



Training of lawyers on various areas of European Union Law (TRAVAR)

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Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings

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Directive 2013 /48/UE on the right of access to a lawyer in criminal proceedings and in European arrest warrant 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.

Scope(art. 2)

persons suspected or accused in criminal proceedings from the moment they are informed by formal notification or otherwise that they are suspected or accused of having committed a criminal offence, whether or not they are deprived of their liberty - until the final disposal of the case;

Persons subject to European Arrest Warrant procedures from the time of arrest in the executing Member State;

Persons who become suspects or accused persons during questioning;

The suspected or accused person is deprived of liberty, regardless of the stage of the criminal proceedings;



Directive 2013/48/EU is without prejudice to national law on legal aid applicable under the Charter and the Convention.

Access to a lawyer in criminal proceedings (art. 3)

The enforcement of
the right to be
PRACTICAL and
EFFECTIVE;

Without undue
delay;

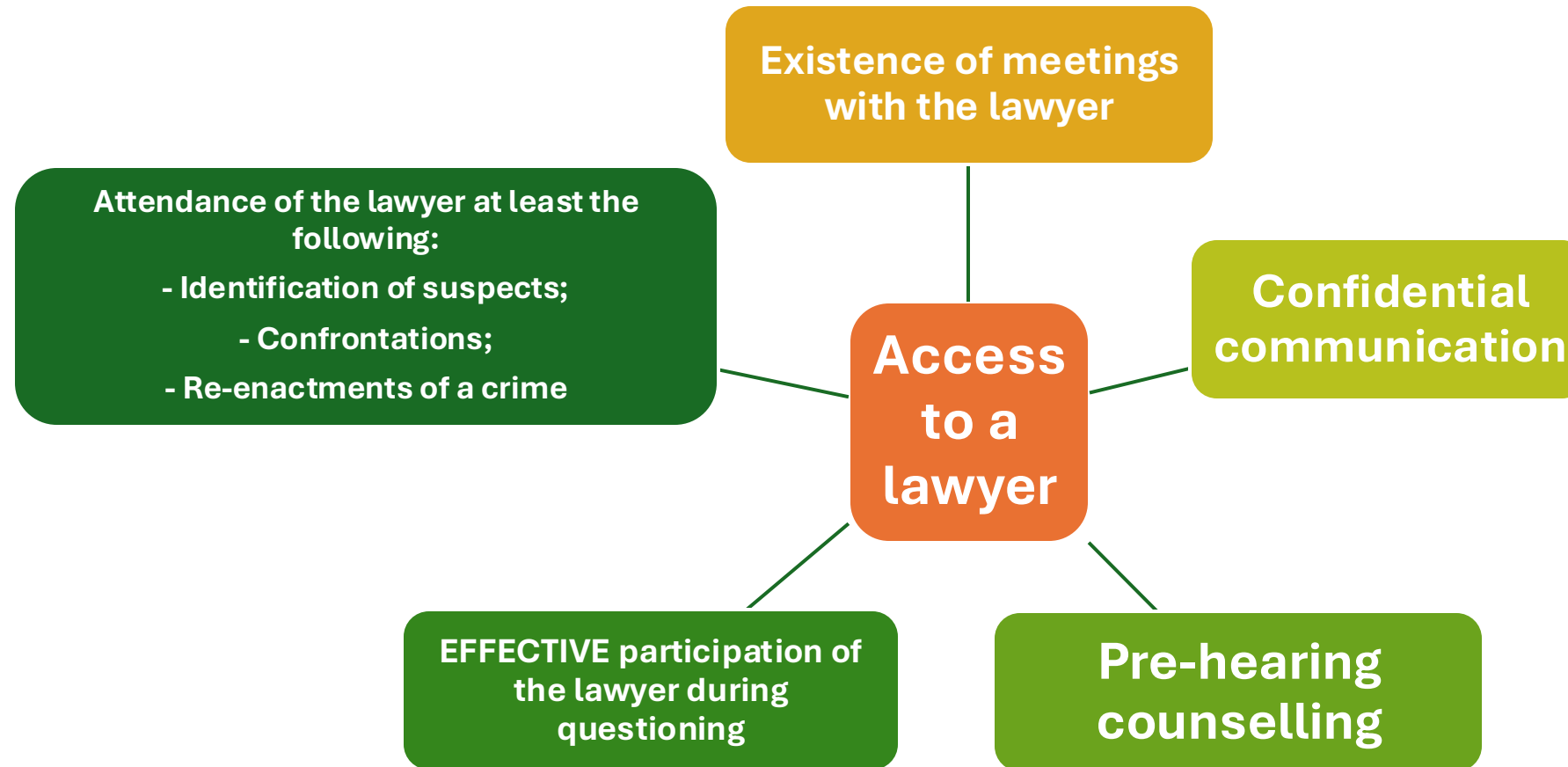
Derogation: due to the
person's remote
geographical location it
is impossible to ensure
access to the lawyer
without delay;

Access to a lawyer
must be provided
starting with:- Before
questioning- During
an investigation or
evidence gathering
action;

No undue delay
after deprivation of
liberty;

If they have been
summoned, in good
time before they
appear in court;

States must take the necessary measures to ensure **EFFECTIVE** access to a lawyer;



Note: Member States **may derogate temporarily** only where and to the extent justified, taking into account the specific circumstances of the case on the basis of one or more of the following grounds:

- **there is an urgent need to prevent serious harm to a person's life, liberty or physical integrity;**
- **Immediate action by the investigating authorities is absolutely necessary to prevent criminal proceedings from being considerably jeopardised;**



Renounce of the right of access to a lawyer (art. 9)

Without prejudice to national law providing for the compulsory presence or assistance of a lawyer, Member States shall ensure that, in respect of any renounce of the right of access to a lawyer:

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The person must have received in **WRITTEN** or **VERBAL** form **CLEAR** and **SUFFICIENT** information, in **SIMPLE LANGUAGE**, about the content of the right concerned and the **possible consequences** of waiving it.;

Renunciation must be **VOLUNTARY** and **CLEAR**;

Renunciation must be **REGISTERED** according to the Member State's procedure;

Possibility to **REVOKE** the renounce of the right of access to a lawyer;

Access to a lawyer in European Arrest Warrant proceedings (art. 10)

Access to a lawyer in the executing Member State after arrest

Access to a lawyer
must be timely,
without undue
delay, for the
effective exercise
of rights

Right to interviews
and communication
with the lawyer

Attendance and
participation of the
lawyer at the
hearing

The competent authority in the executing Member State

Informs the requested persons that they have the right to engage a lawyer in the issuing Member State if there is an unjustified delay

The lawyer in the issuing Member State shall assist the lawyer in the Member State of information and advice to enable the requested person to exercise his or her rights under Framework Decision 2002/584/JHA

If they wish and do not have a lawyer, the authority in the executing State shall inform the authority in the issuing State

The authority of the issuing State shall without undue delay provide the requested person with information in order to help him/her to find a lawyer in the place concerned

Member States must ensure that :

They provide for an **effective remedy** under national law in the event of infringement of their rights under this Directive;

When evaluating statements made by suspects or accused persons or evidence obtained in violation of the right to counsel or in a waiver situation, the right to counsel and procedural fairness must be respected.

Transposition of the regulations on the right of access to a lawyer provided for in Directive 2013/48/EU into Romanian law



- Law No 51/1995 on the organisation and practice of the legal profession;
- Law No 302/2004 on international judicial cooperation in criminal matters;
- Law No 255/2013 for the implementation of Law No 135/2010 on the Code of Criminal Procedure
- Emergency Ordinance no. 3/2014 for taking certain implementing measures necessary for the application of Law no. 135/2010 on the Code of Criminal Procedure;
- Law no. 75/2016 for the approval of Government Emergency Ordinance no. 82/2014;
- Law 135/2010 on the Code of Criminal Procedure;
- Law no. 254/2013 on the execution of sentences and measures of deprivation of liberty ordered by judicial bodies in the course of criminal proceedings;
- Law no. 300/2013 amending and supplementing Law no. 302/2004;
- Emergency Ordinance no. 18/2016 for the amendment and completion of Law no. 286/2009 on the Criminal Code;
- **Law no. 236/2017 for amending and supplementing Law no. 302/2004;**
- Law no. 284/2020 for amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure;
- **Law No 51/2021 amending and completing Law No 302/2004 on international judicial cooperation in criminal matters**
- **Law no. 1222/2024** for introducing, amending or supplementing the provision on the transposition of European Union rules into the content of some normative acts, as well as for amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters and Law no. 135 /2010 on the Code of Criminal Procedure;



Right of access to a lawyer in criminal proceedings - Romanian legislation -

Law No 236 of 2017 amending and completing Law No 302/2004 on international judicial cooperation in criminal matters

- In Article 90, three new paragraphs are inserted after paragraph (2), paragraphs (3) to (5), with the following content :

(3) If the requested person, who is under arrest in the executing State, exercises his or her right to appoint a lawyer in Romania, the Romanian court issuing the European arrest warrant shall, upon request and without undue delay, transmit to the executing authority information on the list of lawyers entitled to practise in one of the member bar associations of the Romanian National Union of Bar Associations. The information may also be transmitted in electronic form.

(4) The role of the lawyer in Romania, designated under para. (3), is to assist the lawyer in the executing Member State by providing information and advice to enable the requested person to formulate his or her defences in the procedure for the execution of the European Arrest Warrant..

(5) All communications between the lawyer appointed in Romania and the lawyer in the executing State shall be direct and confidential."

- In Article 104, after paragraph (2) three new paragraphs are inserted, paragraphs (21) to (23), with the following content :

(2¹) The prosecutor or, where appropriate, the executing court shall inform the detained or arrested person that he or she has the right to appoint a lawyer in the Member State issuing the European arrest warrant and to communicate with him or her directly or through the lawyer chosen or appointed ex officio in Romania, under the conditions provided for by Romanian law and subject to confidentiality..

(2²) If the detained or arrested person indicates that he or she intends to exercise this right, the prosecutor or the executing court shall inform the authority issuing the European arrest warrant without delay. The information transmitted by the issuing authority, by any means capable of producing a written record, shall be communicated to the requested person without delay via the administration of the place of detention..(...

- In Article 110, after paragraph (5) a new paragraph is inserted, namely paragraph (6), with the following content :

(6) Conduct of the procedure referred to in Article 104(2). (21) and (22) shall not affect the time limits laid down in this Article."

Law No 51/2021 amending and completing Law No 302/2004 on international judicial cooperation in criminal matters

In Article 91, after paragraph (3) a new paragraph is inserted, namely paragraph (31), with the following content:

(3¹) If the European Arrest Warrant is issued at the pre-trial, pre-trial chamber or trial stage, and the requested person exercises the right to have a lawyer in Romania, he or she may benefit from free legal assistance, if he or she so requests. In this case, the issuing court shall make arrangements for the appointment of a public defender and shall inform the executing authority accordingly.

In Article 91, paragraph (4) is amended to read as follows :

(4) The role of the lawyer in Romania, appointed in accordance with the provisions of paragraph. (3) or (31), is to assist the lawyer in the executing Member State by providing information and advice to enable the requested person to formulate his or her defences in the procedure for the execution of the European Arrest Warrant..



Law 122/2024 transposes into national law the provisions of Article 3 para. (1) - (4), art. 4, art. 5 par. (1) - (3), art. 6 par. (1) and (2), art. 7 par. (1), Art. 8 par. (1) and (3), Art. 9, Art. 10 para. (1) and (2), Art. 13 and Art. 15 para. (2) of Directive 2013/48/EU



- The **right of the detained person to request that a family member or third party be informed of the measure taken;**
- The suspected or accused person **may exercise the right not to be assisted by a lawyer;**
- Non-exercise of the right must be **VOLUNTARY and CLEAR;**
- May be made known **VERBALLY or IN WRITING;**
- Does **not prevent the subsequent exercise at any stage of the criminal proceedings of the right of access to a lawyer of one's choice.**
- **Failure to exercise the right of access to a lawyer DOES NOT in any way affect the application of the rules on compulsory legal aid to them.;**

Law 302/2004 on international judicial cooperation in criminal matters

Art. 101 para. (4) "The detained person **may request to be informed** of the measure taken by **a family member or by another person designated by him**. Both the request and the notification shall be recorded in a report.

The provisions of Article 210 of the Code of Criminal Procedure apply accordingly..

- Art. 210 Code of Criminal Procedure

(1) Immediately after detention, the detained person shall have the right to inform in person or to ask the judicial body which ordered the measure to inform a member of his family or another person designated by him of the detention order and of the place where he is detained.

(2) If the detained person is not a Romanian citizen, he/she also has the right to contact or request the contact of the diplomatic mission or consular office of the State of which he/she is a citizen or, where appropriate, of an international humanitarian organisation, if he/she does not wish to benefit from the assistance of the authorities of his/her country of origin, or of the representative office of the competent international organisation, if he/she is a refugee or, for any other reason, is under the protection of such an organisation. The General Inspectorate for Immigration is informed in all cases of the imposition of preventive measures on this category of persons.

(3) The provisions of para. (1) and (2) shall also apply accordingly in the event of a subsequent change of place of detention.

(5) The detained person may only be denied the right to make the interview in person on serious grounds, which shall be recorded in the minutes..

(6) Exceptionally, the delay of up to 4 hours may only be applied where, given the specific circumstances of the case, there is an urgent need to prevent :

- a) causing serious harm to a person's life, liberty or physical integrity;**
- b) considerable jeopardisation of criminal proceedings.**

Code of Criminal Procedure

- In Article 10, after paragraph 6, a new paragraph is inserted, paragraph. (7) with the following content :

(7) Any non-exercise of the right to be assisted by a chosen lawyer during the criminal proceedings must be VOLUNTARY and CLEAR and NOT PREVENT the subsequent exercise, at any time during the criminal proceedings, of this right. In the event of non-exercise of the right to be assisted by a chosen lawyer, the suspect or defendant shall be INFORMED by the judicial authorities, in SIMPLE and ACCESSIBLE LANGUAGE, of the content of the right and the possible consequences of non-exercise of the right..

- In Article 89, three new paragraphs are inserted after paragraph 1, as follows (11)-(13), with the following content :

(1¹) The suspect or defendant may not exercise the right to be assisted by a chosen lawyer. The non-exercise of this right by the suspect or accused must be voluntary and clear, may be made known to the judicial body orally or in writing and shall not prevent the right to be assisted by a chosen lawyer from being exercised subsequently at any time during the criminal proceedings..

(1²) If the suspected or accused person does not exercise his right to be assisted by a lawyer of his choice under the conditions laid down in paragraph 1, the suspect or accused person shall be entitled to be assisted by a lawyer of his choice. (11), the judicial body shall inform him or her, in plain and accessible language, of the content of the right provided for in Article 83 (11). (c), of the possible consequences of non-exercise of that right and of the possibility of exercising the right to be assisted by a chosen lawyer at any time during the criminal proceedings.

(1³) The decision of the suspect or accused person not to exercise the right to be assisted by a lawyer, its voluntary and unequivocal nature and the information provided for in paragraph 1 shall be taken by the competent authorities. (12) shall be recorded in writing by the judicial body."

- In Article 210, paragraph (6) is amended and shall read as follows :

(6) Exceptionally, the delay of up to 4 hours may only be applied where, given the specific circumstances of the case, there is an urgent need to prevent :

- a) causing serious harm to a person's life, liberty or physical integrity;***
- b) considerable jeopardisation of criminal proceedings."***

- **The right to inspect the file under the conditions provided for in Article 94 of the Code of Criminal Procedure;**

(1) The lawyer of the parties and of the principal parties to the proceedings has the right to request consultation of the file throughout the criminal proceedings. This right may not be exercised or unduly restricted.

(2) Inspection of the file implies the right to study its documents, the right to note data or information in the file and to obtain photocopies at the client's expense.

(3) In the course of the prosecution, the prosecutor shall set the date and duration of the consultation within a reasonable time. This right may be delegated to the criminal investigation body.

(4) In the course of criminal proceedings, the prosecutor may restrict consultation of the file, giving reasons, if this could prejudice the proper conduct of the criminal proceedings. After the initiation of the prosecution, the restriction may be ordered for a maximum of 10 days.

(5) In the course of criminal proceedings, the lawyer shall be under an obligation to preserve the confidentiality or secrecy of the data and documents which come to his knowledge during consultation of the file.

(6) In all cases, the lawyer may not be restricted in his right to consult the statements of the party or of the principal procedural subject whom he is assisting or representing.

(7) For the purpose of preparing the defence, the defendant's lawyer shall have the right to acquaint himself or herself with all the material in the prosecution file in proceedings before the judge of rights and freedoms concerning deprivation or restriction of rights, in which the lawyer participates. (...)

- **Inspection of the file is carried out throughout the criminal proceedings;**
- **The right to have a lawyer of his choice, and if he does not have a lawyer of his choice and it is one of the cases for compulsory legal aid, he has the right to have a public defender appointed to him;**
- **The witness has the right to be assisted by a lawyer;**

- **When can it be considered that the suspect's assistance is effective?**





Training of lawyers on various areas of European Union Law (TRAVAR)

Dominic Pop

**The presumption of innocence and the right to be
present at trial in criminal proceedings**

Bucharest, 20 June 2024



Co-funded the European Union

“Preferable that a guilty person be acquitted than an innocent person be condemned.”

- Article 2 Scope
- Article 3 Presumption of Innocence
- Article 4 Public references to guilt
- Article 5 Presentation of suspects and accused persons
- Article 6 Burden of proof
- Article 7 Right to remain silent and right not to incriminate oneself
- Article 8 Right to be present at the trial

Article 2

Scope

This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

- ➔ Applicability *ratione personae*: when does the presumption of innocence come into effect? The *de facto* and *de jure* accused.
- ➔ Applicability *ratione materiae*: the right to remain silent and the right not to cooperate with the judicial authorities.

➔ the importance of notifying the accusation (expressly or implicitly):

- *“The suspect has the right to be informed immediately, and before being interviewed, of the offense the criminal investigation is looking into and the charge for that offense. The defendant has the right to be informed immediately of the offense the prosecution against them has started for, and the charges for that offense.”* (article 10 par. 3 of the Romanian Criminal Procedure Code)
- *“The judicial body that ordered the widening of the scope of the criminal investigation or the change of charges is under an obligation to inform the suspect about the new facts that warranted the widening of the scope.”* (article 311 par. 3 of the Romanian Criminal Procedure Code)

The provisions are constitutional just as long as the criminal investigation body is compelled to inform the accused on the change of the charges (Decision no. 90/2017 of the Constitutional Court).

- *“When during the court proceedings, it deems that the legal charges for the crime in the bill of indictment are about to be changed, the court is under an obligation to discuss the new legal charges and to draw the defendant’s attention that he has the right to ask for the case to be adjourned for later during the same court session or to be postponed, to prepare his defense.”* (article 386 of the Romanian Criminal Procedure Code)

The Constitutional Court emphasized that any change of the legal qualification of the accusation during the judgment should be made and notified to the defendant before the debates and the ruling (Decision no. 250/2019 of the Constitutional Court).

Article 3

Presumption of innocence

Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty according to law.

Art. 4 of the Romanian Criminal Procedure Code

Benefit of the doubt

“(1) Any person shall be considered innocent until their guilt is established by a final criminal judgment.

(2) After all the evidence is presented in the case, any doubt persisting in the mind of the judicial bodies shall be interpreted in favor of the suspect or defendant.”



Is the presumption of innocence a judgment rule or an evidentiary standard?

- it was considered a subjective right, which protects a person against the arbitrary
- it is also an evidentiary rule, meant to ensure the discovery of the truth (at least the judiciary truth)
- It also acts as a judgment rule: *“In making a decision on the existence of an offense and a defendant’s guilt, the court decides, on a justified basis, based on all the assessed pieces of evidence. Conviction is ordered only when the court is convinced that the charge was proven beyond any reasonable doubt.”* (Article 103 par. 2 of the Criminal Procedure Code)



guarantees in the national system:

- separation of the judicial functions;
- guilt is to be determined only in the criminal process, with respect for procedural guarantees; the simple existence of an accusation is not equivalent to guilt;
- clear and precise accusation (the importance of the preliminary chamber phase);
- the standard of evaluating the evidence:
 - preponderance of evidence; clear and convincing evidence; evidence beyond a reasonable doubt;
 - the standard of precise, certain, decisive and complete evidence which precludes any rational doubt.



In dubio pro reo – the decisional dilemma?

Article 4

Public references to guilt

1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence.
2. Member States shall ensure that appropriate measures are available in the event of a breach of the obligation laid down in paragraph 1 of this Article not to refer to suspects or accused persons as being guilty, in accordance with this Directive and, in particular, with Article 10.
3. The obligation laid down in paragraph 1 not to refer to suspects or accused persons as being guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest.

➔ Violations of Article 4:

- Public campaigns related to a criminal file;

- Dissemination of confidential information related to criminal investigations is prohibited by the Romanian Law:
 - Article 285 of the Criminal Procedure Code, entitled *Object of the criminal investigation* states in paragraph 2 that “*The procedure during the criminal investigation is not public.*”
 - Article 304 of the Criminal Code, entitled *Disclosure of information classified as service secret or not public* incriminates

“(1) The unlawful disclosure of information classified as service secret, or which is not for the general public, by the person aware thereof owing to their professional responsibilities, if it affects the interests or the activity of a person, shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine.

(2) The unlawful disclosure of information classified as service secret, or which is not for the general public, by the person aware thereof shall be punishable by no less than 1 month and no more than 1 year, or by a fine.

(3) If, as a result of the action provided under par. (1) and par. (2), a crime was committed against an undercover investigator, a protected witness or a person included in the Witness Protection Program, the punishment shall be no less than 2 and no more than 7 years of imprisonment and if a crime against life was committed with direct intent, shall be punishable by no less than 5 and no more than 12 years of imprisonment.”

Article 5

Presentation of suspects and accused persons

1. Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.
2. Paragraph 1 shall not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons.

Article 6

Burden of proof

1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.
2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.

Art. 99 of the Romanian Criminal Procedure Code

Burden of proof

“(1) In a criminal action, the burden of proof rests primarily with the prosecutor, while in a civil action it rests with the civil party or, as applicable, upon the prosecutor initiating the civil action, if the victim lacks mental competence or has limited mental competence. (2) A suspect or defendant benefits from the presumption of innocence, has no obligation to prove their innocence, and has the right not to contribute to their own incrimination. (3) In criminal proceedings, victims, suspects and parties have the right to propose the production of evidence to judicial bodies.”

➔ *Relevant provisions:*

Art. 5 of the Romanian Criminal Procedure Code

Finding the truth

“(1) The judicial bodies are under an obligation to ensure the finding of the truth about the facts and circumstances of the case, based on evidence, and about the person of the suspect or defendant. (2) The criminal investigation bodies are under an obligation to collect and submit evidence both in favor and against the suspect or defendant. Denying or failing to record evidence in favor of the suspect or defendant, in ill-faith, shall be punishable according to the stipulations in this Code.”

Art. 100 of the Romanian Criminal Procedure Code

Production of evidence

“(1) During the criminal investigation, criminal investigation bodies gather and produce evidence both in favor and against a suspect or a defendant, ex officio or upon request. (2) During the trial, the court produces evidence upon request by the prosecutor, the victim or the parties and, subsidiarily, ex officio, when it deems it necessary for the creation of its own conviction.”

Art. 374 of the Romanian Criminal Procedure Code

Informing on the charges, clarifications and applications

“(7) The evidence submitted throughout the prosecution and not challenged by the parties shall not be resubmitted during the court investigation. They shall feature in the parties’ adversarial debate and taken into account by the court for the deliberation. (8) The evidence provided under par. (7) may be submitted ex officio by the court when the court feels that it is necessary to do so to find the truth and rightfully adjudicate the case. (9) The prosecutor, the victim and the parties may apply for the submission of new evidence also during the court investigation. (10) The court may order ex officio the submission of evidence required to find the truth and rightfully adjudicate the case.”

- ➔ the presumption of innocence is meant to reestablish an equilibrium between the accused and the accuser, putting the burden of proof on the accuser (prosecutor);
- ➔ *actor incumbit probatio; reus in excipiendo fit actor*; if the defendant opts for an affirmative defense, not merely a negative one, then he has the burden of proof on the matters raised in his defense;
- ➔ the defendant does not need to prove his innocence; it is sufficient that he demonstrates a reasonable doubt to secure an acquittal;
- ➔ the asymmetrical allocation of the risk of judicial error means that the accuser must persuade the judge, based on concrete and viable evidence, on the guilt of the accused; to his end, the accused may just persuade the judge on the possibility of a judicial error and thus, secure an acquittal;
- ➔ factual presumptions are, in principle, allowed, but restrained to reasonable assumption, which grants the defense the right of counterevidence and may only regard facts that are impossible to prove (i.e. ECHR Case of Salabiaku vs. France)
- ➔ insufficient evidence does not allow declarations of guilt, even in the body of a decision of acquittal;
- ➔ the criminal investigative bodies have the burden of proof, the courts have a subsidiary active role in the criminal proceedings, limited by the duty of impartiality;
- ➔ the inequality between the defendant and the damaged person/civil party which is also a state body (e.g. the right of the National Agency for Fiscal Administration to produce certain evidence in the criminal file, sanctioned by the Constitutional Court Decisions no. 72/2019 and 80/2024)

➔ The standard of evidence in distinct stages of the criminal process:

- Starting a criminal investigation: *“When the referral meets the conditions required by law and it is found that none of the cases preventing criminal action as under Art. 16 par. (1) applies, the criminal investigation body shall order the criminal investigation to start.”* (Article 305 par. 1 of the Criminal Procedure Code entitled *Starting a criminal investigation*)
- Charging a person: *“When the existing data and evidence in the case constitute probable cause to believe that a certain individual has committed the offense that warranted the start of the criminal investigation the prosecutor shall order that the criminal investigation continue in relation to that individual, and the latter shall acquire the capacity of suspect.”* (Article 305 par. 3 of the Criminal Procedure Code)
- Starting the criminal action: *“The criminal action is set in motion by the prosecutor, by order, during the criminal investigation, when they find that evidence exists to attest that an individual has committed an offense and none of the cases under Art. 16 par. (1) applies.”* (Article 309 par. 1 of the Criminal Procedure Code entitled *Start of the criminal action*)
- Bringing the case before a court: *“When the prosecutor finds the legal requirements have been met that guarantee discovery of the truth, that the criminal investigation is complete and the necessary evidence is in place and has been properly processed, the prosecutor: a) shall return an indictment whereby the case shall be prosecuted, if the criminal investigation shows the offense exists, was committed by the defendant and that the defendant has criminal liability;”* (Article 327 of the Criminal Procedure Code entitled *Disposition of cases*)
- Convicting an accused: *“The court shall rule to convict when it feels that, beyond any reasonable doubt, the act exists, it is an offense and was committed by the defendant.”* (Article 396 par. 2 of the Criminal Procedure Code entitled *Settling the criminal proceedings*)

Article 7

Right to remain silent and right not to incriminate oneself

1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.
2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.
3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.
4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.
5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.
6. This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.

➔ *Relevant provisions:*

Art. 83 of the Romanian Criminal Procedure Code

Rights of the defendant

“During the course of criminal proceedings, a defendant has the following rights: a) not to give any statements during criminal proceedings, and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statement they do make may be used as evidence against them.”

Art. 118 of the Romanian Criminal Procedure Code

The right of the witness to remain silent and to not self-incriminate

“The right of the witness to remain silent and not to incriminate himself”, which states in paragraph 1 that “The witness has the right to not declare facts and circumstances which, if known, would incriminate him.”, and in paragraph 3 that “A witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them.”

Art. 170 of the Romanian Criminal Procedure Code

Surrender of objects, documents or computer data “

“In the event that there is a reasonable suspicion in relation to the preparation or commission of an offense and there are reasons to believe that an object or document can serve as evidence in a case, the criminal investigation bodies or the court may order the natural person or legal entity holding them to provide and surrender them, subject to receiving proof of surrender.”

- ➔ Whilst the waiver of the right to remain silent in the case of the defendant gives way to using the statement against the defendant, in the case of the witness, the waiver of the right to remain silent still prohibits the judicial body to use the statement against the witness;
- ➔ Although the law protects the defendant from the duty to cooperate with the judicial bodies by providing objects and documents which are incriminatory, the *de facto* accused does not benefit from such a right:
i.e. Article 271 of the Criminal Code, entitled *Obstruction of justice* sanctions “(1) *The individual who, being warned of the consequences of their actions: ...b) refuses to provide the criminal prosecution body, the court or the bankruptcy judge, in whole or in part, any data, information, documents or assets they hold and which have been explicitly requested, under the law, in order to settle a case, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine. (2) Par. (1) does not apply to an individual who is prosecuted or on trial for offenses that are the subject of the criminal trial.*” (There is no reference to individuals who are *de facto* accused!)
- ➔ the questionable decisions of ECHR (*e.g.* John Murray vs. UK from 8th of February 1996), whereby it has ruled that the right to remain silent is not absolute, as in some cases where the evidence is compelling, the defendant must provide a reasonable explanation, and failing to do so may give way to unfavorable conclusions from the judge; the national standard provides higher protection, therefore it will be prevalent;
- ➔ the right of the accused to remain silent in disjointed cases against co-defendants (Decision no. 10/2019 of the High Court of Cassation and Justice).
The Court ruled that the participant in an offence trialed separately from the other participants and heard as a witness in the case of the participants, cannot be the active subject of the offence of false testimony – Article 273 of the Criminal Code);

Article 8

Right to be present at the trial

1. Member States shall ensure that suspects and accused persons have the right to be present at their trial.
2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:
 - (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or
 - (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.
4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.
5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with.
6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial.

➔ the presence of the accused via private electronic means of communication does not equvalate to a regular presence at the trial, in view of the limits of the jurisdiction of national judicial bodies when the accused is in another country - the obligation of the judicial bodies to attest the identity of the accused and the duty of a judge to observe *ex propriis sensibus* the persons questioned during the trial and also ensure the viability of the evidence provided (e.g. that the person is alone and not influenced by anybody or anything).

➔ the written procedure is not contrary to Article 8 of the Directive. Still, in the national law system, the Constitutional Court has highlighted on multiple occasions the importance of oral proceedings and the right of the defendant to be present at the proceedings.

The Constitutional Court found that a written procedure contravenes the guarantees of a fair trial when the issue/matters debated are important for the judgment on the merits (*e.g.* Decision no. 641/2014 regarding the unconstitutionality of the provisions of the Criminal Procedure Code related to preliminary chamber judgments rendered after a non-contradictory and written procedure).



Training of lawyers on various areas of European Union Law (TRAVAR)

Daniela Zaharia Manescu

**Directive (EU) 2016/1919 on legal aid for suspects and
accused persons in EAW proceedings**

Bucharest, 20 June 2024



Co-funded the European Union

**Directive 1919/2016 on legal aid for suspects and accused persons
in criminal proceedings and for requested persons
in European arrest warrant proceedings**

The purpose of the Directive is to ensure the effectiveness of the right of access to a lawyer provided for in Directive 2013/48/EU;

Directive 1919/2016 supplements Directives 2013/48/EU and 2016/800;

Sets common minimum standards for:

- **Persons suspected and accused in criminal proceedings;**
- **Persons subject to European Arrest Warrant procedures;**

- The Directive applies from the moment of arrest in the executing Member State to requested persons who have the right of access to a lawyer under Directive 2013/48/EU;



Scope (art. 2)

1. Persons suspected in criminal proceedings who have a right of access to a lawyer under Directive 2013/48/EU and who:

- **are in prison;**
- **must be assisted by a lawyer in accordance with Union or national law; or**
- **must or may be present at an investigative or evidence-gathering act, including at least the following: reconnaissance of a group of persons; confrontations; reconstructions;**

2. persons who were not initially suspected or accused but become so during the hearing;



Free legal assistance in criminal proceedings (art. 4)

- Legal assistance is provided **if** the suspected or accused person **does not have sufficient resources** to cover the costs and it is necessary in the interests of justice;
- **Material status** criterion (e.g. income, family situation, living costs, etc.);
- The criterion of **substantiality** (seriousness of the offence, complexity of the case, severity of the sanction, etc.);



Free legal assistance in European Arrest Warrant proceedings (art. 5)

⊗ #TRAVAR

- They are entitled to free assistance **from the moment of arrest** under an arrest warrant **until they are surrendered or until the decision becomes final;**
- If they exercise their right to appoint a lawyer **in the issuing Member State to assist the lawyer in the executing Member State**, they **shall be entitled to free legal assistance in the issuing Member State** for the purpose of such proceedings in the executing Member State **to the extent that free legal assistance is necessary to guarantee effective access to justice;**
- The criterion of **material condition** can be applied;
- It is granted **without undue delay;**
- It shall be granted **at the latest before the questioning or the carrying out of investigative or evidence-gathering acts;**





Procedure

Training of Lawyers on
various areas of European
Union Law

Directive

Romanian legislation

⊗ #TRAVAR

The appointment of the lawyer is made **without delay**;

The designation decision must be made **with due diligence and with respect for the right of defence**;

Beneficiaries of free assistance **are informed in writing about the outcome of the application**;

The need for an effective free legal aid system **of adequate quality**;

The quality of services should be such as to ensure **fairness of procedures**;

Adequate training of staff involved in making decisions on the provision of free assistance;

Possibility of replacing the lawyer providing free legal assistance if necessary;

Existence of an **effective remedy** under national law for infringements of rights under the Directive;

- The appointment of the lawyer is carried out **as soon as the Legal Aid Service of the competent Bar receives the request (by telephone and/or in writing) for the appointment of a public defender.**;
- The lawyer must **have time** to reach the judicial body, to advise the beneficiary of legal assistance, to prepare the defence, etc.;
- The appointment of the public defenders **is carried out on the basis of criteria that are established** by regulations of the National Union of Bar Associations in Romania and/or of each bar association in relation to the provisions of Law no. 51/1995 on the organization and exercise of the legal profession, the Statute of the Legal Profession, the Code of Criminal Procedure, etc.;
- The request for the appointment of a public defender in criminal matters is made by the **judicial body**.;
- If the suspect or defendant wishes to appoint a public defender and makes the request to the bar association, he or she **shall be informed in writing of the procedure**;

- Lawyers **who wish to be appointed to provide legal aid can choose which matters they wish** (civil, criminal, asylum and migration, litigation, court, criminal prosecution, weekends, legal holidays, etc.)
- Since they have access to a case with a specific subject matter (European Arrest Warrant) it is assumed that they have **the necessary knowledge** to make an efficient and effective defence.;
- Conducting **professional training courses** in various fields;
- **The replacement of the public defender is carried out only after analysis of the situation and of each individual case;** it can take place either at the request of the judicial body, of the lawyer or at the request of the beneficiary of legal assistance.;
- **The possibility of appointing the same lawyer** by the court for all stages of the proceedings **with the consent of the lawyer** and with the **request of the suspect and accused person;**
- If legal assistance is mandatory and a procedural act is carried out in which the suspect or defendant was not assisted by a lawyer, **the sanction is the absolute nullity of that act. This may be grounds for appeal.**
- The legal aid service may **be led by a head of the legal aid department chosen from among lawyers;**
- The department is coordinated by the Dean and co-counsel lawyers;



**Transposition of the Directive into Romanian
law**

**Law no. 236 of 2017 amending and
supplementing Law no. 302/2004 on
international judicial cooperation in criminal
matters**



In Article 16, after paragraph (4) a new paragraph is inserted, paragraph (5), with the following content :

(5) Expenses incurred in the provision of legal assistance by a lawyer in the situations covered by Article 90(1)(a) and (b). (3), Art. 104 par. (21) and (22) shall be borne by the person addressed.

Law No 51/2021 amending and supplementing Law No 302/2004 on international judicial cooperation in criminal matters

- In Article 91, after paragraph (3) a new paragraph is inserted, paragraph (31), with the following content:

(3¹) If the European Arrest Warrant is issued at the pre-trial, pre-trial chamber or trial stage, and the requested person exercises the right to have a lawyer in Romania, he or she may benefit from free legal assistance, if he or she so requests. In this case, the issuing court shall make arrangements for the appointment of a lawyer of its own motion and shall inform the executing authority accordingly.

- In Article 91, paragraph (4) is amended to read as follows :

(4) The role of the lawyer in Romania, appointed in accordance with the provisions of paragraph. (3) or (31), is to assist the lawyer in the executing Member State by providing information and advice to enable the requested person to formulate his or her defences in the procedure for the execution of the European Arrest Warrant.

- In Article 106, paragraph (3) is amended to read as follows :

(3) The prosecutor or, where appropriate, the executing court shall inform the detained or arrested person that he or she has the right to appoint a lawyer in the Member State issuing the European arrest warrant and to communicate with him or her directly or through the lawyer chosen or appointed ex officio in Romania, under the conditions provided for by Romanian law and subject to confidentiality. If the European arrest warrant is issued for the purpose of prosecution or trial, the requested person shall be informed that he or she has the right to apply for free legal assistance.



Compulsory legal assistance to the suspect and the defendant according to the Code of Criminal Procedure

a) when the suspect or defendant is a minor, detained in a detention centre or in an educational centre. when he is detained or arrested, even in when he/she has been ordered to be medically committed, even in another case and in other cases provided for by law:;

b) if the judicial body considers that the suspect or defendant could not defend himself/herself;

c) during the proceedings in the pre-trial chamber and during the trial in cases where the law provides for life imprisonment or imprisonment of more than 5 years for the offence committed.



Other legal provisions

- **Art. 2 of Law 51/1995** - Everyone has **the right to freely choose his lawyer;**
- **Art. 91. Code of Criminal Procedure - Public defender**
 - (1) In the cases referred to in Article 90, if the suspect or accused person has not chosen a lawyer, the judicial body shall arrange for the **appointment of a lawyer of its own motion.**
 - (2) Throughout the criminal proceedings, **where legal assistance is compulsory, if the chosen lawyer is unjustifiably absent, fails to provide a substitute or unjustifiably refuses to defend**, even though the exercise of all procedural rights has been assured, the judicial body shall arrange for the appointment **of a lawyer to replace him, giving him a reasonable time and facilities for the preparation of an effective defence**, which shall be recorded in the minutes or, where appropriate, in the closing of the hearing.
 - . **In the course of the trial**, where legal assistance is compulsory, if the chosen lawyer is unjustifiably absent from the trial, fails to provide a substitute or refuses to conduct the defence, although the exercise of all procedural rights has been assured, the court shall arrange for the appointment of a lawyer to replace him, **giving him at least 3 days to prepare his defence.**
 - (3) The appointed **public defender is obliged** to appear whenever requested by the judicial body, **ensuring a concrete and effective defence in the case.**
 - (4) Delegation of the public defender **stop when the chosen defender is presented.**
 - (5) If the lawyer is absent from the trial and cannot be replaced in accordance with the conditions of paragraph (2), the case shall be adjourned.

Regulation of free legal aid – public defender -

Law 51/1995 on the organization and practice of the legal profession;

Status of the lawyer profession;

Decision No 180 of the Council of the National Union of Bar Associations of Romania of 17 December 2016 regulating the Framework Regulation on the organization, functioning and duties of the legal aid services of the bar associations;

Decisions, rulings and own regulations of bar associations;

Protocol signed between the National Union of Bar Associations of Romania, the Ministry of Justice and the Public Prosecutor's Office on the establishment of fees due to public defenders;

- The lawyer **is obliged to provide legal assistance in cases in which he has been appointed** ex officio or free of charge by the bar.
- The public defender **has the same rights** and obligations as the elected lawyer.
- The lawyer is obliged **to study thoroughly the cases entrusted to him**, whether committed or ex officio, **to appear at every term in court or at the prosecution authorities or other institutions**, in accordance with the mandate entrusted to him, to show conscientiousness and professional probity, **to plead with dignity towards the judges and the parties to the trial, to submit written conclusions or notes for the hearing whenever the nature or difficulty of the case so requires or the court so orders. Failure to comply with these professional duties in an accountable manner shall constitute disciplinary misconduct.**
- Fees for legal aid in any of the forms provided for in this chapter shall be determined by the **protocol** concluded between the U.N.B.R., the Ministry of Justice and the Public Prosecutor's Office.
- **For the legal assistance provided, the appointed lawyer is entitled to a fee set by the judicial body, according to the nature and volume of the work carried out, within the limits of the amounts established by the protocol concluded between the U.N.B.R., the Ministry of Justice and the Public Prosecutor's Office, as well as to the settlement of transport costs if the legal assistance activity is carried out in a place other than the place of residence or the place where he has his professional seat. The reimbursement of transport costs shall be based on supporting documents bearing the price and date of issue, such as: fuel coupons, travel tickets, train tickets, air tickets, vouchers, documents proving payment of taxes paid during and in connection with the journey.**

- In the legal aid decision, the court shall also determine the provisional amount of the lawyer's fee.
- The report drawn up by the lawyer containing the fee is subject to confirmation by the judicial body, which, depending on the volume and complexity of the work carried out by the lawyer, as well as on the duration, type and particularities of the case, may order that the fee initially fixed be maintained or increased..
- In the case of legal aid granted at the prosecution stage, if it exceeds 60 days, the provisional fee fixed by the judicial body shall be paid to the lawyer and, at the end of the prosecution, the provisional fee shall be deducted from the final fee fixed by the judicial body, on the basis of the written report on the actual legal services provided.
- If, after the provisional fee has been paid, the lawyer ceases to provide legal assistance before the end of the prosecution, the judicial body shall, depending on the actual legal services provided, decide on the fee due for the work actually done, any difference to be refunded.
- **According to the Law, the fees must be paid within 45 days from the date of submission of the statements by the bar associations to the competent judicial body. For late payment of fees, interest/penalties are calculated and paid at the level prescribed by the Code of Fiscal Procedure at the request of the bar associations;**
- **Fees are adjusted annually by the inflation rate;**



Training of lawyers on various areas of European Union Law (TRAVAR)

Piotr Turowicz

**Application of the three EU procedural rights
directives in Poland**

Bucharest, 20 June 2024



Co-funded the European Union

Right of access to a lawyer

Directive 2013/48/EU

- Directive 2013/48/EU has not been fully implemented in Poland, but many solutions in Polish law harmonise with certain requirements of the directive (they are inspired by the provisions of the directive); however, still 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.



Right of access to a lawyer

Directive 2013/48/EU

- 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).
- 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



Right of access to a lawyer

Directive 2013/48/EU

- 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. 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. 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 lawmaker has not indicated the time limits for such a condition.
- 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 and a person in a pre-trial detention is entitled to have, at least, one visit from such 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)



Right of access to a lawyer

Directive 2013/48/EU

- 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.



Right of access to a lawyer

Directive 2013/48/EU

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.



Right of access to a lawyer

Directive 2013/48/EU

- 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).
- 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.



Right of access to a lawyer

Directive 2013/48/EU

- 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 fulfilment of international obligations, and therefore no legislative work is planned.
- 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.



Right to be presumed innocent

Directive (EU) 2016/343

- 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
- thus, no public statement saying that someone is guilty is allowed
- 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.



Right to be presumed innocent

Directive (EU) 2016/343

- 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).



Right to be presumed innocent

Directive (EU) 2016/343

- 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

- this directive regulates the important issue of *ex officio* legal assistance, including *ex officio* defence.
- 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.
- 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.
- 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. Such a lawyer is appointed from a list of lawyers. 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
- 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.



Right to legal aid

Directive (EU) 2016/1919

- 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 (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 (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.
- 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.

Summary

- 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.
- 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.



Training of lawyers on various areas of European Union Law (TRAVAR)

Adrian Haratau

**The impact of the European Arrest Warrant on
Directive 2013/48/EU, Directive (EU) 2016/343 and
Directive (EU) 2016/1919**

Bucharest, 20 June 2024



Co-funded the European Union

I. The European Arrest Warrant (EAW)

- ✓ Established under Framework Decision 2002/584/JHA of 13 June 2002
- ✓ Entered into force in 2004, replacing the multilateral extradition system
- ✓ EAW is a judicial decision issued by one Member State directed to judicial authorities of another Member State to secure the arrest and surrender of a requested person for criminal prosecution or execution of a custodial sentence.

Principles of EAW

- ✓ Relies on mutual recognition and trust between Member States
- ✓ Executing authorities should as a principle execute the EAW
- ✓ Obligation to respect fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union and the Charter of Fundamental Rights of the EU

FOCUS DIRECTIVES

- ✓ **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant 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;
- ✓ **Directive (EU) 2016/1919** of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.
- ✓ **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;

II. The impact of the EAW on the application of the Directive 2013/48/EU on the right to access to a lawyer

- Purpose: Establishes minimum rules for the right of access to a lawyer in criminal proceedings and EAW.
- The impact of the EAW on the application of the Directive 2013/48/EU on the right to access to a lawyer

KEY PROVISIONS OF THE DIRECTIVE

- Right of access to a Lawyer:
 - ✓ Prompt access without undue delay
 - ✓ Meetings and communication with the lawyer
 - ✓ Lawyer's presence during hearings
- Non-regression Clause: No limitation on existing rights and procedural safeguards.

Article 10(1) - Rights upon Arrest under EAW

- Access to a Lawyer: Ensured promptly after arrest.
- Participation in Hearings: Right to lawyer's presence and participation.
- Effective Defense: Access to proceedings in the issuing state.

Transposition into National Law

➤ Law No. 302/2004 Amendments:

- ✓ Article 106(3): Right to appoint a lawyer in the issuing Member State.
- ✓ Article 106(6): Right to an interpreter if the detained person does not understand the language.

III. The impact of the EAW on the application of the Directive 2016/1919

- Article 5(1): Right to legal aid from arrest until surrender or refusal decision.
- Means Test: Evaluation of financial resources to determine eligibility for legal aid.
- Setting common minimum standards is indispensable to establish the climate of mutual trust which is at the core of mutual recognition instruments such as EAW
- Today the main challenge is the full transposition of all the directives' provisions into national law, translating into effective protection of procedural rights for requested persons under the EAW

III. The impact of the EAW on the application of the Directive (EU) 2016/343

- Every individual, suspected or accused, has the right to be presumed innocent until proved guilty according to the law
- Rights:
 - Article 4 – the prohibition on public references to guilt
 - Article 5 – measures regarding the public presentation of suspects and accused persons
 - Article 6 - guarantees regarding the burden of proof
 - Article 7 – the right to silence and the right not to incriminate oneself

Melloni case

CJEU's Decision:

- Execution of an EAW can be subject only to conditions set in the Framework Decision.
- Article 4a(1)(a) and (b): Precludes refusing an EAW for in absentia sentences if the person had a legal counselor.
- Reinforces mutual trust and recognition among EU Member States.
- Implications: Ensures uniform application of the EAW, avoiding conditional surrenders not stipulated in the Framework Decision.

V. Rights in Practice: Access to a Lawyer and Procedural Rights in Criminal and European Arrest Warrant Proceedings¹

a) Legal Assistance in the Executing State

1) *European Arrest Warrant Proceedings – Room for improvement to guarantee rights in practice – available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2024-european-arrest-warrant-proceedings_en.pdf*

- Information about the right to a lawyer:
 - - Authorities in the executing Member State inform the requested person about their right to a lawyer.
 - - Information usually conveyed first by the police, then reiterated by prosecutors and judges.
 - - Language barriers can cause initial problems for non-native speakers.
- Appointment of a lawyer:
 - Common practice: Police inform the arrested person about their right to appoint a lawyer.

 - Police do not assist in contacting private lawyers.
- At the beginning of proceedings, ex officio lawyer appointments are common.
- Private lawyers play a crucial role in some cases in preventing EAW execution.

b) Legal Assistance in the Issuing State

Information about the Right to a Lawyer:

- Variations in information provided about the right to legal assistance in the issuing state among different countries.
- Some countries, such as Belgium, Finland, Germany, and Slovakia, inform requested persons of their right to legal assistance in both issuing and executing states.

Appointment of a Lawyer in the Issuing State:

- - In Sweden, a lawyer is usually appointed for prosecution cases but not for execution of sentences.
- - In other countries, lawyers in the issuing state are often contacted by lawyers in the executing state or family members of requested persons.



Training of lawyers on various areas of European Union Law (TRAVAR)

Yiannis Polychronis

The European Arrest Warrant in Cyprus

Bucharest, 20 June 2024



Co-funded the European Union

The EAW (European Arrest Warrant) in Cyprus.

A) Historical background in relation with the Republic of Cyprus.

The republic of Cyprus joined the EU as a member state on May 1st, 2004, and immediately incorporated the provisions of the framework decision on the EAW into the national law system. Until then, the European Convention on Extradition was in force. The Republic of Cyprus, to facilitate the execution process of a EAW, declared English as an official language. Therefore, when a EAW is submitted to the Cypriot authorities, it must be formulated in one of the official languages of the Republic of Cyprus or in the English language.

Initially, Article 11.3 of the Constitution of Cyprus stipulated that no one could be arrested or deprived of their liberty without a judicial warrant, except for the flagrance offences.¹The article was amended in 2013² and now upon the transmission of the translated EAW to the authorities of the Republic, the competent police authorities are legitimizing to arrest an individual and bring them before the court, to commence the surrender procedure, without the need for issuing a previous national arrest warrant.

Before the enactment of the legislation for the EAW the Constitution³ of Cyprus explicitly prohibited the extradition of Cypriot citizens, a provision that was common in many member states at the time of the adoption of the Constitution of Cyprus. Thus, in the case of the ***Attorney General of the Republic v. Kostas Konstantinou 2005***⁴ the Full Bench of the Supreme Court of Cyprus ruled that a EAW could not be executed against a Cypriot citizen without the prior amendment of Article 11.2(f) of our Constitution.

Consequently, in 2006 Article 11.2(f) of the Constitution was amended accordingly, but with reference to events that occurred after the Republic's accession to the European Union. Therefore, the amendment of the Constitution was not entirely compatible with the provisions of the possibility of extraditing a citizen of the Republic "*only concerning events that occurred or acts committed after the date of the Republic's accession to the European Union*" i.e May 1st, 2004.

This event made it necessary to amend again the provision of Article 11.2(f) which was done in 2013 to lift the specific limitation and achieve full compliance with the Framework Decision.

¹ The concept of "in flagrante delicto" in Cyprus implies that the arrest must occur while the crime is being committed, meaning it must immediately follow the commission of the offense.

² With the Seventh Amendment of the Constitution Law of 2013 (N. 68(I)/2013) E.E., Part I(I), No. 4400, 17.2013.

³ Article 11.2(st)

⁴ C- 294/2005.

B) The problematic issue of the potential violation of the fundamental rights of the requested person by the issuing member state of the European Arrest Warrant.

From a practical perspective, in Cyprus there is a very high execution rate of EAWs and generally decisions for the rapid extradition of requested individuals with EAWs. Our Courts are very hesitant to accept defenses from requested individuals with EAWs. In fact, the Supreme Court issued procedural rules under which the First Instance procedure and the decision for the execution of the EAW must take place within 35 days from the day of the arrest, unless exceptional circumstances exist.

Despite the extremely high execution rate of the EAWs in Cyprus, the issue of the potential violation of the fundamental rights of the requested person by the requesting member state has been raised many times in the courts of the republic of Cyprus. In most cases, this argument was rejected as Cypriot courts placed an extremely high burden of proof on the requested individuals to demonstrate such a violation. Below, I will refer to cases where requests for the execution of EAWs were rejected because it was proven that the extradition would amount to a violation of the fundamental rights of the requested individual:

B. (1) Convictions in absentia.

On March 3rd, 2020 the Supreme Court of the Republic of Cyprus ⁵upheld a first instance decision that rejected a request for the extradition of an individual to the Greek authorities to serve prison sentence imposed on him in – absentia. The reasoning that the Cypriot courts rejected the request for the execution of the EAW was because adequate legal safeguards were not provided, as required in §5(1) of the framework Decision. The “safeguards” provided from the Greek authorities did not allow the requested individual to challenge his convictions and have his case retried, but only through invoking force majeure. This was judged not to ensure the guarantees that the law, the framework decision, and the overall spirit of the EAW process mandate.

The above line of argument was followed in a subsequent decision in February 2021⁶ where again the Supreme Court upheld a first – instance decision that rejected a request from the Greek authorities for the execution of an EAW for a (5) five – years imprisonment sentence regarding consecutive thefts. The sentence was given in – absentia of the requested individual, as he, although duly and timely summoned, did not appear at the trial during the case. The problem was that the requested individual was not informed that a decision could be taken in his absence, nor he was informed of any decision against him after the issuance, nor were the legal safeguards required for the court to execute to EAW presented to him. The following significant points raised:

“The adoption finally of the principle of mutual recognition in the framework decision cannot in any case be perceived as a return to a bipolar model of judicial cooperation, where the requested person is simply the object of the procedure without subjective rights, since, as has been stated, efforts to reform the law on

⁵ Attorney General and XXX, Political Appeal No. 230/2019, dated March 3, 2020.

⁶ Attorney General of the Republic v. Stavros Georgiou, Political Appeal No. 317/2020, February 17, 2021.

extradition were linked to the request to strengthen the position of the requested person."

B. (2) Member states with systemic problems.

B. (2)(i) The state of Romania:

In the very recent decision of the Cyprus Court of Appeal, in the case of **Benyamin Steinmetz v. Attorney General of the Republic**, dated November 3rd, 2023⁷, the Court of Appeal overturned the First instance decision which ordered the execution of a EAW and Mr. Steinmetz surrender to the authorities of Romania, stating that *"based on the evidence before the trial court, the risk could not be excluded that if the Appellant were surrendered to the issuing state of the EAW, he would face inhuman or degrading treatment during his detention there."* In this case, the Appellant was sought for the enforcement of a 5 – years imprisonment sentence imposed on him by the Supreme Court of Romania, and he raised several defenses, including that the conditions of detention in Romania would violate his fundamental rights, given systematic problems in the Romanian prison system.

The Cypriot Court of the Appeal applied the test established by the European Court of Justice in the **Aranyosi**⁸ case and determined at an initial stage that it was proven based on objective, verified, reliable, specific, and adequately informed evidence that there were systemic or generalized deficiencies in relation to the conditions of detention in Romania. Crucial to this decision were rulings of the ECHR ⁹reports from the CPT and a decision of the Council of Europe's Committee of Ministers.

Furthermore, it was judged that the adequate assurances were not provided by the authorities of the requesting member state that in the specific case there were no serious and proven grounds to believe that there wasn't a real risk that the Appellant would face inhuman or degrading treatment in case of his surrender regarding the conditions of his detention. It was crucial that no assurances or guarantees were provided by a Judicial Authority, but by the National Administration of Penitentiaries in Romania.

B. (2)(ii) The member state of Poland - The independence of the Judiciary:

Contrary to the previous decision, the Cypriot Courts in a subsequent ruling in March 2024¹⁰ concerning the judicial system in Poland, accepted that there is a systemic problem in Poland related to the independence of the judiciary, based on credible sources such as judgments of the ECJ, judgements of the ECHR and the Council of Europe Committee of Ministers. However, they judged at a later stage that based on the evidence before them, there was no real risk of violating the appellant's right to a fair trial. It was decided that although 6 out of the 21 judges who could potentially hear the case of the appellant were appointed following the proposal of the newly established Supreme Judicial Council, which was subject to criticism because it included individuals appoints

⁷ Benyamin Steinmetz v. Attorney General of the Republic, EAW Appeal No. 3/23 November 3, 2023.

⁸ Aranyosi C-404/15, 05.04.2016.

⁹ REZMIVES AND OTHERS v ROMANIA Applications nos. 61467/12, 39516/13, 48231/13 and 68191/13.

¹⁰ TOMASZ BOGDAN BIENIOSZEK v. Attorney General of the Republic, C- 2/24, 26/3/2024

by the legislative or executive authority, this alone was not sufficient evidence to demonstrate a real risk of violating the appellant's right to a fair trial.

C) Conclusion.

In Conclusion, the EAW constitutes an institution that embodies the deeper European idea in the crucial field of criminal law, where state sovereignty has been traditionally taken for granted and exclusive. However, the principle of mutual trust and recognition, as the cornerstone of the EAW should not operate to the detriment of fundamental rights, including the traditional right of defense and the presumption of innocence of an accused person. National courts are obliged to protect these rights in cases where there is evidence of a serious and substantial reason for clear insufficient protection before a National Court deciding on the execution of the EAW. Towards this direction, all those involved in the matter must work.

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