that cannot be removed shall be resolved in favour of the accused.

- The principle of the presumption of innocence shapes the entire model of criminal proceedings whose task is, above all, to detect a perpetrator of a crime and to hold him or her criminally liable, as well as to shape the criminal proceedings in such a way that an innocent person will not bear liability (*see* Article 2 § 1 point 1 CCP).

- This principle is the only directive in Polish law which takes the form of a so-called absolute rule. In other words, the rule recognises no exceptions. Even if suspects and/or accused persons are held in pre-trial detention, they may not be deprived of the presumption of innocence. They must still not be called guilty, their right of access to a lawyer and to a defence must be guaranteed and safeguarded, and the burden of proving their innocence cannot be shifted to them.

- In the day-to-day practice of prosecutor's offices and courts, there are public statements made by prosecutors or judges concerning the perpetration of a crime and, in fact, guilt of a person, many times of a categorical nature. They appear at those stages of criminal proceedings to which the principle of presumption of innocence extends (and should extend). Such statements, including words which may be verified in future in court and may be effectively challenged, cannot be regarded as admissible.

— According to the case law of Polish courts, including the Supreme Court, the burden of proof should relate only to findings unfavourable to accused persons, because they enjoy the presumption of innocence (Art. 5 para. 1 CCP), and doubts which cannot be eliminated are resolved in their favour (Art. 5 para. 2 CCP). In view of these principles, an acquittal is required both if the accused has been proved innocent and – which probably seems to be the more common situation – he or she has not been proved guilty of the criminal act of which he or she was charged. In the latter case, therefore, it is sufficient that accused persons' statements denying the charges are substantiated. However, a decision to acquit must also be rendered in a situation where circumstances indicated by an accused person are not plausible but also fail to prove guilt. It should be emphasised that the legal value of acquittals for different reasons is the same, because Polish criminal procedural law does not provide for so-called intermediate judgments, i.e. judgments that leave a person in a state of continuous suspicion (*absolutio ab instantia*). The presumption of innocence does not require a proof. But rebutting the presumption requires evidence.

— Comparing the content of the presumption of innocence in the CCP (according to the currently accepted formula) with the minimum standard of the directive, there is no compatibility. The legal standard resulting from the directive is not achieved. In Poland, the principle of removing doubts in favour of an accused (*in dubio pro reo*), which stems from the principle of presumption of innocence, applies if, despite the evidentiary proceedings, circumstances remain unexplained and cannot be clarified (there are doubts which cannot be removed through evidence and proper application of the principle of free evaluation of evidence). Existing doubts should be resolved in favour of an accused, even resulting in an acquittal. The directive does not refer to 'irremovable doubts' but 'any doubt'. In addition, in Polish criminal proceedings the issue of doubt is limited only to doubts arising in court proceedings. The directive does not limit them to this stage of criminal proceedings - they are extended also to preparatory proceedings. The directive also refers to the evaluation of evidence ('any doubts concerning a guilt'), and not only to facts revealed by evidence. According to the directive, 'Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law'. Consequently, any evidence contrary to the law cannot be taken into account by the court. This also applies to the so-called 'fruits of the poisoned tree', i.e. evidence obtained illegally (e.g. as a result of illegally used wiretapping or other means of surveillance). Polish procedural law currently allows for the admission of such evidence (*see:* Art. 168a CCP).

— The directive applies to persons who are suspects or accused persons. All the provisions regarding the suspect under the directive are intended to apply also to persons who could become suspects (there is a high probability that such persons become formal suspects), in other words to persons before they are criminally charged. Although these people do not make statements of the same nature as statements made by suspects or accused (i.e. explanations), self-incriminating statements made by them and placed on the record of their interrogation or in other procedural documents may have a negative impact on their subsequent procedural situation. Therefore, it is important that such people should have an express guarantee of effective access to a lawyer and the right to defence. Admittedly, in the light of Art. 87 para. 2 CCP, it seems that they could have lawyers as their proxies, but this type of right is subject to the rationing provided for in Art. 87 para. 3 CCP (the court or, in preparatory proceedings, the public prosecutor may refuse to allow a proxy to participate in the proceedings if the bodies mentioned determine that the defence of interests of people who are non-parties to the proceedings does not require such participation). Enabling effective access to a lawyer by means of an appropriate amendment of the law for those who may turn into suspects in a given criminal proceeding would be a step towards decreasing the risk that such people make self-incriminating statements. It should also be mentioned that the Polish Criminal Code of 6 June, 1997 (hereinafter CC) defines the offence of giving false statements by those who do it fearing criminal liability affecting them or their closest persons. This offence is punishable by deprivation of liberty from 3 months to 5 years (*see:* Art. 233 para. 1a CC). It seems that the scope of criminal liability here violates the directive's requirements aimed at strengthening the procedural guarantees and safeguards provided also for those who may - with a high probability - become suspects, but at the moment of criminal proceedings are witnesses.

— If there are indications at the stage of interrogation as a witness that someone could be a participant in criminal activity, that person may exercise their right to refuse to make statements or avoid answering a question (see Arts. 182 and 183 CCP). Before interrogation as a witness, the interrogating authority is obliged to instruct the witness about his or her rights and obligations (*see:* Art. 300 para. 3 CCP). However, this guarantee mechanism seems to be too weak to be considered as meeting the requirements of the directive. There should be an addition that if those who are interrogated as a witness do not know that they have the right to refuse to make statements (which, in practice, could occur if they were not instructed about their rights), they would not be subject to punishment under Art. 233 para. 3 CC.

— In Poland, the EU standard ensuring the right to be present at the trial and the right to a new trial in the absence of entitled persons at the trial is embodied in the existing legal regulations. Polish provisions of the CCP define the right of an accused to participate in the trial (*see:* Art. 374 para. 1 CCP). This right also extends to participation in a trial held remotely, i.e. with the use of technical devices that allow participation in such a trial with simultaneous direct transmission of images and sounds. Court proceedings concluded with a final decision (a final judgment) may be resumed at the request of the accused submitted in due time, in which they found out about a decision which concerns them. This is possible if a case was heard in the absence of the accused who was not properly informed about the date of the trial, and for those who prove that they were unaware of the date and possibility of rendering a court decision in their absence (*see:* Art. 540b para. 1 CCP). This provision is not applied only exceptionally, in a very few strictly specified situations, like – for instance – if there was a substituted service (*see:* Art. 540b para. 1 CCP). However, the exceptional derogation from application of this provision does not violate the minimum standard of the directive.

The issue of amending procedural law in Poland in the context of implementation of the directive - to strengthen certain aspects of the presumption of innocence - is obviously not over. However, at present, there is no clear initiative in this field. There are no draft amendments of domestic law that could lead to the desired changes 'in the spirit' of the directive. Legislative activity in order to make the directive's requirements a reality – in areas where they have not yet been fulfilled – would obviously be an added value for Polish procedural law. Infringement proceedings (under Art. 258 of the Treaty on the Functioning of the European Union), initiated on the 18th of February, 2021, have been opened against Poland in relation to implementation of the directive.

Right to legal aid
Directive (EU) 2016/1919

Directive 2016/1919/EU regulates the important issue of *ex officio* legal assistance, including *ex officio* defence. Legal aid means the financing of the legal assistance of a lawyer by an EU Member State. Such a solution complements and enables the exercise of the right of access to a lawyer. The creation of a proper mechanism is required to guarantee that the right of access to a lawyer will be exercised effectively by a person who does not have a defence lawyer and/or lawyer's assistance of choice.

It should be observed that although in general the issue of legal assistance in Poland, granted and provided *ex officio* (so-called legal aid), refers to the requirements of the directive, there has not yet been a satisfactory implementation of the standards in the Directive. Unfortunately, various deficiencies in the implementation of Directive 2013/48/EU on the right of access to a lawyer 'reflect' on the correctness and quality of the implementation of Directive 2016/1919/EU.

Current legal and practical issues in Poland on the right of access to a lawyer have already been analysed earlier. However, it is worth noting the following:

— In the light of the Polish Constitution of 2 April, 1997 - Art. 42 section 2 - 'Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He or she may, in particular, choose a lawyer or avail himself or herself - in accordance with principles specified by a statute - of a lawyer appointed by the court (acting *ex officio*)'. So, this general provision constitutes a rule of access to a lawyer *ex officio* in accordance with principles specified by a statute. The Constitution identifies, as a legitimate subject, anyone against whom criminal proceedings are conducted. Such wording means that it is undoubtedly applied to suspects (formal suspects) and accused persons. In accordance with international standards concerning the protection of human rights, to which references can be found in judgments of the Polish Constitutional Tribunal and Supreme Court, the right to defence also extends to a person who is not only formally suspected but is suspected in fact. Therefore, a proper interpretation of the term 'person against whom criminal proceedings are pending', contained in the Constitution, should not be limited only to formal suspects and accused persons, but also to those who are suspects in fact, i.e. who have not yet been formally charged, but the probability of such charges is high. This category of people appears in both Directive 2013/48/EU and Directive 2016/1919/EU and such people are beneficiaries of rights which are safeguarded and guaranteed by these directives.

— 'Suspects in fact' are not indicated expressis verbis in Polish law as beneficiaries of certain rights outlined in criminal procedural law.

— Being a suspect in fact in criminal proceedings entails a number of different legal consequences. Such a person is under a number of obligations in the criminal procedural law, which seriously limit the rights and freedoms of an individual. First, Art. 74 para. 3a of the Code of Criminal Proceedings of the 6 June, 1997 (hereinafter CCP) states that those who are suspects in fact are obliged, *inter alia*, to undergo external examination of their body or other examinations not affecting the integrity of the body. Moreover, they are obliged to allow their fingerprints and photo to be taken, as well as presenting themselves to others for identification. A suspect in fact is also obliged to undergo examinations combined with bodily procedures (with exception of surgical procedures) if they are carried out by a duly authorised health-care professionals (e.g. taking blood, hair or secretions from the body). Suspects in fact are also obliged to allow a police officer to take a swab from their buccal mucous membrane, if necessary and if there is no reason to fear that this could endanger the health of the suspect in fact or other persons.

— A suspect in fact who refuses to comply with these obligations may be detained and forcibly brought before a police officer and subjected to physical force or technical means of restraint, to the extent necessary to carry out the activities mentioned. If the suspect in fact consents, technical measures may be taken to control their involuntary bodily reactions. Control and recording of telephone calls is also allowed for this category of people.

- A detained suspect in fact has the right to complain about the detention, and moreover, as a detained person, may request contact with a lawyer (*see:* Art. 245 para. 1 CCP). There is no regulation expressly granting the right to a defence lawyer and, consequently, there is also no provision that would allow such a person to have such assistance *ex officio* (i.e. to have legal aid). In the light of Art. 87 para. 2 CCP, it seems that those who could become formally suspected could appoint lawyers as their representatives (proxies - not defence lawyers), but this type of right is subject to the rationing provided for in Art. 87 para. 3 CCP.

- Numerous provisions in Polish criminal procedure which refer to accused persons also apply to 'suspects' (i.e. persons who are formally suspected). However, they do not apply to those who, although they are suspects in fact, do not have such a formal status. Article 71 para. 3 CCP provides that if the CCP uses the term 'an accused' in a general sense, the relevant provisions also apply to 'a suspect'.

The legal context presented above paints a picture of the current standard of national procedural regulations concerning the right to legal aid:

- Pursuant to Art. 78 para. 1 CCP, accused (and accordingly suspects), who do not have a defence lawyer of choice, may request such a lawyer, if they duly demonstrate that they are not in a position to bear the costs of defence without losses to subsistence of themselves and their family. Reasons for refusing a public defender (*ex officio* lawyer) appointment cannot include that an accused had free legal assistance or free civil advice, which are regulated in a separate Act of Parliament. The general criterion for appointing a defence lawyer acting *ex officio* (a public defender) is the specific financial situation of the person who applies, and more precisely the assessment of that situation made by a court. This solution applies, accordingly, when the accused demands the appointment of a public defender in order to carry out a particular procedural act (*see:* Art. 78 para. 1a CCP). The appointment of a public defender may be withdrawn. Such a situation occurs when it turns out that the circumstances of the basis on which a public defender was appointed do not exist. The decision regarding withdrawal of appointment of a defence lawyer may be appealed to another equivalent panel of the same court (*see:* Article 78 para. 2 CCP).

- An *ex officio* defence lawyer is appointed by a judge – i.e. by the president of a court - or by a court official (referendary) in a court competent to hear the case (*see:* Art. 81 para. 1 CCP). Such a lawyer is appointed from a list of lawyers (*see:* Art. 81a para. 1 CCP). Pursuant to Art. 81a para. 2 CCP, a request for appointment of a public defender should be considered 'without delay'. The provision therefore obliges a court, the court president or a court official to examine a submitted request as soon as possible, if there are no objectively justifiable impediments to make a decision without undue delay. However in practice in Poland, 'undue delay' ('promptness') may mean the passage of several days or even weeks. This may be caused by the need to complete formal deficiencies concerning documents proving the requesting person's financial situation, which is important in the context of granting legal aid. In the meantime, however, a person - as a suspect - may be subject to various procedural steps, including those which will subsequently complicate an effective defence (e.g. interrogation). The existing national law and practice may here violate the minimum standard set out under the directive. Domestic law does not foresee an obligation to consider the request for the appointment of a public defender before interrogation or any other evidence-gathering.

- Poland does not have a system of so-called *ad hoc* financial assistance ensured by the state. There is no developed and established institutional financial assistance to covering costs of *ex officio* lawyers providing assistance to suspects or accused persons while their requests for assistance of just such lawyers are being adjudicated in connection with their financial situation which itself may influence a relevant decision by the court. A legal aid mechanism while formal or factual obstacles have not yet resulted in a decision concerning a request submitted pursuant to Art. 78 para. 1 CCP, would be a solution to meet the requirements of the directive

- A separate legal act - the Ordinance of the Minister of Justice of the 28th of September, 2020 - regulates the way an accused is provided with the assistance of a public defender (including the way of drawing up the list of lawyers providing legal assistance *ex officio* and the way to appoint a public defender), as well as the way to submit a request to court for appointing a public defender, and the detailed procedure for adjudicating such a request. Lists of lawyers are submitted by the relevant bar councils to the president of the district court, regional court and appellate court covering the council's territory.

- In separate regulations, the Minister of Justice determines rates for costs of legal aid paid for by the State Treasury. These are the Ordinance of the Minister of Justice of the 3 October, 2016, for an *ex officio* 'adwokat' and the Ordinance of the Minister of Justice of the 3 October, 2016 for an *ex officio* 'radca prawny'. The rates for costs in criminal matters and petty offences are low and have not been changed for years (they generally have not been modified since 2002). Legal professionals are of the view that these rates are inadequate. If *ex officio* legal assistance is not properly paid by the state, it may lead to lower quality work and less of lawyers' involvement in the cases of clients represented *ex officio*. In Poland one can come across the stereotype of a 'good lawyer', who is a lawyer of choice, and a 'bad lawyer', who is an *ex officio* lawyer.

- In the binding model form of the Letter on Rights and Obligations of a suspect in criminal proceedings (stipulated by the Ordinance of the Minister of Justice of 14 September, 2020), which is used by criminal proceedings authorities, we find wording suggesting that the right to request an *ex officio* defence lawyer is not available for preparatory proceedings. The ordinance states that such a request may be submitted within 7 days from the date of service of the copy of the indictment (*see:* Art. 338b para. 1 and para. 2 CCP). The ordinance also indicates that a request for appointment of a public defender after the first date of a trial or hearing should be submitted within a time limit so that its consideration does not cause a change of date for the next trial or hearing (*see:* Art. 338b para. 3 CCP). In these circumstances, it must be assumed that the way in which suspects are instructed about their rights clearly violates the standard of the directive. It is highly probable that the current wording may cause difficulties in proper understanding of the content and scope of the suspect's right to be assisted by a public defender.

- There is also the lack of solutions concerning the right to a 'dual defence' ('dual representation') in cases related to the European Arrest Warrant (EAW), where legal aid in the issuing state is at stake. There is no statutory basis that would allow the subject of an EAW procedure to request and obtain legal aid when Poland is the issuing state, which certainly doesn't meet the standard of the directive (see: Art. 5 section 2).

- Polish procedural law identifies situations when a suspect or an accused person must have a defence lawyer (i.e. where defence in criminal proceedings is obligatory and a defence lawyer is appointed ex officio). Certain categories of persons are entitled to have obligatory legal aid: a person under 18 years of age, a person who is deaf, dumb or blind, a person regarding whom there appear reasonable doubts concerning their mental capacity and mental health or ability to participate in criminal proceedings or to conduct a defence in an independent and reasonable manner. A suspect and an accused must also have a defence lawyer if the court deems it necessary due to other circumstances hindering the defence (see: Art. 79 para. 1 and para. 2 CCP). In addition, a suspect or an accused must have a defence lawyer in criminal proceedings before a district court if charged with a felony (see: Art. 80 CCP).

- The appointment of a public defender at the stage of appointing the defence lawyer is free of charge. If an accused is convicted of an offence and charged in a final judgment with the costs of the proceedings, the accused will have to reimburse the costs of legal aid. Expenses paid by the State Treasury on account of services of a defence lawyer (see: Art. 618 para. 1 point 11 CCP) are a component of proceedings costs which shall be borne exclusively by the party on whose behalf legal aid was rendered. These costs, if there is an adjudication of proceedings costs against a convicted person in favour of the State Treasury, are borne individually and exclusively by a convicted person who was a beneficiary of legal aid.

The lack of satisfactory legal solutions in Polish law which could be recognised as implementing the standards of the directive (but also other legal instruments, including Directive 2013/48/EU), has become a matter of interest in Poland for the Ombudsman. The Ombudsman, in his statement dated 14 July, 2021, wrote directly to the European Commissioner Didier Reynders, informing him of inadequacies concerning the implementation in Poland of certain directives, including those indicated above. The Ombudsman pointed out the shortcomings of the current national legal system resulting in the conclusion that it does not comply with EU requirements. He indicated that he was forced to write to Commissioner Reynders, since he was unable to take any further binding internal legal action, in particular due to the fact that in Poland there is no longer an independent Constitutional Tribunal which can rule on any incompatibilities of national legislation with binding EU law. The Ombudsman stressed that he undertook this action for the benefit of all Polish citizens and residents. He made an official request for the Commissioner to consider using the European Commission's powers to ensure the compatibility of Polish national legislation with the provisions of the directives, including Directive 2016/1919/EU.