



Training of lawyers on various areas of EU Law (TRAVAR)

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The right to access to a lawyer, Directive 2013/48/EU

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Introduction

Legal assistance in criminal proceedings as a fundamental right

Article 6 § 3 (c) of ECHR

Article 47 and Article 48 § 2 of the Charter of Fundamental Rights EU

Article 48 § 2

Article 14 § 3 of the International Covenant on Civil and Political Rights

Articles 11(4) and 12(5)c of Cyprus Constitution

The lawyer is the guarantor for the respect of the rights of the suspects

1. Historical background of DIRECTIVE 2013/48

- 2009, Council of EU, Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings
- 2011, Proposal submitted for discussion in September
- Five countries - the United Kingdom, Belgium, France, Ireland and the Netherlands - expressed in a Joint Note "serious reservations about the Commission's approach"
- June 2012, a new text was finally presented by the Council, as a "compromise" proposal
- October 2013, after negotiations between the Council, the Parliament and the Commission that lasted about 18 months, a compromise text was adopted

2. Impementation into Cyprus criminal justice system

- **Constitution:** articles 11,23 and 35
- The Rights of Suspected Persons, Persons under Arrest and Persons under Detention Act **163(I) of 2005**, as amended by Law 22(I)/2017
- ***F.L.H. v. Police*** , Cr. Appeal 4/2020, 31.1.2022
 - stressed the importance of suspects having timely access to a lawyer
 - protection covers every suspected person (not only arrested persons)
 - the waiver of the right of access to a lawyer must be voluntary, formulated in a manner that is not open to challenge and made by the suspect with full knowledge of the consequences of

3. The right of access to a lawyer

3.1. To whom does it apply ?

- **FROM:** (1) the time a person is made **aware** by the competent authorities (Police or other enforcement governmental agent), by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, **irrespective of whether they are deprived of liberty**
(full enforcement when arrested)
(2) in the course of questioning become suspects or accused persons
- **UNTIL:** until the conclusion of the proceedings (i.e. the final determination of the investigation or sentencing or resolution of any appeal)
- **EAW:** from the **time of their arrest** in the executing Member State
- **DOES NOT APPLY : IN MINOR OFFENCES:**
 - (1) where deprivation of liberty cannot be imposed as a sanction
 - (2) imposition of a sanction by an authority other than a court, and the imposition of such a sanction may be appealed or referred to such a court i.e. road traffic offences (**it does APPLY in court proceedings**)

3. The right of access to a lawyer

3.2. What does it entail ?

- suspects or accused persons have the right to **meet in private and communicate** with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority
- have the right for their lawyer to be present and **participate effectively** when questioned
 - SOS: according to procedures under national law, provided that such procedures do not prejudice the effective exercise of the right
 - SOS: lawyers participation (or not) in the procedure shall be noted
- at a **minimum**, the right for their lawyer to attend the following **investigative or evidence-gathering acts** (provided that if the suspect or accused person is required or permitted to attend the act concerned)
 - (a) identity parades;
 - (b) confrontations (not applicable in Cyprus)
 - (c) reconstructions of the scene of a crime (rarely used in Cyprus)

3. The right of access to a lawyer

3.3. When does it apply?

- **in such time and in such a manner** so as to allow the persons concerned to exercise their rights of defence **practically and effectively**
- **PRACTICALLY** shall have access to a lawyer **without undue delay**:

from whichever of the following points in time is the earliest:

(1) *“before they are questioned by the police or by another law enforcement or judicial authority”*

SOS: Where/ circumstances/ in writing or verbally (police note)

(2) *“upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3”*

SOS: easy way of acquiring self incriminating evidence

(3) *“without undue delay after deprivation of liberty”*

SOS: admissions out of police stations

(4) *“where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court”*

4. Temporary derogation

In **exceptional** cases and only **at the pre-trial stage** :

- (a) where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty (art3(2)(c) D.)
 - (b) No application of art 3(3), in the light of the **particular circumstances** of the case where
 - (1) there is an **urgent** need to avert **serious** adverse consequences for the life, liberty or physical integrity of a person,
i.e. abduction, pursue of a bomber or
 - (2) where immediate action by the investigating authorities is imperative to prevent **substantial** jeopardy to criminal proceedings
i.e. witness tampering
- proportionate, limited in time, not be based exclusively on the type or the seriousness of the offence, not prejudice the overall fairness of the proceedings

5. Waiver of rights

Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:

(1) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it;

(2) the waiver is given voluntarily and unequivocally

SOS : The waiver, which can be made in writing or orally, **shall be noted** in the police file, as well as the circumstances under which the waiver was given

SOS: suspects or accused persons may revoke a waiver at any point during the criminal proceedings

6. The right in EAW proceedings

- from the time of her arrest in such time and in such a manner as to allow her to exercise her rights effectively
- A lawyer can be present and participate during a hearing of a requested person by the executing judicial authority: the lawyer may ask questions, request clarification and make statements.
- the content of the right, conditions for its waiver, and temporary derogations provided in the Directive that apply to suspect are also applied to the requested persons' cases
- information should be given that the requested person has the right to appoint a lawyer in the issuing Member State whose role 'is to assist the lawyer in the executing Member State by providing information and advice

7. Remedies in breach of the provided rights

Art.12

- Suspects/accused/ requested persons in EAW should have an effective remedy under national law in the event of a breach of the rights under this Directive

Illegally obtained evidence

- Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.
 - National rules – art. 35 of Cyprus Constitution

8. As an ending: The Non-regression clause

- The Directive sets the minimum rules concerning the rights of suspects and accused persons
- Not limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection
- Art. 35 Constitution “the legislative, executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of Part II of the Constitution”, which safeguards the fundamental human right, within which the right of a suspect and accused person to access to a lawyer.



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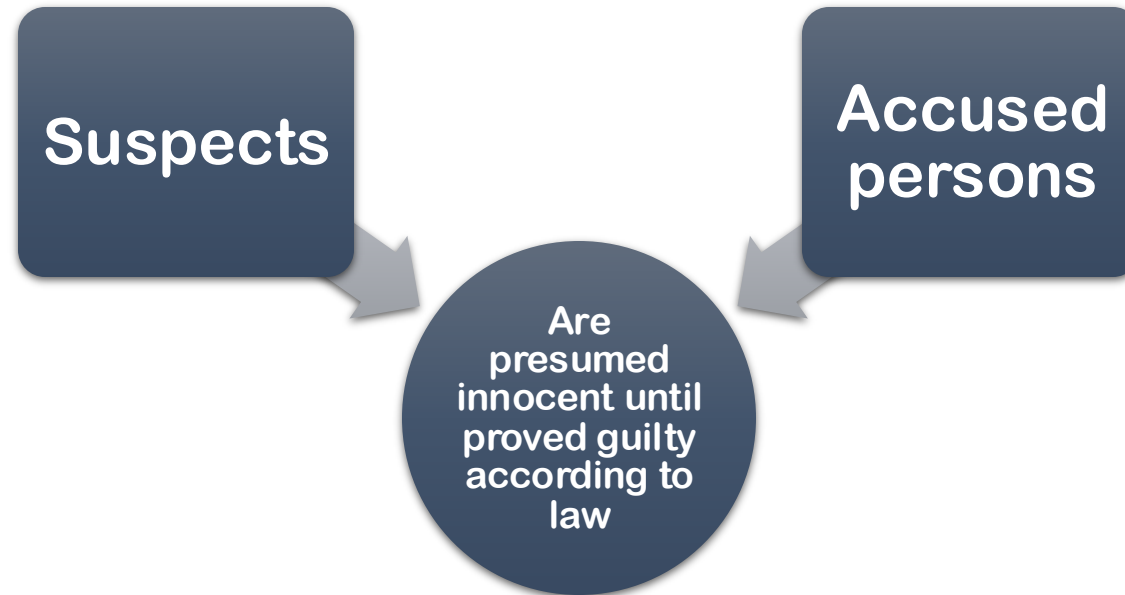
**Directive (EU) 2016/343 on the strengthening of
certain aspects of the presumption of innocence and
of the right to be present at the trial**

Nicosia, 24-25 October 2024



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Understanding the Presumption of Innocence



This presumption is an **essential element of the right to a fair trial** and is closely related to other procedural rights, such as the rights to remain silent, not to incriminate oneself and to be present at trial.

The principle that a person must be presumed innocent until proved guilty according to law is an **essential safeguard in criminal proceedings**.

It is a principle universally recognised in international law and in the law of most nations.

How it is applied at the European Level

European Convention on Human Rights

Article 6(2): *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."*

Charter of Fundamental Rights (CFR) of the European Union

Article 48(1): *"Everyone who has been charged shall be presumed innocent until proved guilty according to law."*

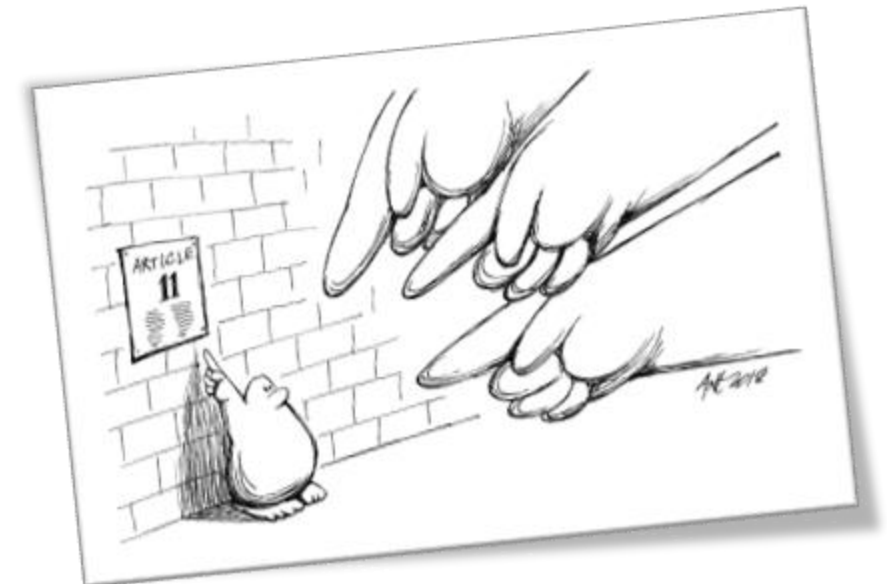
A directive expressly addressing certain aspects of the presumption of innocence was adopted in 2016, harmonising the minimum requirements within the national laws of the EU Member States.

Directive (EU) 2016/343 – Article 3: *"Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law"*.

The presumption of innocence is a broad concept that **seeks to ensure the overall fairness** of the proceedings.

As a procedural guarantee, it affects the **burden of proof**, **public references to the suspect or accused's guilt**, the **presentation of the accused**, and the right **not to incriminate oneself**.

In its second dimension, it protects persons acquitted of a crime or against whom proceedings were discontinued from being treated by public officials and authorities as if they were guilty.



Directive (EU) 2016/343

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.

Article 4 – Public References to Guilt

Article 5 - Presentation of suspects and accused persons

Article 6 – Burden of Proof

Article 7 – Right not to incriminate oneself

Unbiased approach to the accused...

is one that respects the fundamental elements of the presumption of innocence:

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that the burden of proof falls on the prosecution and a person should not be forced to produce incriminating evidence

that public references to a person's guilt before the guilt has been established by a court of law are prohibited, and

that a person should not be presented in court or at a public hearing in a manner which gives the impression that he or she is guilty of the crime.

ECtHR Case Law

In **Buscemi v. Italy**, App. no. 29569/95, a court president publicly used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality.

- **Incompatible with the impartiality required of any court, as laid down in Article 6(1) of the Convention!**

The ECtHR repeated its reasoning in **Lavents v. Latvia**, App. no. 58442/00 where a judge engaged in public criticism of the defence and publicly expressed surprise that the accused had pleaded not guilty.

Burden of Proof

The evidentiary dimension of the presumption of innocence dictates that:

1. The burden of the proof for establishing the guilt of an accused falls on the prosecution (**Karelin v. Russia**, App. no. 926/08, par. 72). Only under exceptional circumstances the burden of proof can be shifted to the accused. This notion relates with another right discussed in this course, the right not to be forced to present incriminating evidence against oneself, also referred to as the privilege against self-incrimination.
2. Any doubts as to questions of guilt must benefit the suspect or accused, i.e. in dubio pro reo (**Frumkin v. Russia**, App. no. 74568/12, par. 166).

EU Directive 2016/343 - Article 6(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"

The respect for a person's presumed innocence and for the need to place the primary burden of proof on the prosecution is, in principle, not incompatible with:

- **Ex officio fact-finding powers of the judge or the court** to seek both inculpatory and exculpatory evidence (**Recital 22** EU Directive)

”(22) The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice to any ex officio fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.”

- **The right of the defence to submit evidence**
- **The existence of presumptions of fact and presumptions of law** (such as those found in most criminal law systems regarding road traffic, drugs or tax offences) under certain conditions

Presumptions of fact and **presumptions of law** are therefore compatible with the respect for a person's right to be presumed innocent to the extent that they are:

- **Rebuttable**, providing the accused the possibility to challenge them and to present exculpatory evidence,
- **Confined to reasonable limits**,
- **Reasonably proportionate to the legitimate aim** sought to be achieved and ensure a balance between the protected interest and the rights of the defence

(see also ECHR Guide on Article 6 (criminal limb), par. 334-336)

In deciding the question of the guilt of the accused, the Court must always start from the legal presumption that the accused is innocent, persistently maintaining this position until the end of the trial, where it must weigh all the evidence as a whole and decide whether the prosecution has discharged the burden of proof placed on its shoulders and has satisfied the Court of the guilt of the accused of the particular offence charged.

The burden of proof in criminal cases was extensively analysed in Cypriot authority case **Charitonos and others v. The Republic (1971) 3 J.S.C. 284**, in which substantial reference was made to Article 6(2) of the European Convention on Human Rights, the provisions of which correspond to Article 12(4) of the Cyprus Constitution.

- On this decision, it was stated that the Court bears the heavier responsibility for the effective safeguarding of individual human rights.

Charitonos & others v. The Republic (1971) 2 C.L.R. 40, 10/03/1971

Cyprus Case Law

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*“The seriousness of the case has already been underlined earlier in this judgment; But this fact must not overwhelm one into forgetting that the Appellants are the first to bear the impact of such a case. **Their protection lies in the law of their country; a fundamental part of which is the provision in Article 12 of the Constitution that "every person charged with an offence shall be presumed innocent until proved guilty according to law".***

*Moreover, **this is one of the basic human rights which received recognition in international declarations, intended to give the character of present day civilisation; the civilisation we pride ourselves to belong.** It is the right in Article 6, para. 2, of the European Convention of Human Rights, which, according to the interpretation received in the case of Austria v. Italy (Op. Corn. 788/60, para. 199 at page 140 in The Digest of Case Law, relating to the European Convention 1955-1967) requires that **"Court Judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged"**. In our legal system this is the well established fundamental principle which settles the onus of proof on the prosecution. But the commentary goes further It reads:-[...]*

"Since Article 6(2) is thus primarily concerned with the spirit in which the Judges must carry out their task, it may be asked whether it does not also apply to the attitude of other persons taking part in the proceedings, such as counsel for the prosecution and for the civil plaintiff, experts and witnesses. If such persons express themselves towards the accused in flights of language such as might disturb the calm of the Court by their violence..."

the responsibility rests on the Presiding Judge to react against such behaviour, lest he may give the impression that the Court shares the obvious animosity towards the accused and regards him from the outset as guilty. This is the atmosphere which the law requires to be maintained in every criminal trial (let alone a trial of this magnitude) and places the responsibility for maintaining it, on the Court.

The Court which carries – and must be seen to be carrying - the still heavier responsibility of actually sustaining individual human rights entrenched in the law. Such atmosphere is most necessary to enable the Court to decide the very important issue of the guilt or otherwise of the accused, starting from the legal presumption that he is innocent; and persistently preserving an open mind on this issue, until the end of the trial, as it is at that stage (and at that stage only) that the Court must weight the evidence as a whole and decide whether the prosecution have discharged the onus placed upon it by the law, to satisfy the Court's mind and conscience, of the guilt of the accused for the particular offence charged. [...]

Salabiaku v. France, App. no. 10519/83

The applicant was found in possession of illegal drugs at a Paris airport and was convicted of smuggling.

The French Customs Code stated that “the person in possession of contraband goods shall be deemed liable for the offence”. The offence was committed by the “mere (“objective”) fact” of “possession of prohibited goods when passing through customs”.

It was for the Prosecution to establish possession and for the accused to provide evidence of lack of knowledge or intent.

The national courts considered that the defendant's intent could be inferred from the fact that he declared at customs that the suitcase in which the drugs were found belonged to him and that he showed no surprise when the suitcase was opened and the drugs were found.

Findings:

The ECtHR noted that “Article 6 par. 2 does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” (par.28).

The Court noted that the domestic courts “exercised their power of assessment ‘on the basis of the evidence adduced by the parties’ and inferred from the ‘fact of possession a presumption which was not subsequently rebutted by any evidence”.

They further identified “certain ‘element of intent’, even though legally they were under no obligation to do so” (par. 30). The presumption of smuggling was therefore confined to reasonable limits, it was aimed at a legitimate aim and the defendant had the possibility to refute it in court.

There was therefore **no violation** of Article 6(2) ECHR.

Telfner v. Austria, App. no. 33501/96

The applicant was convicted of an offence of negligent injury involving a hit-and-run driving incident. He chose to remain silent, and the prosecution relied entirely on the report by the local police. The extent of the report's evidence was that the applicant was the main user of the car and that he had not been home on the night of the accident.

Findings:

The ECtHR held that the prosecution had built its case by relying on very weak evidence against the accused and failed to prove in itself that he had committed the offence.

In requiring the applicant to provide an explanation without having first established a convincing case against him, the national court had in effect shifted the burden of proof from the prosecution to the defense.

There was a **violation** of Article 6(2) ECHR.

Public References to Guilt

Principles:

The presumption of innocence **is violated if a judicial decision or a public statement made by a public authority concerning a person charged with a criminal offence reflects an opinion that the person is guilty before the person has been proved guilty according to law.**

It also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged.

However, not all actions or statements that may reflect an opinion about the accused's guilt are prohibited.

Whether a public statement or a decision amounts to a violation of a person's right to be presumed innocent will depend on its nature and on the context (**Allen v. United Kingdom [GC]**, App. no. 25424/09).

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Scope:

Examples where, in principle, statements of suspicion do not affect the presumption of innocence:

- **Acts of the prosecution which aim to prove the guilt** of the suspect or accused person (such as the indictment)
- **Preliminary decisions of a procedural nature** (such as decisions on pre-trial detention) which are based on a suspicion or incriminating evidence, provided they do not refer to the person as being guilty (**Article 4(1) and Recital 16 EU Directive**)
- The dissemination of information to the public about ongoing criminal proceedings, where strictly necessary for reasons relating to the criminal investigation or to the public interest (**Article 4(3) and Recital 18 EU Directive**)

The respect for the presumption of innocence does not prevent public authorities from publicly **disseminating information on the criminal proceedings** where this is **strictly necessary** for reasons relating to the criminal investigation (Article 4(3) EU Directive).

This dissemination must:

- be **reasonable**
- be **proportionate**
- be **based on objective information**, and
- **take all interests into account**

It must in no way create the impression that the person is guilty before such guilt has been proven in accordance to law.

- See also **Recital 18** of the EU Directive.

“(18) The obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings where this is strictly necessary for reasons relating to the criminal investigation, such as when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence, or to the public interest, such as when, for safety reasons, information is provided to the inhabitants of an area affected by an alleged environmental crime or when the prosecution or another competent authority provides objective information on the state of criminal proceedings in order to prevent a public order disturbance. The use of such reasons should be confined to situations in which this would be reasonable and proportionate, taking all interests into account. In any event, the manner and context in which the information is disseminated should not create the impression that the person is guilty before he or she has been proved guilty according to law”.

Y.B. and Others v. Turkey, App. no. 48173/99 & 48319/99

The five applicants were arrested and taken into police custody. Before they had been brought before a judge, the police investigators presented them to the press at a press conference held in the security police's premises.

The police officers stated that the applicants were members of an illegal organisation and that it had been established that they were involved in criminal activities; those activities were then listed in the press release issued by the police (which did not name the applicants). Journalists took photographs of the applicants. On the day on which the applicants were brought before the prosecutor and the judge, a daily newspaper published an article which described them as the perpetrators of specific named offences.

They were named and their photographs were published. A few days later, the applicants were charged with those offences. At the close of a trial, held in the same year before a National Security Court which included a military judge, the applicants were found guilty of membership of and assistance to an illegal organisation.

They were each sentenced to terms of imprisonment.

Findings:

The Court noted that the national authorities were entitled to inform the public about ongoing criminal investigations, provided this was done with all the discretion and prudence required. In the present case, however, **the way in which the applicants were presented to the press made them very easily identifiable.**

Similarly, the content of the press release drawn up by the police referred to the applicants, without any qualification or reservation, as “members of the illegal organisation” and stated that it had been “established” that they had committed several offences.

Taken as a whole, the attitude of the police authorities was incompatible with the applicant's presumption of innocence.

Judicial Authorities

Statements or decisions by judges concerning the accused's guilt are subject to stricter scrutiny than those by investigative or other public authorities (**Pandy v. Belgium**, App. no. 13583/02).

Whether a judicial decision or statement violates the person's presumption of innocence depends on whether it reflects **some reasoning suggesting that the court regards the accused as guilty**.

An outright declaration of guilt is not needed. A breach can therefore occur even in the absence of a formal decision or finding of guilt by the court (**Minelli v. Switzerland**, App. no. 8660/79).



Pandy v. Belgium

The applicant was tried and sentenced to life imprisonment for, inter alia, the murder of his two wives and four of his children and the rape and indecent assault of several of his daughters. Throughout the course of the investigations, the applicant denied any involvement in the matter and compared his situation to that of an unjustly accused military commander (Captain Dreyfus).

During the investigation, the investigating judge (who under Belgian law is in charge of gathering and assessing both incriminating and exculpatory evidence) **made remarks during a public hearing to the effect that the applicant should not be comparing himself to Dreyfus, but to two notorious serial killers.** The applicant's request for the judge to be withdrawn was dismissed.

Findings:

The ECtHR found that the comments made were unacceptable from an investigating judge and, in the circumstances of the case, amounted to a declaration of the applicant's guilt which had both encouraged the public to believe him to be guilty and had prejudged the assessment of the facts by the competent judicial authority.

The Court found a **violation** of Article 6(2) ECHR.

Nešťák v. Slovakia, App. no. 65559/01

The applicant was arrested for robbery and remanded to pre-trial detention on the basis of a strong suspicion that he would commit another offence.

His appeal against this decision was dismissed by the Regional court on the basis that he had a tendency to commit offences and that he had a debt to repay which was why he had decided to commit the robbery.

Findings:

The ECtHR found that this statement took as proven that the applicant had committed the offence imputed to him in violation of his presumption of innocence.

Minelli v. Switzerland

The applicant complained that while the Swiss court had discontinued the proceedings against him due to the expiration of time limitations to prosecute the offence of which he was charged, it held that he should bear two-thirds of the cost of the proceedings on the grounds that, in the absence of such time limitation, the existing evidence would “very probably have led to his conviction”.

The applicant complained that these statements violated his presumption of innocence.

Findings:

The ECtHR agreed that, by including this statement in the reasoning of the decision, the Swiss court had shown that it was satisfied of Mr Minelli’s guilt.

The ECtHR found a **violation** of Article 6(2) ECHR.

Investigating Authorities

The respect for the presumption of innocence **does not prevent the prosecution and other investigating authorities from carrying out acts aimed at proving the guilt of the suspect or accused**, such as issuing an indictment, carrying out searches, seizures or questioning the person.

These acts and statements **cannot, however, portray the suspect or accused as definitively guilty of the offence.**

Whether a statement violates the person's presumption of innocence depends on the **context of the particular circumstances** in which the statement was made.

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Khuzhin and Other v. Russia, App. no. 13470/02

A man was detained and accused of a crime of kidnapping and torture. A few days before the opening of the trial, a State television channel broadcasted a talk-show with the lead investigator of the case and the prosecutor. The participants discussed the details of the case and made several statements about the accused's violent character and gave details of his criminal record. They referred to the circumstances in which the criminal acts took place as something that the accused would do.

The prosecutor specifically said that the only choice the trial court had was to sentence him for an appropriate length of time. The mugshot of the accused and the case-file were shown on the screen. The show was aired again during the trial and days before the appeal hearing.

Findings:

The ECtHR found that the lead investigator and the prosecutor made statements that went beyond a mere description of the pending proceedings or a state of suspicion. The statements unequivocally suggested that the accused was guilty and prejudged the assessment of the facts by the competent judicial authority. Given the high-profile of the two participants, their statements had the effect of encouraging the public to believe the accused to be guilty before he had been convicted according to law.

The ECtHR thus found a **violation** of Article 6(2) ECHR.

Daktaras v. Lithuania, App. no. 42095/98

A Lithuanian prosecutor instituted criminal proceedings against the applicant for suspected involvement in an offence of demanding and obtaining a ransom for the return of a stolen car. The applicant argued that the case was ill-founded, that there was no evidence of guilt and requested its discontinuance.

The prosecutor dismissed his request by stating that: *“it has been established...from the evidence collected in the course of the pre-trial investigation that the applicant is guilty of these crimes.”* He went on to state which evidence proved that the applicant had committed the offence. The applicant was eventually found guilty of blackmail and of inciting a victim to make false statement.

Findings:

The ECtHR emphasised the importance of the words used by public officials in their statements before a person is proved guilty. In the present case, the prosecutor used the same terms used by the applicant (evidence of guilt) and he did not refer to the question of whether the applicant’s guilt was established, but to the question of whether the case-file disclosed sufficient evidence of the applicant’s guilt to justify proceeding to trial.

The ECtHR found **no violation** of Article 6(2).

Allenet de Ribemont v. France, App. no. 15175/89

The applicant was arrested in relation to a crime of murder.

During the investigation phase, some of the highest-ranking officers in the French police and the Minister of Interior gave a press conference in which **they clearly referred to him as one of the instigators of and an accomplice to an intentional murder, without qualification or reservation.**

Findings:

The ECHR found that these statements amounted to a violation of Article 6(2) because “this was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.”

Other Public Officials

The respect for a suspect or accused's presumption of innocence also applies to statements made by public officials, including:

- Heads of State and Prime Ministers (**Peša v. Croatia**, App. no. 40523/08)
- Ministers of the Interior (**Gutsanovi v. Bulgaria**, App. no. 34529/10) and Ministers of Justice (**Konstas v. Greece**, App. no. 53466/07)
- Presidents of the Parliament (**Butkevičius v. Lithuania**, App. no. 48297/99)

The respect for a person's presumption of innocence imposes on public officials an obligation to refrain from public statements about pending criminal investigations which **clearly encourage the public to believe that the suspect is guilty of the offence** and that **prejudge the assessment of the facts by the competent judicial authority**.

Application 1/2024 by the Attorney General of the Republic for the dismissal of Auditor General of the Republic for misconduct (Supreme Constitutional Court)

The application of the Attorney General was based, inter alia, on the violation of the presumption of innocence of the Assistant Attorney General due to the public statements of the Auditor General following the acquittal by the Anti-Corruption Authority.

*"The presumption of innocence is one of the fundamental human rights (**Heracleous v. Municipality of Limassol (1993) 2 AAD 410**) and is guaranteed by **Article 12(4) of the Constitution**, the wording of which is identical to that of **Article 6(2) of the European Convention on Human Rights**.*

*As stated in **Allen v. the United Kingdom [GC], no. 25424/05, ECHR 2013**, the presumption of innocence has two aspects: as a procedural guarantee, which is the traditional version of this concept, and as a guarantee to protect persons who have been acquitted of a criminal charge or for whom criminal proceedings have been discontinued and who are treated by public officials and authorities as if they had in fact been guilty of a criminal offence.*

*The obligation to respect the presumption of innocence extends beyond the competent judicial bodies to all organs of the State. In **Alenet de Ribemont v. France, no. 15175/89, dated 10.2.1995, par. 35 and 36**, it was pointed out that no State official may declare a person guilty of a criminal offence before his guilt has been established by a court.*

In addition, the Court examines the status of a State official in order to assess the impact of his opinions on, inter alia, public opinion (see, inter alia, the Court's judgment of the Court of Justice of the European Communities in the case of a State official in the case of a State party, which is the subject of a judgment of the Court of First Instance in the case of a public official).

*In **Konstas v Greece, no. 53466/2007, no. 53466/2007, 28.11.2011, par. 32-44**, it was emphasised that public officials, particularly those of high rank, have a duty to respect the principle of the presumption of innocence when making statements.*

*In order to determine whether statements violate **Article 6 § 2 of the ECHR**, their literal meaning is not taken into account, but they must be placed in the historical context of the dispute and their actual meaning must be sought (see **Lavents v. Latvia, no. 58442/2000, 28.2.2003, par. 126** and **Slavov and Others v. Bulgaria, no. 58500/2010, 10.2.2016, par. 121**).*

The presumption of innocence is triggered and applied from the moment a person is considered a suspect or becomes an accused, at all stages of criminal proceedings, including the investigation stage, and extends to all bodies, including those with disciplinary powers.

It should be noted that the Court is the only competent to establish the criminal responsibility of a person. It applies both before and after the Court's verdict, if the latter results in an acquittal. In the case of an acquitted person, no authority can even express suspicion of his guilt.

***Articles 3A, 3B and 3C of the Criminal Procedure (Amendment) Act 2018,** were introduced for the purpose of harmonisation with **Directive 2016/343 of the European Parliament and of the Council**, in order to strengthen certain aspects of the presumption of innocence. According to **Article 3B(1)**, no public statement of guilt may be made by a public authority is allowed until a final decision on the guilt of a suspect or accused person has been made. **Subsection (3)** of the same article defines the meaning of public authority and public official. It includes, inter alia, the Auditor General.*

[...] the Auditor General not only "crossed the line", but persistently violated the presumption of innocence of another public official and discredited the acquittal of the Anti-Corruption Authority by referring it to the people's courts. In doing so, he failed to understand that disputes between institutions are not resolved by verbal, public confrontations, nor is the imputation of possible reprehensible conduct to another official a matter for public debate.

.....

The Respondent's violation of the Assistant Attorney General's presumption of innocence, particularly in the circumstances in which the petition was filed, also constitutes misconduct of such gravity as to warrant his dismissal on the basis of the relevant constitutional provisions. [...]"

Press

The dissemination of information by the press on ongoing criminal investigations and trials is an important aspect of freedom of speech and of the press.

However, the interests protected under Article 10 ECHR (freedom of expression) must be balanced against a person's right to be presumed innocent (**Article 6(2) ECHR**) as well as a person's right to privacy (**Article 8 ECHR; *Bédat v. Switzerland***).

In striking a balance between competing interests, the competent authorities must take all relevant circumstances into account. Any restrictions on either the freedom to impart and receive information or on the defendant's rights in criminal proceedings must be "*necessary in a democratic society*".

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Axel Springer SE and RTL Television GMBH v. Germany, App. no. 51405/12

Two German media companies complained about a judicial order banning the publication of images where the face of the defendant in a murder case was identifiable. The defendant, a young man allegedly suffering from schizoid personality disorder, had confessed to killing his parents. He was not a public figure, had never been subject to public attention and expressly asked that his identity be concealed. The judicial order did not prohibit the taking of photographs or film, but demanded that the defendant's face be blurred or made otherwise unidentifiable, under penalty of the responsible journalist being banned from the hearing room.

Findings:

The ECHR concluded that the national judge had carefully balanced the opposing interests. The order had been proportionate to the legitimate aim pursued, namely to protect the personality rights of the defendant during his trial, in the course of which he was to be presumed innocent until proved guilty. The order banned merely the publication of images from which the accused could be identified. Any other reporting on the proceedings was not restricted. As regards the consequences of a breach of the court order, the potential barring from further reporting on the case was equally limited to proceedings against the accused. The order did not have a chilling effect on the applicant media companies contrary to their rights under Article 10.

The ECtHR therefore found that there was **no violation** of Article 10.

Presentation of the suspect or accused

Unless required by specific security reasons, suspects or accused persons should not be presented in court or in public as being guilty.

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This includes (**Article 5 EU Directive, Jiga v. Romania**, App. no. 14352/04):

- The presentation of the accused in **prison clothing**, giving the impression that the accused is guilty
- The use of measures of physical restraint, such as **handcuffs, glass boxes, cages or leg irons**.

Measures of physical restraint should only be applied when required by case-specific security reasons, relating to preventing the suspect or accused from:

- ✓ Harming himself or others, or from damaging property
- ✓ Absconding
- ✓ Having contact with third persons, such as witnesses or victims



Samoilă and Cionca v Romania, App. no. 33065/03

The applicant was presented to the court wearing prison clothes specific of persons that have been convicted.

The government maintained that it was only an administrative and preventive measure to ensure the hygiene of prisoners.

Findings:

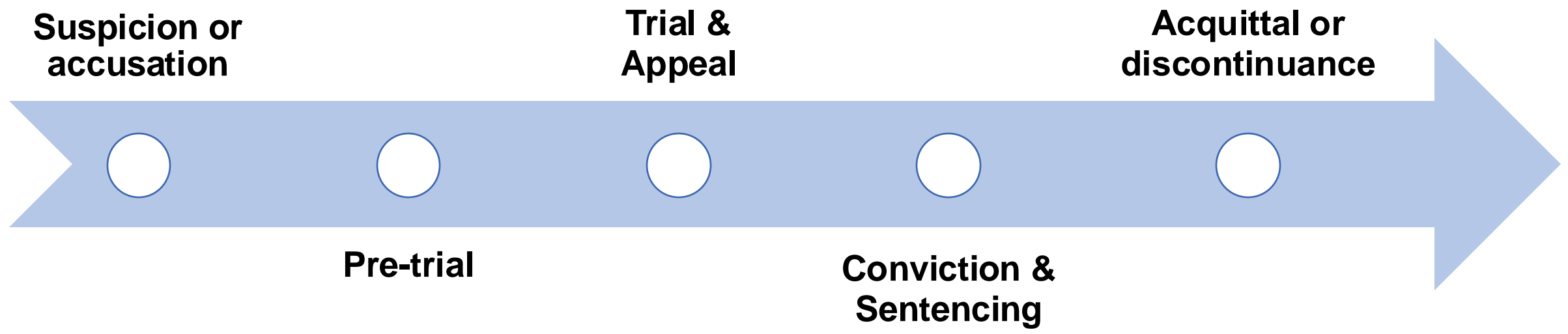
The ECtHR found that having not been shown that the applicants did not have adequate clothing, the practice was without any justification and was likely to strengthen the public opinion of the applicant's guilt.

The Court found a **violation** of Article 6(2) ECHR.

Timeline of Protection

Training of Lawyers on various areas of European Union Law

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Sekanina v Austria, App. no. 13126/87

The applicant was tried and acquitted for the murder of his wife, and therefore he brought proceedings for reimbursements of cost and compensation for spending over one year in pretrial detention. The claim for compensation was dismissed on the ground that his acquittal had not dispelled the suspicion of him having committed the murder.

The government argued that the indications given by the national court simply referred to the continued existence of a suspicion. They were therefore consistent with the presumption of innocence, in so far as they did not reflect the opinion that the person concerned was guilty.

Findings:

The ECtHR found that “the voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of [Austrian courts] is incompatible with the presumption of innocence”.

The ECtHR thus found a **violation** of Article 6(2) ECHR.

Remedies against Breach

Any violations of a suspect or accused's presumption of innocence must be redressed through effective remedies (Article 13 taken in conjunction with Article 6 ECHR; Articles 4(2) and 10 EU directive; Article 47 CFR)

Remedies should, to the extent possible, return the person to the position in which he or she would have been in the absence of a violation.

Depending on the stage at which the violation takes place, some remedies may include:

- ✓ ordering a retrial
- ✓ ordering a public retraction of any prejudicial/biased statements
- ✓ ordering the recusal or removal of judges or prosecutors from the relevant case
- ✓ changing the location of the trial

The right to remain silent and not to incriminate oneself

ECHR case law has recognised that the presumption of innocence includes the right to remain silent and thus the right not to incriminate oneself.

The rights to remain silent and not to incriminate oneself are directly related to the respect for an individual's presumption of innocence and the notion that the burden of proof of a person's guilt lies with the prosecution.

A person cannot be forced to provide evidence or information that will lead to his or her conviction. The essence of these rights resides "in the protection of the accused against improper compulsion by the authorities", including deceitful tactics used by the authorities to get a confession or incriminating information.

These rights contribute to avoiding miscarriages of justice and to securing the aims of Article 6 ECHR (**Jalloh v. Germany**, App. no. 54810/00, par. 100)



"We have ways of making you talk!"

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.

The essence of this right entails that:

- ❖ If a person **exercises** his right to remain silent and not to incriminate himself, his silence cannot be used against him or as evidence of guilt that he committed the criminal offense (**Article 7(5) EU Directive**)
- ❖ A suspect (during investigation) should **not be forced** to produce incriminating information, evidence or documents (**Recital 25 EU Directive**)

"(25) The right not to incriminate oneself is also an important aspect of the presumption of innocence. Suspects and accused persons should not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information which may lead to self-incrimination".

- ❖ Where a person **voluntarily agrees** to give a statement to the police after being informed that everything he says may be used as evidence against him, this **cannot be considered** as an informed choice if he has not been expressly advised of his right to remain silent and if his decision has been made without the assistance of a lawyer (**Stojkovic v. France and Belgium**, App. no. 25303/08, par. 54).
 - Access to a lawyer, from the first time a person is interrogated by the police, is a strong factor in assessing whether this right has been respected.

However, the right to silence and the privilege against self-incrimination are not absolute (**John Murray v. The United Kingdom [GC]**, App. no. 18731/91, par.47). They do not protect against incriminating statements per se, but against coercion and oppression (**Ibrahim and others v. The United Kingdom [GC]**, par.267).

Exceptions to these rights are provided by both Directive 2016/343/EU and the case law of the ECtHR and must in any case be interpreted restrictively.

The respect for these rights does not prevent:

- (i) judicial authorities from taking into account the **cooperative behavior** of the accused at the sentencing stage (**Article 7(4) EU Directive**)
- (ii) judges from assessing all the evidence and drawing inferences from the accused's silence of the accused in limited situations where **(a)** the prosecution has **prima facie established** that the accused committed the offence, and **(b)** the evidence clearly **calls for an explanation** from the accused; and
- (iii) the competent authorities are prevented from collecting evidence that has been lawfully obtained through the use of legal powers of coercion, the existence of which is independent of the will of the suspect or accused (**Recital 29 EU Directive, Saunders v. The United Kingdom [GC]**, par.69).

Recital 29 EU Directive:

*"(29) The exercise of the right not to incriminate oneself should not prevent the competent authorities from gathering evidence **which may be lawfully obtained from the suspect or accused person** through the use of legal powers of compulsion and which has an existence independent of the will of the suspect or accused person, such as material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood or urine samples and bodily tissue for the purpose of DNA testing".*

The exercise of legal powers of compulsion must however be **necessary, proportionate** and **respect the rights of suspects or accused**.

The ECHR has identified at least 3 situations which may amount to the improper exercise of legal powers of compulsion under Article 6 ECHR:

- Where a suspect testifies under threat of sanctions or is sanctioned for refusing to testify (**Saunders v. The United Kingdom (GC)**, App. no. 19187/91, **Brusco v. France**, App. no. 1466/07)
- Where physical or psychological pressure amounting to ill treatment is applied to obtain real evidence or statements (**Jalloh v. Germany (GC)**, **Öcalan v. Turkey (GC)**, App. no. 46221/99)
- Where the authorities use subterfuge to obtain information that they were unable to obtain during questioning (**Allan v. The United Kingdom**, App. no. 48539/99)

In determining whether the exercise of legal powers of compulsion by the competent authorities violated a person's right not to incriminate oneself, a judge must take into account:

- The nature and degree of compulsion used to obtain the evidence;
- The weight of the public interest in the investigation and punishment of the offence;
- The existence of safeguards in the procedure; and
- The use given to the material obtained through compulsion

Jalloh v. Germany

Upon his arrest on suspicion of involvement in a drug dealing offence, Mr Jalloh was seen swallowing a small plastic bag, which was believed to contain drugs.

On authorisation of the public prosecutor, an emetic was forcibly administered in order to provoke the regurgitation of the bag. In the hospital, he was held down and immobilised by four police officers.

By force, the doctor injected him with apomorphine and administered the emetic through a tube introduced into his stomach through the nose, which resulted in Mr Jalloh regurgitating one bag containing cocaine.

Findings:

Violation of Article 3 and Article 6(1) ECHR.

- 1. The nature and degree of compulsion used:** Although the treatment to which the applicant was subjected did not amount to torture, it did attain the minimum threshold of severity under article 3 (prohibition of inhuman or degrading treatment), thus raising serious issues as to the fairness of the proceedings.
- 2. The weight of the public interest:** Administering emetics by force was disproportionate and could be justified for a street-dealer who was ultimately sentenced to a six-month suspended prison sentence and probation.
- 3. The existence of safeguards in the procedure:** the procedure was carried out before ascertaining whether the suspect was physically able to endure it. The use given to the material: Given that the bag of cocaine was decisive for his conviction, there was a violation of article 6(1) echR. had it not been for the improper exercise of compulsion, the authorities would probably not have been able to convict the accused.

Under well defined circumstances, judges may exceptionally draw **adverse inference from an accused's silence**.

Whether these inferences violate a person's right to remain silent must be determined in light of all the circumstances of the case, in particular, the **evidentiary weight accorded to the person's silence** and the **degree of compulsion** inherent in the situation (**John Murray v. the United Kingdom [GC]**, par. 47).

In practice, **adequate safeguards** must be in place to ensure that any adverse inferences do not go beyond what is permitted under article 6 ECHR (**O'Donnell v. The United Kingdom**, App. no. 16667/10, par. 51) and EU Law.



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

Dimitris Lochias

**Directive 2016/1919 on Legal Aid for Suspects & Accused
Persons in Criminal Proceedings and for Requested Persons
in EAW Proceedings**

Nicosia, 24-25 October 2024



Co-funded the European Union

The right to legal aid, goes hand in hand with the right of access to a lawyer.

See Article 1(2): *This Directive complements Directives 2013/48/EU and (EU) 2016/800 (Directive on procedural safeguards for children who are suspects or accused).*

Basic principles of fairness and equality. If one cannot afford legal representation in criminal proceedings, he must be aided, to that end, by the State.

The right to legal
aid, as provided
for in this
Directive, is not a
novel right!

- **Article 6(3) ECHR**: Everyone charged with a criminal offence has the following minimum rights: (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- **Article 47(3) CFR**: Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
- **Article 14(3)(d) ICCPR**: [...] to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

The general right to legal aid is also referenced in [Directive 2013/48/EC](#) on the right of access to a lawyer.

Recital (48): “Pending a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.”

See also Article 11 of the same Directive.

Directive on Legal Aid:

- What is it?
- What does it purport to achieve?
- Why?

What is it?

As already mentioned, the right to legal aid pre-existed the Directive. This Directive, therefore, is one that **regulates** that pre-existing right to legal aid.

To achieve?



The Directive purports to “ensure the effectiveness of the right of access to a lawyer ... by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for persons who are the subject of EAW proceedings” – Recital (1).



To establish **common minimum rules** concerning the right to legal aid, which in turn aims to strengthen the **trust** of Member States in each other’s criminal justice systems and thus improve the notion of mutual recognition of decisions/judgements.



Whilst the right, as already mentioned, pre-existed the Directive, nonetheless, experience has shown that the right itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States. In other words, we needed something more **specific** than a general right.

Why was it necessary?

- Part of the EU's 2009 Roadmap on Strengthening Procedural Rights of Suspected and Accused Persons in Criminal Proceedings. This Directive falls under the step-by-step approach mentioned in the Roadmap and specifically **Measure C**.
- 2009 Roadmap: "*Mutual recognition presupposes that the competent authorities of the Member States **trust** the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist **European Union standards for the protection of procedural rights** which are **properly implemented** and applied in the Member States.*".
- Recital (31) of the Directive: The objective of this Directive cannot be sufficiently achieved by Member States but can, by reason of its scale and effects, be **better achieved at Union level**.
- EAW Proceedings are notoriously short. They are based on the notion of trust between Member States and there is little, if any, scope for disputing whether a requested person will receive a fair trial in the issuing state. Therefore, Member States can be **sure**, with Directives such as these, that the fundamentals of a fair trial are **guaranteed** throughout the EU and that includes, the same **minimum** rights to legal aid.

General Notes on the Directive

- Applies to criminal & EAW proceedings **only**. Three types of persons therefore: *suspects*, *accused persons* and *requested persons* in EAW proceedings.
- **Not absolute**: Does not apply where one has waived his right to legal representation or in some minor offences (more to follow on that).
- Whether legal aid should be granted can be determined by a means test, a merits test, or both.
- The Directive sets out **minimum rules**. Member States free to extend rights but **may never allow such rights to fall below** the standards set by this Directive, the Charter or the ECHR.
- Staff involved in decision-making whether to grant legal aid, must be adequately trained. That includes judges.
- The right applies to all persons, irrespective of their legal status, citizenship or nationality.

Article 1: Subject Matter

This Directive lays down common minimum rules concerning the right to legal aid for:

- (a) Suspects and accused persons in criminal proceedings; and
- (b) Persons who are the subject of EAW proceedings.

Criminal Proceedings (under ECHR case-law):

See *Engel a.o. v. The Netherlands*, paras 82-83 for the concept of “criminal charge”. Defined as having an **autonomous** meaning, independent of the classifications of the national systems. The criteria outlined in the *Engel* case:

- *The classification under National law;*
- *Nature of the offence;*
- *Severity of the penalty the person risks incurring.*

See also *Beuze v. Belgium* [GC] para 113 for the moment protection under Art. 6 of the ECHR is “*activated*” – once a person is made aware, by a competent authority, that he is suspected or accused of having committed a criminal offence, or from the point at which his situation has been **substantially affected** by actions taken by the authorities as a result of a **suspicion against him**.

Article 2: Scope

Article 2 sets the scope of the Directive regarding suspects and accused persons in criminal proceedings. It states that it applies to those aforementioned persons (and of course requested persons in EAW proceedings) who have the right of access to a lawyer, pursuant to Directive 2013/48/EU and who are:

- Deprived of liberty;
- Required to be assisted by a lawyer in accordance with Union or national law; or
- Required or permitted to attend an investigative or evidence-gathering act, such as identity parades, confrontations and reconstructions.

Note: The Directive also applies, under the above conditions, to persons who were not initially suspects or accused persons but **become suspects** or accused persons *in the course of questioning*.

Recital (10): “Where, in the course of such questioning, a person other than a suspect or an accused person **becomes** a suspect or an accused person, questioning should be **suspended immediately**. However, it should be possible to continue questioning where ... That person is able to **fully exercise the rights provided for in this Directive**”.

Article 2: Scope (continued)

The right is not an absolute one

Article 2(4) states that in respect of minor offences and without prejudice to the right to a fair trial:

- (a) Where the law of a Member State provides for the imposition of a **sanction** by an authority **other** than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
- (b) Where deprivation of liberty cannot be imposed as a sanction;

This Directive applies **only** to proceedings before a court having jurisdiction in criminal matters.

In any event, the Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.

Directive's explanation for this:

Recital (11) – (14):

It would be unreasonable to require the competent authorities to ensure all rights under this Directive, where for example, minor traffic offences are dealt with out of court. Therefore, where the law of a MS provides for the imposition of a sanction by a competent authority and there is a possibility for the case to be referred to a court having jurisdiction in criminal matters, this Directive will only apply to those proceedings before the court.

In some MS, traffic offences, municipal regulations and minor public order offences are considered criminal offences. It would be unreasonable therefore to expect competent authorities to apply this Directive to such cases, where for example fixed notice fines are issued

This, however, does not affect the obligations of MS under the ECHR to ensure the right to a fair trial, including obtaining the assistance of a lawyer.

Article 3: Definition

"For the purposes of this Directive, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer"

See also, Recital (8): *"Legal aid should cover the costs of the defence of suspects, accused persons and requested persons. When granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons bear part of those costs themselves, depending on their financial resources"*.

Consider what the "costs of the defence" means. Expert witness costs & costs of any forensic examinations, for example?

Article 4: Legal aid in criminal proceedings

Member States must ensure that those who lack sufficient resources, have the right to legal aid when the interests of justice so require.

Member States may apply a **means test**, a **merits test** or **both** to determine whether legal aid should be granted.

Means test – Art. 4(3): taking into account all relevant and objective factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that MS, in order to determine whether the person concerned lacks sufficient resources to pay for the assistance of a lawyer.

Merits test – Art. 4(4): taking into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:

- (a) Where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage within the scope of this Directive; and
- (b) During detention.

Article 4(5) requires MS to ensure that legal aid is granted without undue delay, and at the least **before questioning** or **before** the evidence-gathering acts previously referred to in Article 2(1).

Croissant v. Germany

Facts: The applicant had been represented by three court-appointed lawyers during the whole trial and had been convicted and sentenced to 2 ½ years' imprisonment. He was also ordered to pay costs and expenses, including the fees of the three lawyers. The applicant complained that the order to pay the costs of the three court-appointed lawyers was incompatible to Art. 6(3)(c) ECHR, arguing that once free legal assistance had been granted, no payment could subsequently be demanded.

Findings:

The ECtHR found no violation of Art. 6(3)(c). The lawyers had been appointed in the interests of justice (merits test) and not as a result of an assessment of the financial situation of the accused (means test), in which case the requirement to pay the costs would have been incompatible with Article 6. In addition, the costs of their legal representation was not excessive and German law provided for the possibility to cover said costs, partially or in greater part, if **the applicant demonstrated a lack of sufficient means to cover them.**

Other ECHR judgements of note:



Pakelli v. Germany: Proof of lack of resources on the applicant's part does not have to be "beyond all doubt". It is sufficient that there are some indications, or, a "*lack of clear indications to the contrary*" – para. 34



Quaranta v. Switzerland: A further criterion of the merits test, is the complexity of the case and the personal circumstances of the accused. In this case, the ECtHR held that the applicant's personal situation, (foreign and underprivileged) meant that the fact that the case was not a complex one, **was not decisive**.



Meftah v. France: The Court rejected the argument that the guarantees of Art. 6(3)(c) ECHR ceased to apply after the first instance proceedings or the stage at which, in domestic terms, the applicant is regarded as "convicted". Guarantees of Art 6 continue to apply in any and all appeal proceedings.



Pham Hoang v. France: Applicant was fined several million francs. He was refused legal aid for appeal. The Court held that the interests of justice (merits test) required legal representation having regard to the serious consequences at stake, the complexity of issues and his inability to present and develop the appropriate arguments.

Article 5(1) requires that MS shall ensure that requested persons have a right to legal aid upon arrest, pursuant to a EAW until they are surrendered or until the decision not to surrender them becomes final.

Article 5(2) requires that the issuing MS shall ensure that requested persons who are the subject of EAW proceedings have a right to legal aid **in the issuing MS** for the purpose of such proceedings in the executing MS, so long as:

- The EAW is for the purpose of conducting a criminal prosecution;
- The requested person exercises his right to appoint a lawyer in the issuing MS to assist the lawyer in the executing MS;
- Legal aid is necessary to ensure effective access to justice.

Article 5(3) states that the abovementioned rights may be subject to a means test.

Article 5: Legal aid in EAW proceedings

Article 6: Decisions regarding the granting of legal aid

1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, **without undue delay**, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, **respecting the rights of the defence**.
2. Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Without undue delay and respecting the rights of the defence. Consider, for example, an accused person who is brought before a Court and who applies for legal aid. The judge informs him that a report will have to be compiled by the Social Welfare Authorities into his financial background and that will take around a month. Upon that, he asks the defendant to enter a plea immediately and before he has had his application determined.

Recital (19): "The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law-enforcement authority or by a judicial authority ... If the competent authorities are not able to do so, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts are carried out."

Cyprus & the investigative stage

The Legal Aid Law (2003), s. 3 states that the right to legal aid lies, inter alia, in any criminal proceedings and that includes (s.4) every investigative stage before any criminal procedure is brought before a Court.

However, we must also look at the Rights of Suspects and Persons Under Arrest and in Custody Law (2005) and section 3A, which states that where a person is considered a suspect **and has been arrested** and applies for legal aid, this is granted immediately and without undue delay. This legal aid is granted under the condition that a competent Court will approve it if the suspect is brought before such a Court within 24 hours of their arrest. If the person is not brought before such a Court, then the legal aid is finalised and the lawyer is entitled to the relevant compensation.

The keywords are **arrested** and **in custody**. The right to legal aid at the investigative stage, applies only to persons who are arrested and not to those who are merely considered suspects or who, as per the Recitals in the Directive, become suspects in the course of giving evidence as witnesses.

This is a serious departure from the minimum standards of the Directive.

However, this Law was examined in the Supreme Court Case of **FLH v. The Police (2022)**. Not under this Directive but under the very relevant Directive 2013/48. It was held that the 2005 law was amended in 2017 to harmonise national legislation in line with the 2013 Directives, but that that harmonisation was flawed. It went on to decide that the Directive was directly effective in Cyprus and applied it to the facts of that case, despite and/or in contradiction to the national law. The same should therefore apply to the Legal Aid Directive.

Article 7: Quality of legal aid services and training

This is perhaps, the most important article in the Directive. It obliges MS to take necessary measures, including with regard to funding, to ensure that:

- (a) There is an effective legal aid system that is of an adequate quality; and
- (b) Legal aid services are of a **quality** adequate to **safeguard the fairness of proceedings** with due respect for the independence of the legal profession.

It also obliges MS to ensure that adequate training is provided to staff involved in the decision making on legal aid. That includes any Social Welfare staff, who usually compile reports on the financial resources of an applicant. Furthermore, Article 7(3) requires that legal aid lawyers are themselves adequately trained, to ensure the fairness of proceedings.

Article 7(4) requires that MS take all necessary measures to ensure that suspects, accused persons and requested persons have the right to have their legal aid lawyer replaced, where the specific circumstances so require.

ECHR Judgements on the Quality of Legal Aid Services

- **Daud v. Portugal:** The appointment of a legal aid lawyer does not exhaust the obligations of the State. Legal assistance provided must be practical and effective and if the authorities are put on notice that a legal aid lawyer is unable to fulfill his duties, they are under an obligation to replace him (See also case of Artico v. Italy). Once they are, or should be, aware of a problem, the domestic courts cannot remain passive.
- **Bogumil v. Portugal:** Failure of a legal aid lawyer appointed shortly before the trial to request an adjournment to prepare does not relieve the court of its responsibility to ensure an adequate defence. It follows that it ought to adjourn of its own accord.
- **Czekalla v. Portugal:** The failure of a legal aid lawyer to complete the grounds of appeal with the necessary formal conclusions, which led to the rejection of the appeal, was found to deprive the applicant, who was a foreigner an ignorant of the language, of a practical and effective defence.
- **Lagerblom v. Sweden:** No right to choose who is appointed as legal aid counsel. Whilst domestic courts must have regard to the applicant's wishes, these can be overridden where there are relevant and sufficient grounds for holding this necessary in the interests of justice.

Articles 8 & 9

Article 8

Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Article 9

Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

See also: Recital (18) – Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, **such a request should not, however, be a substantive condition for granting legal aid.**

Article 11 – Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a **higher level of protection**.

Directly Effective

Given that, by way of Article 12, Member States had until the 25th of May 2019 to implement this Directive into national law, the Directive now has **direct effect** (vertically) in Member States.

- See well-known case of [Van Duyn v. Home Office](#).

Cyprus and Legal Aid

- **Section 10, Legal Aid Law (2003):** An individual who has been granted legal aid, has the right to choose the lawyer who will act on their behalf and who are willing to provide their services. The Court appoints a lawyer only where the individual has not chosen a specific lawyer or where that specific lawyer has refused to accept his appointment.
- Under the case law of the ECHR, an applicant cannot claim a right to choose who is appointed as his legal aid counsel. Whilst the Court must have regard to the individual's wishes, these can be overridden for relevant and sufficient reasons.
- Amendments to the Law to ensure that requested persons in EAW proceedings are also eligible to be granted legal aid where the Republic is the issuing MS (section 4A).
- **Training of decision makers:** No known training in place. Some source of income does not always mean that an individual will be able to pay legal costs.
- **Quality of legal aid services:** Question marks in certain situations. No targeted training, although lawyers are generally required to have around 12 hours of training per year to be able to renew license.

Closing Remarks



Directive aims at regulating a right which has always existed, namely, by establishing minimum common rules throughout the EU.



The right to legal aid is a huge part of the procedural fairness notions dealt with by all 2009 Roadmap Directives. The right to adequate legal representation in criminal proceedings cannot hinge on the financial resources of each suspect or accused person. Therefore, legal aid is a crucial part of ensuring equality between all those brought before the law.



It can improve! Practically, there are still huge difficulties with legal aid services. Unfortunately, there is a general theory/mindset that legal aid services are of a lesser quality to the legal services offered by other legal practitioners. This is, of course, partly true. Hence why the Directive itself seeks to ensure that lawyers who provide legal aid services receive constant training.



Remedies to this problem?



Training of lawyers on various areas of EU Law (TRAVAR)

Spilios Spiliakos

**Comparative law and best practices on the
application of the three procedural rights directives
in Greece**

Nicosia, 24-25 October 2024



Co-funded the European Union

THE RIGHT TO ACCESS TO A LAWYER

DIRECTIVE 2013/48/EU (GREEK LAW 4478/2017)

(art. 3 par. 1) Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

(art. 10 par. 1) Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant

THE PRESUMPTION OF INNOCENCE

DIRECTIVE (EU) 2016/343 (GREEK LAW 4596/2019)

(art.3) Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.

LEGAL AID

DIRECTIVE (EU) 2016/1919 (GREEK LAW 4689/2020)

(art.4 par.1) Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.

(art.5 par.1) The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.

INTRODUCTION

Article 1 Subject matter

“This Directive lays down common minimum rules...”

Key concept of the procedural Directives: Member States must reach the minimum standards, not drop below their (above minimum) standards

The milestones of criminal procedure In Greece

Preliminary investigation (suspect)

Indictment

Judicial investigation (accused)

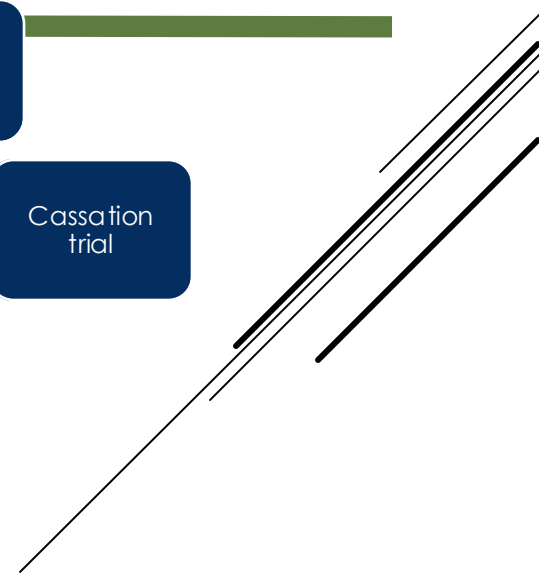
Court in Chambers Decision

Trial

Appeal trial

Cassation trial

Milestones of the Greek criminal procedure in felonies (normal procedure)



Milestones of the Greek criminal procedure in misdemeanors (normal procedure)



The Greek legal system is an inquisitorial legal system.

Thus:

The judicial authorities are actively involved in investigating the facts of the case.

The PP is an impartial judicial authority and not a party (like the Adversarial legal system).



Application in Greece of Directive 2013/48/EU

Greek legislature had a long tradition and a high standard concerning the right of access to a lawyer. The effectiveness regarding exercising that right is a different story

- Transposition of Directive 2013/48/EU took place in the old criminal procedure code of 1950 by Law 4478/2017
- These provisions were then integrated in the new criminal procedure code of 2019
- In general, only minor interventions were needed.

On the other hand, Greek law did not provide for 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.

- Thus, the relevant provisions of Directive 2013/48/EU were fast mot à mot integrated in the Greek criminal procedure code.

The impact in the relevant provisions of Greek CPC.

- **Article 95.** – *Right to information. 1. The suspect or accused person shall be informed immediately of at least the following rights: a) the right to be represented by a lawyer...*
- *2. The information in accordance with para. 1 is provided in plain and intelligible language, orally or in writing, taking into account the specific needs of vulnerable suspects or accused persons. The object of the information must also be to indicate the consequences of waiving the exercise of rights. A report is drawn up for the information of the suspect or accused person and signed.*
- **Article 96.** – *Letter of rights. 1. A suspect or accused person who is arrested or detained shall be provided immediately with a document listing their rights, which they are allowed to keep in their possession throughout the period of deprivation of liberty. This document contains information on the following rights: a) the right to be present with counsel...*
- *2. Where this is not available in the appropriate language, the suspect or accused person is informed of their rights orally in a language they understand. That document must then be issued, without undue delay, in a language that the suspect or accused person understands.*

Important note:

- The above provisions were, in general, always present in Greek CPC (bear in mind the relevant provision of European Convention on Human Rights).
- *But*, before the implementation of art. 96 and the introduction of the SPECIFIC document an “unintentional” waiver was not uncommon (in cases of arrest).

The impact in the relevant provisions of Greek CPC.

- **Article 97. – Right to have a person informed in the event of deprivation of liberty.** 1. The accused person shall have the right to request that at least one person of their choice be informed, without undue delay, of the deprivation of liberty of the accused. If the accused person is a minor, the holder of parental responsibility is informed, unless this is contrary to the interests of the minor, in which case another appropriate adult or the authority responsible for the protection of minors is informed. 2. In exceptional cases and in order to prevent imminent danger either to the life, liberty or physical integrity of a person or to the investigation of the crime, the competent authorities may temporarily refrain from informing a third person of the deprivation of liberty of the accused person. In this case, it is examined whether another third person, designated by the accused, can be informed accordingly. If the accused person is a minor, the authority responsible for the protection of minors is informed in this case. 3. An accused person who is a foreign national and deprived of liberty shall have the right to request that the consular authorities of the State of which he/she is a national be informed without undue delay.
- **Article 98. – Right to communicate with third parties during the deprivation of liberty.** An accused person who is a foreign national and deprived of liberty shall have the right to communicate, without undue delay, with the consular authorities of the State of which he/she is a national. He/she also has the right to receive visits by their consular authorities, the right to talk and correspond with them, and the right to have legal representation arranged by the consular authorities, provided that those authorities have no objection.

Important note:

-
- The above provisions are a *mot à mot* implementation of ar. 5, 6, 7, 8 and 13 of Directive 2013/48/EU
 - Still, though, it is not uncommon for (non Greek) people detained to “disappear” from their keen *with undue delay*.

The impact in the relevant provisions of Greek CPC.

- **Article 99. – Right of attendance of the accused person with a lawyer.** 1. When the accused person is called to account, even in cross-examination with witnesses or other accused persons, they have the right to attend with a lawyer. For this purpose, they are called twenty-four hours before each investigative action.
- 2. This period may be shortened if the postponement creates a risk, the existence of which is specifically certified by a report of the investigator or the investigating officer.
- 3. The investigator has the obligation to ex officio appoint a lawyer for the accused person, unless the latter expressly and irrevocably declares that they waive this right. The investigator has the same obligation in misdemeanours, if the accused person expressly requests it.
- 4. Under no circumstances may the communication of the accused person with their lawyer be forbidden. **This communication is completely confidential.**

Important note:

- Greek authorities had always ensured the **confidentiality** between the accused and the lawyer.

The impact in the relevant provisions of Greek CPC.

- **Article 90. – Waiver of the right to appoint a lawyer.** *Without prejudice to the provisions requiring the mandatory appearance of counsel, the suspect or accused person shall have the right to refrain from the appointment of a lawyer, after having received orally or in writing clear and sufficient information in plain and intelligible language about the content of the right in question and the possible consequences of waiving it. The waiver shall be made in the manner set out in the provisions of the previous article and shall be the product of the person's free will and shall not contain any terms or conditions. The suspect or accused person may revoke the waiver at a later date, at any stage of the criminal proceedings.*

Important note:

- *Mandatory appearance of counsel* exception applies mainly to filing a cassation and appearing in a cassation trial before Greek Supreme Court (Areios Pagos-does not check factual mistakes of the case)

Other relevant remarks regarding Greek CPC.

- The above rights apply also during the preliminary stage (ar. 244-lawsuit filed against the person or any other investigative act against the person during a preliminary investigation) and in cases of arrest (ar.105)
- There are no derogations from the application of the right of access to a lawyer in criminal proceedings like the ones allowed for in Art. 3 par. 5 or par. 6 of the Directive e.g. where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty, where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.
- Any evidence produced by surveillance or generally by control of the communication between the lawyer and the accused person **cannot be lawfully used in court.**
- The problem of “prosagogi”, meaning the police malpractice of “*bringing people in*” without “officially” accusing or “officially” investigating against (a grey zone between *witness* and *accused*). Has led European Council to send ***letter of formal notice to Greece under Article 258 TFEU in the context of infringement proceedings, as it considered that the country had not correctly transposed into its national law the rules contained in Directive (EU)2013/48, concerning the right of access to a lawyer and communication at arrest.***

The impact in the relevant provisions of law 3251/2004 (EAW).

- **Article 15 par. 1** *Where the requested person is arrested on the basis of the European arrest warrant, they shall be immediately provided with a document containing information on their rights and shall be taken without delay to the public prosecutor at the Court of Appeal. The public prosecutor of the Court of Appeal shall, after having established their identity, inform them of the existence and content of the warrant, of their right to have recourse to the services of a legal counsel and interpreter in the executing Member State and in the issuing Member State, of the right to inform a third person and to communicate with third persons and with the consular authorities of the State of which they are a national, and the opportunity to consent to their transfer to the issuing State. For the above information and the relevant statements of the requested person, a report shall be drawn up in accordance with the terms of Articles 148 to 153 of the CCP.*
- **Article 15 par. 5** *The rights of the accused person in domestic proceedings shall apply mutatis mutandis in the case of a requested person arrested on the basis of a European arrest warrant*



Application in Greece of Directive 2016/343/EU

Greek legislature always had relevant provisions especially regarding the presumption of innocence (bear in mind the relevant provision of European Convention on Human Rights).

- So, it can be said that *the added value of the introduction of the directive consists of the better articulation, interpretation and protection of rights which already existed.*

The (non important) impact in the relevant provisions of Greek CPC (briefly).

- **Article 71.** – *suspects and accused persons are presumed innocent until proved guilty according to law.*
- (mot à mot integration of ar. 3 of the Directive). Declaration of the self-evident
- **Article 178** is labeled *Means of evidence. Burden of proof*
- Since, as everybody acknowledges, there is no such thing as *Burden of Proof* in the inquisitorial criminal procedure (and nothing relevant is actually mentioned in the article), this is an example of *bad legislation* and “*legal public relations*”.
- Furthermore, a par. 3 was added to art. 178 stating (mot à mot integration of ar. 6 par.2 of the Directive) that *any doubt as to the question of guilt is to benefit the suspect or accused person.* Of course, this *in dubio pro reo* principle was never put in doubt in Greece.
- **Article 104.** (mot à mot integration of ar. 7 of the Directive)
- 1. *Suspects and accused persons have the right to remain silent and not to incriminate themselves.*
- 2. *The exercise of the right not to incriminate oneself shall not prevent from gathering evidence which may be lawfully obtained and which has an existence independent of the will of the suspects or accused persons suspects and accused.*
- 3. *The exercise of the right to remain silent or of the right not to incriminate oneself shall not be used against the suspects and accused persons.*
- The above were never put in doubt in Greece (and still remain in the relevant art p.e. art. 273 CPC!). Declaration of the self-evident
- The malpractice of “witnessing the accused”.

The (important) impact in the relevant provisions of Greek CPC.

- **Article 7 law 4596/2019.** *The suspect or accused person has the right to bring an action for damages before the competent Court, in accordance with the provisions of Articles 105 and 106 of the Introductory Law of the Civil Code, in order to remedy the damage they suffered as a result of the infringement of their presumption of innocence by statements of public authorities which occurred at any stage of the procedure before the adoption of judgment at first or second instance, which refer directly to the pending criminal proceedings and either encourage the public to believe in their guilt or make an assessment of the facts by which they prejudge the judicial judgment of the case.*
- The above provision integrates the provisions of art. 4, 10 par. 1 of the Directive.
- It is widely considered that the above (sole) provision *does not meet* the minimum standards of the Directive. A claim against the state for a pecuniary compensation cannot be considered an effective remedy in the meaning of Art. 10 par. 1 of the Directive.
- Thus, even today, the malpractice continues (the “Tempi” case).

The (important) impact in the relevant provisions of Greek CPC.

- **Article 8 (par.4) of the Directive** provides 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.
- The relevant art. 155 par. 3 Greek CPC states, amongst other, that *the actual search for the address of the accused, if none was declared, is done with appropriate means, at least according to the address declared in the last tax declaration and the relevant data of the Ministry of Economics.*
- In general, the Greek state was never “proud” (or should have not been “proud”) for the standards needed by Courts for a summoning to be considered lawful. Though, after *POPOVITSI vs. GREECE* and other similar cases, a plenary decision (2/2014) was issued by the supreme court that set some criteria (standards) for a proper search (art. 155 CPC as above integrated the case-law criteria as the *appropriate means*). The criteria were further elaborated in Art. 157 par. 1 CPC 2019 (search in phone books, databases of judicial and tax authorities, through family and professional affiliations).
- Finally, one can argue about the exception of the Greek CPC regarding the obligation *to search* only if the accused has not declared (in a previous stage) an address.



Application in Greece of Directive 2016/1919/EU

Greek legislature always had relevant provisions.

- So, it can be said that *the added value of the introduction of the directive consists of the better articulation, interpretation and protection of rights which already existed.*
- The actual importance of the Directive can be found on a new provision, namely Article 91 of the CCP that provided that the suspect or accused person is entitled to free legal aid, which includes the provision of legal advice and legal assistance and their representation before the Court. This provision makes it **mandatory** to provide legal aid – advice for the suspect or accused person – **at any stage** of the criminal proceedings and for any crime.

The obligatory legal aid of the Greek CPC

- **Art. 99 par. 3 CPC** (judicial investigation): Before providing every statement a) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the offence is a **felony**, b) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the offence is a **misdemeanor** when specifically asked, c) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the latter is a minor.
- **Art. 200 par. 1 CPC**: Before pretrial detention for psychological evaluation is ordered, the judge of investigations is obliged to appoint a lawyer.
- **Art. 340 par.1 , 376 par. 3** (trial): In a felony trial the presiding judge is obliged to appoint a lawyer for the accused person (or more if the trial is expected to last). The same applies for some misdemeanors (minimum 3 years of sentence)
- **Art. 423 CPC** (fast track procedure trial): the court is obliged to appoint a lawyer, if the accused person asks

The non-obligatory legal aid of the Greek CPC

- Apart from the above-mentioned occasions regulated in CPC, a right to legal aid has according to Art. 6 L. 3226/2004 every suspect or accused person if he meets the following conditions:
- Income of the last 3 years not over 6.000 €, if the person is single (increased by 1000 € for every supported child up to 4 children), or 8.000 €, if the person is married or living in a partnership (increased by 1000 € for every supported child up to 4 children)
- Object of the preliminary or judicial investigation is an offence with maximum sentence of up to 2 years (f. ex. there is no right to legal aid for an insult offence [Art. 361 CC])
- Object of the trial is an offence with maximum sentence of more than 2 years
- Object of the appeal trial is an offence with maximum sentence of more than 2 years,
- or the accused was convicted in the first instance to a prison sentence of at least 6 months.
- The same applies in cases of EAW proceedings

Legal aid for victims

- Beneficiaries of legal aid regarding any criminal claims also include the victims of the criminal acts provided for terrorism offences, human trafficking, child abduction, sexual acts with minors, child abuse, facilitation of child abuse, child pornography, sexual act with a minor with payment, immigration offences, rape of minors, child sexual abuse, sexual acts between relatives, child solicitation for sexual reasons, pimping.

The problem of art. 7 of the Directive

- Art. 7 of the Directive (Quality of legal aid services and training) states
- *1. Member States shall take necessary measures, including with regard to funding, to ensure that: (a) there is an effective legal aid system that is of an adequate quality; and (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.*
- *2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.*
- *3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.*
- *4. Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.*

Greek legislation does not have **provisions** regarding the *quality* or the *training* for legal-aid Lawyers.

Problems faced in everyday court life (inadequate quality, inadequate time and facilities for the preparation of defence).





Training of lawyers on various areas of EU Law (TRAVAR)

Spilios Spiliakos

**Comparative law and best practices on the
application of the European Arrest Warrant in Greece**

Nicosia, 24-25 October 2024



Co-funded the European Union

Legal Background

Regulation (EC) No 2002/584

Greek Law n. **3251/2004**

General Comments

- The European arrest warrant ("EAW") is a simplified cross-border judicial surrender procedure for the purpose of prosecution or executing a custodial sentence or detention order.
- It has replaced the lengthy extradition procedures that used to exist between EU Member States.
- The aim of the EAW is to ensure that open borders and free movement in the Union are not exploited by those seeking to evade justice. It is widely accepted as the most successful instrument of judicial cooperation in criminal matters in the Union.



General Comments

- An EAW issued by one EU country's judicial authority is valid in the entire territory of the EU.
- The mechanism is based on the principle of mutual recognition and therefore operates via direct contacts between judicial authorities with no political involvement.
- Decisions on EAW are made by judicial authorities alone, without political considerations. The executive may not interfere in the decision of the judicial authority.
- The judicial procedure also ensures that the rights of the person sought are protected.



The Greek Law

- **Article 3**
- **Central authority**
- **1.** The Ministry of Justice is designated as a central authority to assist the competent judicial authorities and for the administrative transmission and receipt of the European arrest warrant and official correspondence.
- **2.** The Central Authority may also keep statistics.
- **3.** The Ministry of Justice informs the General Secretariat of the Council of the European Union of the competent judicial authorities.

The Greek Law

- **Article 4**
- **Competent judicial authority issuing a European arrest warrant in Greece**
- The competent judicial authority issuing a European arrest warrant is the **public prosecutor at the court of appeal...**
- **Article 6**
- **Transmission of a European arrest warrant and related documents**
- **1.** Where the place of residence or residence of the requested person is known, **the competent prosecutor at the court of appeal** shall transmit the European arrest warrant directly to the competent executing judicial authority.
- **5.** Difficulties relating to the transmission or authenticity of any document required for the execution of the European arrest warrant **shall be resolved by direct contacts between the judicial authorities concerned** or, where appropriate, by intervention by the central authorities of the Member States.

The Greek Law

- **Article 9**
- **Competent judicial authority for the execution of a European arrest warrant in Greece**
- **1.** The competent judicial authority for the receipt of the European arrest warrant, the arrest and detention of the requested person, the introduction of the case to the competent judicial body and the execution of the decision whether or not to bring the requested person is the following: a) **the prosecutor of appeals**, in whose district the requested person resides, b) **the prosecutor of appeals of Athens**, in case the residence of the requested person is unknown.
- **2.** Where the requested person **consents** to be brought to the issuing State, **the competent judicial authority to issue the decision to execute the warrant shall be the President of the Court of Appeal** in whose district the requested person resides or is arrested.
- **3.** Where the requested person **does not consent** to be brought to the issuing State, **the competent judicial authority for issuing the decision to execute the warrant is the Board of Appeal** in whose district the requested person resides or is arrested.

General Comments

- An EAW may be issued by a national judicial authority for
 - a) prosecuting a person
 - Or b) the execution of a custodial sentence or detention order



The Greek Law

- **Article 1**
- **Concept of European arrest warrant**
- **1.** A European arrest warrant is a decision or order of a judicial authority of a Member State of the European Union issued for the purpose of arresting and bringing a person present on the territory of another Member State of the European Union if that person is requested by the competent authorities of the issuing State in criminal proceedings:
 - (a) in order for a person to whom the offence has already been attributed to be prosecuted;
or
 - (b) to execute a sentence or detention order which deprives him of liberty.

General Comments

- The EAW is an extremely FAST procedure imposing STRICT TIME LIMITS.
- The country where the person is arrested has to take a final decision on the execution of the EAW within 10 days, where the requested person consents to his or her surrender.
- Otherwise, the final decision on the execution of the EAW should be taken within a period of 60 days after the arrest of the requested person.
- The requested person must be surrendered as soon as possible on a date agreed between the authorities concerned, and no later than 10 days after the final decision on the execution of the EAW.

The Greek Law

- **Article 21**
- **Time limits and procedure for deciding on the execution of the European arrest warrant**
- **1.** Where the requested person **has consented** to his or her detention, the **competent President of the Court of Appeal** shall decide on the execution of the European arrest warrant **within ten (10) days** of the requested person's declaration of consent.
- **2.** If the requested person **does not consent to his or her detention**, the final decision on the execution of the warrant shall be taken **within forty (40) days from the arrest** of the requested person **and in any case the final decision shall be taken within sixty (60) days.**
- **3.** In specific cases, where the European arrest warrant cannot be executed within the time provided for in paragraphs 1 and 2, the competent public prosecutor at the court of appeal shall immediately inform the issuing judicial authority, stating the reasons therefor. In such cases, **the deadlines may be extended up to thirty (30) days.**
- **4.** Where, in exceptional circumstances, the judicial authority deciding on the execution of the warrant cannot comply with the time limits laid down in this Article, it shall inform Eurojust, giving the reasons for the delay.

The Greek Law



- Article 27
- Time limit for presenting the requested person
- **1.** Under the care of the public prosecutor at the court of appeal, the requested person shall be brought as soon as possible on a date to be agreed with the competent authorities of the issuing State. **The time limit for the production of the requested person may not exceed ten days after the final decision on the execution of the European arrest warrant has been taken.** On production, by the same public prosecutor, all information concerning the duration of detention of the requested person in connection with the European arrest warrant proceedings shall be transmitted to the competent authority of the issuing State.
- **2.** If it proves impossible to bring the requested person within the time limit laid down in paragraph 1 on grounds of **force majeure in one of the Member States**, the competent public prosecutor at the court of appeal and the issuing judicial authority shall immediately agree on a new date for production. In this case, production shall take place **within ten days of the agreed new date.**
- **3.** **Exceptionally, detention may be temporarily suspended on serious humanitarian grounds**, in particular where there are reasonable grounds to believe that it would endanger the life or health of the requested person. The European arrest warrant shall be executed as soon as those grounds cease to exist. The competent prosecutor at the court of appeal shall inform the issuing judicial authority thereof and agree with it on a new date for production. In this case, production shall take place within ten days after the agreed new date.
- **4. If after the expiry of the above time limits the requested person is still detained, he shall be released. If restrictive conditions have been imposed on him, they shall be automatically lifted.**

General Comments

- Double criminality check
- Exception for 32 categories of offences



The Greek Law

- **Article 10**
- **When is the execution of the European Arrest Warrant allowed?**
- **1.** Without prejudice to Articles 11 to 13, a European arrest warrant shall be executed where:
 - a) The offence for which the European arrest warrant has been issued **constitutes a crime under the Greek criminal laws, regardless of the legal classification**, which is punishable under the law of the issuing State by a custodial sentence or a detention order, the maximum limit of which is **at least twelve (12) months**. In cases where the offence constitutes a crime relating to taxes, duties, customs and foreign exchange, it shall not constitute grounds for refusing to execute the warrant if the Greek State does not impose the same type of taxes or fees or does not provide for the same type of regulation for taxes, duties, customs and exchange as that of the issuing Member State.
 - b) The courts of the issuing State have sentenced the requested person to a sentence or detention order **of at least four (4) months** for an offence, **which the Greek criminal laws characterize as such.**

The Greek Law

- **Article 10**
- **When is the execution of the European Arrest Warrant allowed?**
- **2.** The execution of the European arrest warrant shall be permitted, without verification of double criminality, for the following offences, as defined by the law of the issuing State, **if they are punishable in that State by a custodial sentence or a detention order maximum of at least three years:**
- (a) criminal organisation; (b) terrorist acts;(c) trafficking in human beings;(d) violations against sexual freedom and sexual exploitation of minors, child pornography;(e) illicit trafficking in narcotic drugs and psychotropic substances;(f) illicit trafficking in and trafficking in arms, ammunition and explosives;(g) crimes of corruption and corruption;(h) crimes affecting the European Communities' financial interests;(i) money laundering; (j) currency crimes, including the euro;(k) computer-related crimes;(l) environmental crimes, including illicit trade in endangered animal species and endangered plant species and varieties;(m) assistance for illegal entry into and stay in the country;(n) murder with intent, grievous bodily harm;(o) illicit trade in human organs and tissues;(p) kidnapping, unlawful restraint, kidnapping and hostage-taking;(q) racism and xenophobia;(r) organised or armed robbery and theft;(s) illicit trafficking in cultural goods, including antiques and works of art;(k) fraud; (u) extortion;(v) counterfeiting and piracy of goods;(w) forgery of public documents and trafficking in false documents;(x) forgery of means of payment;(y) smuggling of hormonal substances and other growth promoters;(z) illicit trafficking in nuclear and radioactive substances;(aa) trafficking in stolen vehicles,(bb) rape,(cc) arson with intent,(l) crimes falling within the jurisdiction of the International Criminal Court,(ae) hijacking and hijacking,(ff) sabotage.

General Comments

- **Surrender of nationals:**
- **EU countries can no longer refuse to surrender their own nationals, unless the executing state undertakes to execute the sentence or detention order in accordance with its domestic law.**



The Greek Law

- **Article 12**
- **Possibility of non-execution of a European arrest warrant – Exceptions**
- **1.** The judicial authority deciding on the execution of the European arrest warrant may refuse to execute the warrant in the following cases:
 -
 - (e) if the European arrest warrant has been issued for the purpose of executing a custodial sentence or detention order, provided that the requested person **resides or stays in Greece or is a Greek national and Greece undertakes to execute the sentence or detention order in accordance with its criminal laws;**

General Comments



- **Guarantees**
- **The country that executes the EAW may require guarantees that:**
 - **a.the (un-informed) absent requested person will have the right for re-trial**
 - **b. if the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the requested person will have the right to ask for review after a certain period,**
 - **c. the requested person, being a national or resident of the executing state, is returned there to serve there the custodial sentence or detention order passed in the issuing Member State.**

The Greek Law

- **Article 13**
- **Guarantees for the execution of the European arrest warrant**
- **1.** If the European arrest warrant has been issued for the purpose of executing a sentence or detention order imposed by decision rendered **in the absence of the requested person and that person has not been summoned in person or otherwise informed of the date and place of the hearing leading to the judgment in absentia**, the execution of the European arrest warrant by the competent judicial authority **may be subject to the condition** that the issuing judicial authority provides sufficient guarantees to ensure that the requested person with the European arrest warrant **has the opportunity to request a retrial** in the issuing Member State and to be present at the decision.
- **2.** If the offence for which the European arrest warrant has been issued is punishable **by life imprisonment or a measure involving deprivation of liberty for life**, the execution of the European arrest warrant by the competent judicial authority **may be subject to the condition** that the legal system of the issuing State makes provisions for the review of the sentence imposed **on request or at the latest after twenty years** or for the application of measures of equity provided for in favour of the person by the law of the issuing State and aimed at preventing the execution of such a penalty or measure.
- **3.** If the person against whom the European arrest warrant has been issued for the purpose of prosecution, and in any case following the attribution to that person of a specific criminal offence, **is a Greek national or resides in Greece**, the execution of the European arrest warrant by the competent judicial authority may be subject to the condition that the requested person, after being heard, **he will be transferred to the Greek State in order to serve** there the custodial sentence or detention order that will be imposed against him in the issuing State.

General Comments

- Limited grounds for refusal
- Mandatory/optional



The Greek Law (Mandatory)

- Article 11
- When is the execution of the European arrest warrant prohibited?
- The judicial authority deciding on the execution of the European arrest warrant shall refuse to execute the warrant in the following cases:
 - (a) whether the offence for which the European arrest warrant has been issued is covered by an **amnesty in accordance with Greek criminal laws**, provided that Greece had competence to prosecute that offence;
 - (b) if the information available to the judicial authority deciding on the execution of the warrant shows that the requested person **has been finally tried by a Member State of the European Union for the same acts**, provided that, in the case of conviction, **the sentence has been or is being enforced or can no longer be enforced under the law of the convicting Member State**;
 - (c) if the person against whom the European arrest warrant has been issued **is criminally irresponsible because of his age for the offence for which the warrant has been issued, in accordance with Greek criminal laws**.

The Greek Law (Optional)

- **Article 12**
- **Possibility of non-execution of a European arrest warrant – Exceptions**
- **1.** The judicial authority deciding on the execution of the European arrest warrant may refuse to execute the warrant in the following cases:
 - (a) if the person against whom the European arrest warrant has been issued **is being prosecuted in Greece for the same offence** as that referred to in the European arrest warrant;
 - (b) if the Greek authorities **have decided either not to prosecute** the offence for which the European arrest warrant has been issued or **to discontinue the prosecution**;
 - (c) if the requested person **has been finally tried in a Member State of the European Union** for the offence for which the European arrest warrant has been issued, so as to prevent subsequent prosecution;
 - (d) if it appears from the information available to the judicial authority deciding on the execution of the warrant that the requested person **has been finally tried in a third country** for the same acts, provided that, in the case of conviction, **the sentence has been enforced or is being enforced or can no longer be enforced under the law of the sentencing country**;
 - (e) *if the European arrest warrant has been issued for the purpose of executing a custodial sentence or detention order, provided that the requested person resides or resides in Greece or is a Greek national and Greece undertakes to execute the sentence or detention order in accordance with its criminal laws;*

The Greek Law

- **Article 12**
- **Possibility of non-execution of a European arrest warrant – Exceptions**
- (f) if the requested person, for the purpose of executing a custodial sentence or detention order, **did not appear in person** at the trial leading to the judgment;
- g) in case of **statute of limitations** in accordance with Greek criminal laws and the offence **falls under the jurisdiction of the Greek judicial authorities** in accordance with Greek criminal laws;
- (h) if the European arrest warrant has been issued for an offence which is either considered under Greek criminal law to have been committed in whole or in part on the territory of Greece or in a place treated as such, or for an offence committed outside the territory of the issuing Member State and in accordance with Greek criminal laws prosecution for a crime committed outside the territory of Greece is prohibited;
- (i) if the person against whom the European arrest warrant has been issued for the purpose of prosecution is a national or resident in Greece and **is being prosecuted in Greece for the same act.**

The Greek Law

- **Article 12**
- **Possibility of non-execution of a European arrest warrant – Exceptions**
- **2.** In particular with regard to **point (f) of paragraph 1**, the judicial authority **shall execute** a European arrest warrant where it states that, in accordance with the procedural provisions of the law of the issuing State, the requested person:
 - (a) either **he was summoned in good time and in due form, or he was informed** in good time by other means so that it could be clearly established that **he was aware of the date and place of the trial**, and furthermore **knew that a judgment could be given in his absence**; or
 - (b) **was aware of the proceedings and instructed a lawyer appointed by him or a lawyer appointed ex officio** to represent him at the proceedings and was actually represented by that lawyer at the proceedings; or
 - (c) after service of the conviction and after being informed of his right to a new trial or to appeal, at the hearing of which he is entitled to be present and where the merits of the case will be reviewed with any new evidence and with the possibility of setting aside the original decision, **he has expressly stated that he does not contest the decision or did not request a new trial or did not appeal within the statutory time limit**, or
 - (d) has not received the judgment in person by service, but it **was served on him in person and without undue delay after his surrender, and was expressly informed of his right to a new trial or to appeal**, at the hearing of which he is entitled to be present and where the merits of the case will be reviewed with any new evidence and with the possibility of the original decision being set aside and he was informed of the time limit within to which he must apply for a retrial or appeal, as provided for in the relevant European arrest warrant.

General Comments



- **Procedural rights**
- **The European Union adopted specific rules that guarantee the procedural rights of persons suspected and accused in criminal proceedings and persons sought under an EAW. These rules build on the right to a fair trial and the rights of defence.**
- **They include: the right to interpretation and translation**
- **the right to information ("Letter of Rights")**
- **the right of access to a lawyer and 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;**
- **the right to legal aid**

The Greek Law

- **Article 15**
- **Arrest and rights of the requested person**
- **1.** Where a requested person is arrested on the basis of the European arrest warrant, he or she shall immediately be provided with **a document containing information on his or her rights** and taken without delay to the prosecutor at the court of appeal. The prosecutor at the court of appeal, after establishing his identity, shall inform him or her of the existence and content of the warrant, of **his or her right to have recourse to legal counsel and an interpreter in the executing and issuing Member States; the right to have a third party informed and to communicate with third persons and with the consular authorities of the State of which he is a national, as well as the possibility given to him or her to consent to be brought to the issuing State in accordance with Article 17 hereof. The above information and the relevant statements of the requested person shall be the subject of a report in accordance with the conditions laid down in Articles 148 to 153 of the Code of Criminal Procedure.**
- **2.** If the arrested person wishes to **exercise the right to appoint a lawyer** in the issuing Member State and does not already have one, the prosecutor at the appeal court in the executing Member State **shall inform the competent authority of the issuing Member State without delay.** The public prosecutor at the appeal in that Member State shall, without undue delay, **provide the requested person with information enabling him or her to appoint a lawyer.** The arrested person shall have the right himself or through his lawyer to request and receive copies of all documents at his own expense.
- **5. Articles** 99B, 99C, 233(1) and 236A of the Code of Criminal Procedure (note old CPC) shall apply mutatis mutandis to a requested person arrested on the basis of a European arrest warrant.

General Comments

- The Speciality Rule applies
- Right to appeal



The Greek Law



- **Article 34**
- **Specialty rule**
- **1.** A requested person who has been brought before the competent public prosecutor at the court of appeal **shall not** be prosecuted, convicted or otherwise deprived of liberty for an offence committed before his or her arrest which is **different** from that for which the European arrest warrant was issued.
- (exceptions exist)

The Greek Law



- **Article 22**
- **Appeal against the decision**
- **1.** In case of non-consent of the requested person, an appeal may be lodged with the Supreme Court by the requested person or the public prosecutor against the final decision of the Council of Appeals, within twenty-four hours from the publication of the decision, in accordance with the provisions of Article 451 of the Code of Criminal Procedure. A report on the appeal shall be drawn up before the Registrar of the Court of Appeal.
- **2.** The Supreme Court in council decides within eight days of filing the appeal. The requested person is summoned in person or through his procedural representative twenty-four hours before the hearing by the Prosecutor of the Supreme Court.

Case Law (application of the European Arrest Warrant)



- The competent judicial cannot rule regarding the validity of the charges since this ruling belongs to the authorities of the issuing State (Areios Pagos 1553/2022)
- Such ruling is against the principle of mutual recognition (Areios Pagos 104/2024)
- It makes no difference if the sentence of art 10 par.1b (*at least four (4) months*) is comprised of one or more sentences (Areios Pagos 1508/2022)
- The *real meaning* of art 10 par.1b (*at least four (4) months*) is regarding the (originally) imposed sentence **and not** the sentence left to be enforced (Areios Pagos 800/2023)

Case Law (application of the European Arrest Warrant)

- Regarding the exception of **Article 12** par. 1. *The judicial authority deciding on the execution of the European arrest warrant may refuse to execute the warrant in the following cases: (a) if the person against whom the European arrest warrant has been issued **is being prosecuted in Greece for the same offence** as that referred to in the European arrest warrant;)*
- The meaning of *being prosecuted* refers to **actual (official) prosecution** and not the preliminary investigation when he/she is just a “suspect”. On the contrary, if the official charges are filed after the EAW but **before** the hearing of art. 9 par 3 (Council of Appeals) (Areios Pagos 381/2023).

Case Law (application of the European Arrest Warrant)

- Regarding the guarantee of art. 13 par. **3**. *If the person against whom the European arrest warrant has been issued for the purpose of prosecution, and in any case following the attribution to that person of a specific criminal offence, is a **Greek national or resides in Greece**, the execution of the European arrest warrant by the competent judicial authority may be subject to **the condition** that the requested person, after being heard, **he will be transferred to the Greek State in order to serve** there the custodial sentence or detention order that will be imposed against him in the issuing State.*
- The “condition” can be met not only by judicial authorities but, also, executive (Ministry of issuing state) (Areios Pagos 1154/2023).


Case Law (application of the European Arrest Warrant)



- The principle of Proportionality cannot be examined for the *execution* of the EAW because it *was examined* for the issuing of the EAW (Areios Pagos 1508/2023- problematic reasoning, indeed)
- The principle of Proportionality is not violated from the simple fact that milder means existed (p.e. instead of issuing a EAW, to issue a simple summoning) (Areios Pagos 1060/2023)

Case Law (application of the European Arrest Warrant)



- The request for Asylum **does not** prevent the execution of a EAW (Areios Pagos 114/2023)
- 

Case Law (application of the European Arrest Warrant)

- Vocal interpretation of the *essential documents* by a present interpreter is sufficient (Areios Pagos 1366/2018-with regards on the *special nature* of the EAW)
- Interpretation made by the issuing state is suffice, even if the applicable rules are different from Greece (Areios Pagos 1508/2023-with regards to the *principle of mutual trust*)

Case Law (application of the European Arrest Warrant)



- The *ne bis in idem* principle **does not apply** to the execution of the EAW. In the specific case, Greece had rejected EAW for prosecution and executed EAW for sentencing (Areios Pagos 799/2016)



Training of lawyers on various areas of EU Law (TRAVAR)

Yiannis Polychronis

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

Nicosia, 24-25 October 2024



Co-funded the European Union

Module 5: The impact of the European Arrest Warrant on the application of the 3 procedural rights directives **The impact of the European Arrest Warrant on Directive 2013/48/EU, Directive (EU) 2016/343 and Directive (EU) 2016/1919**

According to art. 3 para. 1 of the Treaty on European Union, one of its main objectives is the creation of an Area of Freedom, Security and Justice. The European Arrest Warrant has been at the forefront of the tools to achieve this objective, which is the first case of application of the principle of "mutual recognition" in the field of criminal law and has rightly been described by the European Council as the "cornerstone" of judicial cooperation in criminal matters.

The principle of mutual recognition on which the European arrest warrant system is based on mutual trust between the Member States that their legal systems are capable of providing equal and effective protection of fundamental rights recognised at European Union level, in particular by the Charter.

One of the biggest problems for the application of "mutual recognition" and "mutual trust" **was** and **is** the invocation of a serious risk that the fundamental rights of the requested country will be violated, in view of the settled case-law of the ECtHR, which prohibits the Courts from ordering the extradition of someone to a country where there is a real risk of violation of his fundamental rights¹.

- How can such an issue arise once the principle of mutual trust exists?
- What are the means of proof that a requested person must provide and what is the burden and level of proof he has to prove such an allegation?

Since the first decade of the implementation of the EAW Framework Decision, the European Union has recognized that although Member States are parties to the ECHR and the ICCPR, experience has shown that this alone does not always ensure a sufficient degree of trust in each other's criminal justice systems, in view of the pluralism and diversity of national

¹ See case of Soering v. the United Kingdom

systems which inevitably calls into question the functional equivalence of national penal systems.

The European Union has begun to resolve this problem by establishing minimum procedural rights for suspects and accused persons, which applies in all Member States.

This is the essence and content of the 3 European directives, which concern this conference², that were adopted in this direction and have as their ultimate goal to strengthen the principle of mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition of decisions in criminal matters.

To this end, all 3 European directives explicitly state that they set minimum rules on procedural rights within their scope³, while Member States may extend these rights to provide greater protection.⁴

In this I will not refer to the content of the procedural rights established by the 3 European Directives, I will refer only to the provisions concerning EAW enforcement procedures, as well as to case law of the CJEU.

(A) The impact of the EAW on the application of the Directive 2013/48/EU on the right to access to a lawyer

Article 10 of the Directive is an important innovation that has brought about radical changes in the procedure for executing a EAW, since now explicitly the arrested person with a EAW has all the rights that someone arrested as a suspect or detained as an accused person has, as provided for in Articles 4 to 9 of the Directive.

² as well as other legislative measures of the European Commission, aimed at strengthening the procedural rights of suspects and accused persons in criminal proceedings,

³ It is stressed that the level of protection afforded by Member States should never fall below the standards of the Charter or the ECHR, as interpreted by the case law of the 2 European Courts

⁴ Also in all 3 Directives, in accordance with the principle of effectiveness of EU law, Member States must establish adequate and effective remedies in case of violation of a right granted to citizens under European Directives.

Most importantly, however, for the first time you are establishing the right of a requested person to appoint a lawyer in the issuing Member State of the EAW, who will officially represent him in the Requesting country, pending the execution procedure. The Directive also provides for the functional responsibilities of the lawyer of the issuing Member State of the EAW, which is to assist the lawyer in the execution Member State by providing information and advice; so that the requested person can effectively exercise his rights under Framework Decision 2002/584/JHA⁵. The only limitation laid down in Article 10 of the Directive is that the requested person's right to appoint a lawyer in the issuing Member State should be without prejudice to the time limits laid down in Framework Decision 2002/584/JHA.

In a recent decision of the Cyprus Supreme Court⁶, the lawyer handling the case in the execution Member State, requested a postponement of the case in order to contact the lawyer appointed by the Appellant in the issuing Member State, for consultation and advice from that lawyer. The First Instance Court refused to grant adjournment, thus violating the right to be represented by a lawyer in the issuing Member State of the EAW. The Supreme Court annulled the surrender decision and ordered a retrial, ruling that: "*The consultation between the lawyer of the requested person in the Republic and his lawyer in the country of issue of the EAW is regulated by law, clearly because it is considered important or at least helpful to the fair representation of the requested person.*"

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

Directive (EU) 2016/1919 lays down common minimum rules on the right of suspects, accused persons and requested persons with EAWs to legal aid, ensuring the effectiveness of Directive (EU) 2013/48.

Under Article 5 of the Directive, the executing Member State of the EAW ensures that requested persons have the right to legal aid from the moment they are arrested based on a

⁵ Thus, for the first time, with the provision of Article 10 of the Directive, the executing Member State of the ECA recognises the right of representation and participation in the proceedings of a lawyer from another country acting under the law of that other country.

⁶ In the case of Y.B.L. v. ATTORNEY GENERAL OF THE REPUBLIC, civil appeal 1/2022, date: 04/11/2022

European Arrest Warrant until they are surrendered or until the decision not to surrender them becomes final.

Very progressively, the Directive provides that requested persons who are the subject of European arrest warrant proceedings⁷, and exercise their right to appoint a lawyer in the issuing Member State⁸, should have the right to legal aid in the issuing Member State of the EAW, to appoint a lawyer competent to assist them in the process of executing the EAW, where legal aid is necessary to ensure effective access to justice, as required by Article 47 of the Charter.

The impact of the EAW on the application of the Directive 2016/343

(a) Presumption of Innocence and ECA.

There are no specific provisions for the protection of the presumption of innocence in the process of executing an EAW, but if we are dealing with someone arrested for prosecution purposes, then the executing Member State is bound by the general provisions of the Directive and in particular Articles 4 and 5:

- The prohibition on public references to guilt (Article 4)
- measures regarding the public presentation of suspects and accused persons

Based on my research, I traced the CJEU judgment to Puig *Gordi (C-158/21)*, 31st January 2023.

On 31st January 2023 the Court of Justice of the EU (the “CJEU”) delivered judgment in the case Puig Gordi (C-158/21) The Grand Chamber ruled that an executing judicial authority may not, in principle, refuse to execute an EAW, on the ground that the court of the issuing Member State, that will hear the case, lacks jurisdiction to rule upon his criminal proceedings. In addition, it considered that it had to consider the serious risk of a breach of the presumption of innocence.

⁷ for the purposes of criminal prosecution not to serve a sentence.

⁸ in accordance with Articles 10(4) and (5) of Directive 2013/48/EU,

In the case, the National Court (Brussels Court of Appeal) refused to execute the EAW, ruling that the jurisdiction of the referring Spanish court to try Mr Puig Gordi was not based on an express legal basis and concluded that the execution of the European arrest warrant issued against him jeopardises his fundamental rights. In addition, it considered that it had to consider the extremely serious risk of violation of the presumption of innocence by the Requesting country.

The CJEU in paragraph 45 of its judgment left open the question whether violation of the presumption of innocence by the Requesting country can constitute grounds for refusing to execute a EAW. I refer to this thought⁹:

«Next, account should be taken of the fact that the decision of the cour d'appel de Bruxelles (Court of Appeal, Brussels) to refuse to execute the European arrest warrant in respect of Mr Puig Gordi is based not solely on an infringement of the right to a fair trial, but also on an infringement of the presumption of innocence. The first to sixth questions do not relate to the latter ground, which means that the Court's answers to those questions cannot, in any event, lead to the conclusion that that European arrest warrant should be executed.»

(b) Trial in absentia

In relation to the defendant's right to be present at his trial in criminal proceedings Framework Decision 2009/299, sets out the grounds for refusing to execute a EAW where the person concerned did not appear in person at his trial.

Framework Decision 2002/584/JHA allows the executing authority to require from the issuing member state to give assurances, deemed adequate to guarantee the person who is the subject of the EAW that he will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present when the judgment is given. The sufficiency of

⁹ Next, account should be taken of the fact that the decision of the cour d'appel de Bruxelles (Court of Appeal, Brussels) to refuse to execute the European arrest warrant in respect of Mr Puig Gordi is based not solely on an infringement of the right to a fair trial, but also on an infringement of the presumption of innocence. The first to sixth questions do not relate to the latter ground, which means that the Court's answers to those questions cannot, in any event, lead to the conclusion that that European arrest warrant should be executed.

such an assurance is a matter to be decided by the executing authority, and it is therefore difficult to know exactly when execution may be refused.

The CJEU in the case of *Melloni*¹⁰, ruled that the execution of a EAW can be subject only to conditions set in the Framework Decision. Also decided that article 4a(1)(a) and (b): precludes refusing a EAW in absentia sentences if the person was represented by a legal counselor.

I would like to mention 2 examples from Cypriot case law to understand the possibility of refusing to execute an EAW in cases of convictions in absentia, persons who were not represented by a lawyer:

On March 3rd, 2020, the Supreme Court of the Republic of Cyprus ¹¹upheld 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 2021¹² 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,

¹⁰ Case C-399/11, Stefano Melloni v Ministerio Fiscal. 6 February 2013

¹¹ Attorney General and XXX, Political Appeal No. 230/2019, dated March 3, 2020.

¹² Attorney General of the Republic v. Stavros Georgiou, Political Appeal No. 317/2020, February 17, 2021.

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

Conclusion.

The impact of the European Arrest Warrant (EAW) on the implementation of European directives establishing procedural rights for accused and suspected persons is significant and has several aspects. It empowers the cross-border cooperation between EU Member States by strengthening the protection of procedural rights of defendants. Despite the above, it is a fact that the application of procedural rights of defendants during the execution of a European Arrest Warrant (EAW) can face many challenges due to differences in the legal traditions and systems of EU Member States. This can lead to confusion in cases where procedures are not the same in all states¹³. These challenges require continued cooperation and dialogue between Member States to ensure that arrest and extradition procedures are fair and respectful for all Member States involved.

¹³ Some of these challenges include:

1. Different procedural guarantees:
2. Different approaches to legal aid:
3. Different interpretation of rights:
4. Problems of compliance with European directives due to incorrect transposition