



Training of Lawyers on EU Instruments on procedural rights in Criminal proceedings (CRIMILAW)

Directive 2013/48/EU on the right to access to a lawyer

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Directive 2013/48/EU on the right to 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 and to communicate with third persons and with consular authorities while deprived of liberty

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GENERAL NOTES

- **A human being is a main figure of criminal proceedings** in every democratic state (founded on the rule of law)
- **Fair trial is a legal idea and practical necessity** which should find its reflection in many procedural safeguards created on the public international law level, the European Union law level as well as domestic laws level
- The need of fair trial means the need of **equal position of criminal proceedings parties** (not only in a formal sense)
- The **general right to a fair trial** (and its particular aspects) **has its source in a human being's dignity**

GENERAL NOTES

The right to a fair trial is a pivotal point of reference for procedural safeguards indicated by the:

- **Article 14** of International Covenant on Civil and Political Rights [1966]
- **Article 6** of the European Convention on Human Rights [1950]
- **Articles 47 and 48** of the Charter of Fundamental Rights of the European Union [2007]

The right to a fair trial is a general principle of the European Union law.

GENERAL NOTES

The right to access to a lawyer – although it's recognised as a fundamental feature of a fair trial principle – **isn't the absolute right**.

The issue of the access to a lawyer in judgments of the European Court of Human Rights (selected issues):

- **Case of Salduz v. Turkey** (app. no. 36391/02) – judgment 27 November 2008 (*denying of legal assistance to a person while he/she was held and interrogated in police custody was a violation of his right to a fair trial*)
- **Case of Simeonovi v. Bulgaria** (app. no. 21980/04) – judgment 12 May 2017 (*a lack of legal assistance in police custody did not irremediably infringe the fairness of criminal proceedings, against a person whose conditions of detention amount to inhuman and degrading treatment*)
- **Case of Beuze v. Belgium** (app. no. 71409/10) – judgment 9 November 2018 (*restrictions on right of access to a lawyer in pre-trial proceedings breached the applicant's right to a fair trial*)
- **Case of Doyle v. Ireland** (app. no. 51979/17) – judgment 23 May 2019 (*restriction on right of access to a lawyer during police interviews did not breach the right to a fair trial*)

GENERAL NOTES

- Participation of a human being in criminal proceedings (as a suspect or an accused person) or his/her involvement in EAW proceedings is closely linked to the guarantee of the right to defence (the aspect of this right: assistance of a professional criminal lawyer)
- **The access to a lawyer enables and conditions the proper access to justice** (criminal justice) and is a key that makes possible to „unlock gate” for embodiment of a fair trial

THE ACCESS TO A LAWYER – A CRITICAL NEED

- Lawyers very often are necessary and useful (in police stations, in public prosecutors offices) to help defendants in understanding their rights in practice, the accusation and the reasons for arrest
- Lawyers are responsible for performing an „active control” - in terms of verifying that suspects understand their rights
- Lawyers can be guarantors of proper execution of procedural actions by police officers and prosecutors

THE ACCESS TO A LAWYER – A CRITICAL NEED

- The right to access to a lawyer plays a significant role in facilitating the use of other procedural rights by the defendant.
- A person should have the access to a lawyer from the moment there is a „criminal charge” against him/her (which should be understood as an involvement in a criminal situation as a perpetrator).

DIRECTIVE 2013/48/EU – MATTER AND SCOPE

Directive 2013/48/EU: adopted on 22 October 2013; implementation deadline: 27 November 2016.

It's the one of the EU directives on fundamental rights in criminal proceedings (the catalogue contains six such instruments); for establishment of minimum standards for individuals in criminal proceedings – see Art. 82 (2)(b) TFEU

The adoption of the directive was the result of the Stockholm Programme announced in 2010 (O. J. EU C 115 4 May 2010)

Directive 2013/48 is applied to all criminal cases in which deprivation of liberty is imposed.

The aims of the directive:

- to allow the access to a lawyer at the right time for the defence
- to guarantee the quality of that contact lawyer – defendant (including ensuring confidentiality in this relationship).

DIRECTIVE 2013/48/EU – MATTER AND SCOPE

Application of the directive (Article 2) – **wide subjective scope:**

- **to suspects and accused in criminal proceedings** from the time when they are made aware by the competent authorities (by official notification or in another way) that they are suspected or accused of having committed an offence; it is applied until the conclusion of proceedings
- **to persons being subjected to EAW proceedings** (from the time of their arrest in the executing Member State)
- **to persons other than suspects or accused who** – in the course of questioning by the law enforcement authorities – **become suspects or accused**

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

The scope of the right to access to a lawyer (Article 3). It comprises rights helping to shape defendant's right to defence in such way which allows the practical and effective defence:

- right to have access to a lawyer without undue delay
- right to meet with a lawyer in private and to communicate with him/her
- right to presence and effective participation of a lawyer when a person is questioned
- right to participation of a lawyer in crucial investigative or evidence-gathering acts
- right to obtain a general information which will facilitate the access of a suspect or accused to a lawyer

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

Respecting of the confidentiality of communication between suspects (accused persons) and their lawyers (Article 4)

confidentiality of communication is the duty that is placed upon a lawyer (so lawyers should require environment where the confidentiality of communication is assured)

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

Other rights declared by the directive for suspected or accused persons deprived of liberty:

- **the right to have a third person informed of the deprivation of the liberty (Article 5) – not absolute right (possible temporal derogation)**
- **the right to communicate, while deprived of liberty, with third person (Article 6) – the right may be limited or exercise of the right can be deferred**
- **the right to communicate with consular authorities and the package of other rights: the right to be visited, while deprived of liberty, by consular authorities, the right to converse and correspond with consular authorities, the right to have legal representation arranged by consular authorities (Article 7)**

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

The scope of the right to access to a lawyer in EAW proceedings (Article 10), which should be real and effective for a requested person in an executing Member State:

- the right to access to a lawyer in the proper time and manner (and always without undue delay if a requested person is deprived of liberty)**
- the right to meet and communicate with the lawyer**
- the right to presence and participation of a lawyer during a hearing of a requested person by the executing judicial authority**
- the right to double representation (access to a lawyer either in executing or in issuing Member States)**

In EAW proceedings (in the executing Member State) another provisions of the directive find their proper application

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

Commitments of the authorities of the executing Member State in the context of application of EAW proceedings [Article 10(4)(5)]:

- competent authority in the executing Member State shall (without undue delay after deprivation of liberty) give a requested person the information that he or she has the right to appoint a lawyer in the issuing Member State
- competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State about the will of a requested person to have an assistance of a lawyer in the issuing Member State

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

Temporary derogations – general conditions of their application (in precisely indicated situations) - Article 8

Temporary derogations shall be:

- proportionate and not go beyond what is necessary
- strictly limited in time

and they shall not:

- base exclusively on the type or the seriousness of the alleged offence
- prejudice the overall fairness of the proceedings

Decision of a competent authority concerning certain derogations may be submitted to judicial review

DIRECTIVE 2013/48/EU - MATTER AND SCOPE

Waiver (in case there is no legal requirement of the mandatory presence or assistance of a lawyer) - Article 9

For the **effective waiver of the right to access to a lawyer as well as the right to access to a lawyer in EAW proceedings** such conditions should be fulfilled:

- the suspect or accused person gained clear and sufficient information in simple and understandable language about the content of the right and about possible consequences of waiving it;
- the waiver was given voluntarily and unequivocally
- the waiver and its circumstances have been recorded in an appropriate way

Directive demands that there should be ensured – for a suspect or an accused person – **a possibility to revoke a waiver at any point during the criminal proceedings**

Additional issue is **the right to effective remedy in national law in the event of a breach of the rights ensured by the directive - Article 12(1)**

DIRECTIVE 2013/48/EU – MATTER AND SCOPE

Other issues (general ones) covered by the directive regulations include:

- aspect of legal aid (Article 11)
- requirement of focusing on particular needs of vulnerable suspects and accused persons in the application of the directive (Article 13)
- non-regression clause (Article 14)
- transposition demand (Article 15)
- obligation of submission to the European Parliament a report assessing the transposition results (Article 16)

WHAT SHOULD BE RECOMMENDED AS PROPER PRACTICAL STANDARDS OF THE RIGHT TO ACCESS TO A LAWYER?

In the context of mandatory information on procedural rights:

- the right to access to a lawyer should be expressed in rights' information letters in every EU Member State and it should be orally announced in a clear and understandable way (it should be explained by a proper, „first contact“ representative of law enforcement body or public prosecution service)
- procedural rights' letters and their oral announcements for suspects and accused – containing the indication of the right to access to a lawyer – should be available in national languages of persons who don't speak the language of the country in which a person has a suspect or accused person status

WHAT SHOULD BE RECOMMENDED AS PROPER PRACTICAL STANDARDS OF THE RIGHT TO ACCESS TO A LAWYER?

In the context of waiver of the right:

- the need of mandatory contact by a suspect or accused with a lawyer before waiving the right to have a lawyer present at the interrogation of the suspect or accused
- the waiver of the right shall be expressed clearly and video and audio recorded as well as – in its written form – it should be signed in the presence of a lawyer
- each interview should begin with a reminder to the detained person of his or her entitlement to have a lawyer present, along with a requirement that the waiver be repeated if insisted upon.

WHAT SHOULD BE RECOMMENDED AS PROPER PRACTICAL STANDARDS OF THE RIGHT TO ACCESS TO A LAWYER?

- proper trainings referring to defence rights, addressed to national police services (and prosecutors) should be continuously provided
- perhaps the waiver of the right to access to a lawyer shouldn't be permitted at all or it should be declared – either at the European Union level or in every EU Member State - that it isn't allowed in certain situations

WHAT SHOULD BE RECOMMENDED AS PROPER PRACTICAL STANDARDS OF THE RIGHT TO ACCESS TO A LAWYER?

In the context of legal remedies

- direct application of the directive in the national criminal law (if it's demanded and possible)

ACCESS TO A LAWYER IN COVID TIMES

COVID pandemic times and the need for proper quality of the right to access to a lawyer

- current pandemic situation is a source of many complications and it creates challenges for persons involved in repressive criminal proceedings in the context of effective exercising of their right to access to a lawyer (also in EAW proceedings)
- existing challenges concerning lawyers, too
- the proper quality of the right to access to a lawyer and the law to access to a lawyer in the EAW proceedings, especially in practice, may be seriously endangered in many particular cases

THANK YOU FOR YOUR ATTENTION

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