



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

**Malgorzata Wasek-Wiaderek**

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

**Warsaw, 20-21 February 2025**



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- I. Scope of application of Directive 2013/48/EU at the pre-trial stage of the proceedings;**
- II. When access to the lawyer should be granted at the pre-trial stage of the proceedings;**
- III. Possible limitations of access to the lawyer;**
- IV. Remedies in case of violation of the right to a lawyer; interrogation of a suspect without the lawyer – admissible evidence or not?**
- V. Confidentiality of the communications between suspects and their lawyers – absolute or not?**

## Scope of application of Directive 2013/48:

- Autonomous definition of „a suspect”:
  - **it applies** to persons who were made aware by the competent authorities of a MS, by official notification or otherwise, that they are suspected of having committed a criminal offence (Article 2(1));
  - **it does not apply** to persons submitted to preliminary questioning by the police or by other law enforcement authority just for the purpose of identification, to verify the possession of weapons, for example in the course of a road-side check or during other random checks (preamble, para. 20);
  - **It does apply to person heard as a witness** who becomes a suspect during questioning by the police or other law enforcement authority (Article 2(3); preamble, para. 21).

## Scope of application of Directive 2013/48:

Definition of „a suspect” referring to the case-law of the ECHR (*Salduz v. Turkey* (2008); *Ibrahim and others v. UK* (2016; para. 249)

*A “criminal charge” exists from the moment that an individual is **officially notified** by the competent authority of an allegation that he has 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.*

Conclusion: in Poland the official definition of a suspect is narrower than this provided in Directive 2013/48/EU. In certain circumstances Directive applies also to a „suspected person” within the meaning of the CCP.

Starting point for access to the lawyer at the pre-trial stage of the proceedings

In any event, suspects shall have access to a lawyer from whichever of the following points in time is the earliest:

- (a) before they are questioned by the police or by another law enforcement or judicial authority (this right includes the right to meet in private and communicate with the lawyer prior to questioning and his effective participation in questioning);
- (b) upon the carrying out of an investigative or other evidence-gathering acts listed in Article 3 (3)(c), i.e.: 1) identity parades; 2) confrontations; 3) reconstruction of the scene of a crime, if the suspect is required or permitted to attend the act concerned;
- (c) without undue delay after deprivation of liberty;
- (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court

Limitations of access to the lawyer at the pre-trial stage of the proceedings

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**I. With reference to deprivation of liberty** – derogations are possible „where the geographical remoteness of a suspect [...] makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty” (Article 3(5))

**II. With reference to other situations** – derogations are possible on the basis of one of the following compelling reasons:

- where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

## Conditions for applying temporary derogations at the pre-trial stage of the proceedings

- Any temporary derogation shall:
  - (a) be proportionate and not go beyond what is necessary;
  - (b) be strictly limited in time;
  - (c) not be based exclusively on the type or the seriousness of the alleged offence;
  - (d) not prejudice the overall fairness of the proceedings.
- may be authorised only by a **duly reasoned decision** taken on a case-by case basis, either by a **judicial authority**, or by another competent authority on condition that the decision **can be submitted to judicial review**.
- the duly reasoned decision **shall be recorded** using the recording procedure in accordance with the law of the MS concerned.

Conditions for applying temporary derogations at the pre-trial stage of the proceedings

CJEU judgment of 14 May 2024, C-15/24 PPU:

Question:

„whether Article 3(6)(b) of Directive 2013/48 must be interpreted as meaning that, where that provision has not been transposed into the national legal order, the police authorities of the Member State concerned may rely on that provision in relation to a suspect or accused person in order to derogate from the application of the right of access to a lawyer provided for by that directive?”

Conditions for applying temporary derogations at the pre-trial stage of the proceedings

CJEU judgment of 14 May 2024, C-15/24 PPU, *Stachev*:

„...Article 3(6)(b) of Directive 2013/48 does not establish a right that may be relied on by an individual against a Member State, but, rather, allows Member States to provide for a derogation from the application of the right of access to a lawyer in exceptional circumstances. Consequently, [...] a public authority cannot, in the absence of transposition of that provision, rely on it against a suspect or accused person.

„[...] where that provision has not been transposed into the national legal order, the police authorities of the Member State concerned cannot rely on that provision in relation to a suspect or accused person in order to derogate from the application of the right of access to a lawyer, which is laid down in a clear, precise and unconditional manner by that directive.”

Conditions for applying temporary derogations at the pre-trial stage of the proceedings

The right to access to the lawyer may be waived.

Waiver must be:

- 1) fully informed;
- 2) given voluntarily and unequivocally;
- 3) Waiver shall be revokable.

## Conditions for applying temporary derogations at the pre-trial stage of the proceedings



The concept of waiver in Directive is rooted in the case-law of the ECHR concerning waiver of procedural rights:

Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, such a waiver must, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (*Pfeifer and Plankl v. Austria*, 1992, § 37). In addition, it must not run counter to any important public interest (*Hermi v. Italy* [GC], 2006, § 73; *Sejdovic v. Italy* [GC], 2006, § 86; *Dvorski v. Croatia* [GC], 2015, § 100). Moreover, an accused should be able to foresee the consequences of his conduct (*Di Martino and Molinari v. Italy*, 2021, §§ 33-40).

## Conditions for applying temporary derogations at the pre-trial stage of the proceedings

### CJEU judgment in the case C-15/24 PPU

question:

„whether Article 9(1) of Directive 2013/48 [...] must be interpreted as meaning that the requirements laid down by that provision for the waiving of the right of access to a lawyer are met in the case of a written waiver of that right of an illiterate suspect, to whom the possible consequences of that waiver have not been explained, and who claims that he was not informed of the content of the document which he signed at the time of his arrest?”

## Conditions for applying temporary derogations at the pre-trial stage of the proceedings

### CJEU judgment in the case C-15/24 PPU

Answer:

„Article 9(1) and (2) of Directive 2013/48 must be interpreted as meaning that the statement of waiver of the right of access to a lawyer by an illiterate suspect cannot be regarded as complying with the requirements laid down in Article 9(1) of that directive, **where that suspect has not been informed, in a manner which takes due account of his or her particular circumstances, of the possible consequences of such a waiver and where that waiver has not been recorded in accordance with national procedural law, in such a way as to enable compliance with those requirements to be verified**”.

## Conditions for applying temporary derogations at the pre-trial stage of the proceedings

### CJEU judgment in the case C-15/24 PPU

Answer:

„Article 9(3) of Directive 2013/48 must be interpreted as meaning that, in the event of a **vulnerable person** waiving the right of access to a lawyer, within the meaning of Article 13 of that directive, that person **must be informed of the possibility of revoking that waiver before any subsequent investigative act is carried out** during which, taking into account the intensity and importance of that investigative act, the absence of a lawyer is liable particularly to harm the interests and rights of that person.”

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

About remedies:

„Member States should ensure that 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 from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that **the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.**” (preamble, para. 50).

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

About remedies – Article 12(2) of Directive.

„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.”

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

## **CJEU judgment in the case C-15/24 PPU:**

Question:

„whether Article 12(2) of Directive 2013/48, read in conjunction with [...] Article 47 of the Charter, must be interpreted as precluding national legislation and case-law under which a court which examines the involvement of an accused person in a criminal offence in order to determine whether the restraint measure to be imposed on that accused person is appropriate, is deprived of the possibility, when adopting a decision on the continued detention of that accused person, of assessing whether evidence has been obtained in breach of the requirements of that directive and, where appropriate, of disregarding such evidence?”

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

## **CJEU judgment in the case C-15/24 PPU:**

„Article 12(2) of Directive 2013/48, read in conjunction with the first and second paragraphs of Article 47 of the Charter, must be interpreted as precluding national case-law under which a court which examines the involvement of an accused person in a criminal offence in order to determine whether the restraint measure to be imposed on that accused person is appropriate, is deprived of the possibility, when adopting a decision on the continued detention of that accused person, of assessing whether evidence has been obtained in breach of the requirements of that directive and, where appropriate, of disregarding such evidence.”

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

Interrogation of a suspect without access to the lawyer – judgment of the CJEU of 5 September 2024, C-603/22, M.S., J.W., M.P., and others:

The case concerns application of another EU directive granting the right to access to a lawyer to children-suspects. Three minor-suspects were charged with having broken into a disused holiday centre in Ustka, a criminal offence punishable by up to one year's imprisonment. They were questioned by the police, without presence of their parents, after obtaining standard information about their procedural rights (including the right to silence and the right to a lawyer). At the trial stage of the proceedings the court appointed the lawyer for all suspects. Moreover, the court declared that the statements of all suspects are inadmissible evidence.

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?



Interrogation of a suspect without access to the lawyer – judgment of the CJEU of 5 September 2024, C-603/22, M.S., J.W., M.P., and others:

1. Article 6(1) to (3) of Directive (EU) 2016/800 read in the light of Article 18 of that directive, must be interpreted as precluding national legislation which, first, does not provide for children who are suspects or accused persons to be assisted by a lawyer – a court-appointed lawyer if necessary – before being questioned by the police or by another law enforcement or judicial authority and, at the latest, before they are first questioned and, second, allows those children to be questioned as suspects in the absence of such a lawyer during their questioning.
2. Article 2(1) and (3) of Directive 2016/800 must be interpreted as precluding national legislation which provides that the right to be assisted by a court-appointed lawyer automatically ends for persons who were children at the time when they became the subject of criminal proceedings, but who have subsequently reached the age of 18, in so far as such legislation does not permit a determination of whether the application of that directive or of some of its provisions and, consequently, of the rights set out therein is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of those persons.

Remedies; question: whether evidence gathered without the access to the lawyer should be inadmissible?

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Interrogation of a suspect without access to the lawyer – judgment of the CJEU of 5 September 2024, C-603/22, M.S., J.W., M.P., and others:

[...] 4. Article 19 of Directive 2016/800 must be interpreted as **not precluding national legislation which, in criminal proceedings, does not allow a court to declare as inadmissible incriminating evidence contained in statements made by a child during questioning by the police in breach of the right of access to a lawyer, provided for in Article 6 of Directive 2016/800**, provided, however, that, in criminal proceedings, that court is in a position, first, to verify that that right, read in the light of Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union, has been respected and, second, to draw all the inferences from that breach, in particular **as regards the probative value of the evidence obtained in those circumstances.**

## Communication with the lawyer

### Article 4 of Directive:

„Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.”

Question: whether limitation of confidentiality of communications may be upheld by national law in the circumstances that allow for derogation of access to the lawyer under this Directive?



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

**Piotr Turowicz**

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

**Warsaw, 20-21 February 2025**



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# Introduction

- Directive (EU) 2016/1919 establishes minimum standards for legal aid in criminal proceedings
- it aims to ensure effective access to a lawyer and fair trial rights for suspects, accused persons, and also individuals involved in European Arrest Warrant (EAW) cases
- will not limit or derogate from any rights/procedural safeguards ensured by the provisions of Charter of Fundamental Rights of the European Union („the Charter”) and the European Convention for the Protection of Human Rights and Fundamental Freedoms („ECHR”), as well as other laws providing higher level of protection

# Background & Legal Context

- adopted on 26 October 2016, with implementation deadline on 25 May 2019
- complements Directive 2013/48/EU on the right of access to a lawyer
- part of the EU Roadmap „for strengthening procedural rights in criminal proceeding“, as adopted on 30 November 2009, by the Council
- aims to enhance mutual trust between Member States' legal systems

# Scope of the Directive

- applies to:
  - those deprived of liberty
  - required to be assisted by a lawyer in accordance with EU or national law
  - suspects and accused persons in criminal proceedings
    - individuals subject to European Arrest Warrant proceedings
- it covers:
  - legal aid funding for access to a lawyer
  - procedural safeguards ensuring effective legal representation

# Key Provisions

- *„Given the specificity of European arrest warrant proceedings, the interpretation of the provisions of this Directive relating only to requested persons should take into account this specificity and should not in any way prejudice the interpretation of the other provisions of this Directive” (recitals 20)*
- right to legal aid in pre-trial and trial stages
- access to legal aid for those subject to EAW proceedings
- criteria for granting legal aid (means and merits tests)
- obligation to ensure quality legal assistance
- timely decision-making on legal aid applications
- right to appeal decisions on legal aid denial

# Legal aid criteria ("tests")

- Member States may apply two tests:
  - "Means Test": assesses the financial situation of the suspect or accused, 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 Member State
  - "Merits Test": evaluates the necessity of legal aid based on case complexity and potential penalties, taking into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake,
    - but the merit test should be deemed to be met in case detention decisions or in case people already in detention

# EAW proceedings

- par. 5:
  - 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
  - the issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice
  - always the right to legal aid may be subject to a means test

# Implementation in Poland

- legal aid is provided at police stations and during court proceedings
- suspects in detention have the right to free legal assistance
- legal aid applications assessed based on income and case severity
- ongoing need for improved training and monitoring of legal aid quality

## Implementation in Poland – cont.

- when a suspect or an accused person must have a defence lawyer (a defence lawyer is appointed ex officio):
  - a person under 18 years of age, a person who is deaf, dumb or blind, a person regarding whom there appear reasonable doubts concerning their mental capacity and mental health or ability to participate in criminal proceedings or to conduct a defence in an independent and reasonable manner
- a suspect and an accused must also have a defence lawyer if the court deems it necessary due to other circumstances hindering the defence
- Poland incorporated Directive (EU) 2016/1919 into national law, but ...
  - lack of satisfactory legal solutions in Polish law which could be recognised as implementing the standards of the Directive (but also other legal instruments, including Directive 2013/48/EU), has become a matter of interest for the Ombudsman. The Ombudsman, in his statement dated 14 July, 2021, wrote directly to the European Commissioner Didier Reynders, informing him of inadequacies concerning the implementation in Poland.

# Overall Challenges in Implementation in EU

- inconsistent application across Member States
- delays in legal aid decision-making
- quality of legal aid services varies
- limited awareness among suspects of their rights
- insufficient funding for legal aid programs

# Case Study – Poland

- Poland faces challenges in ensuring uniform access to legal aid
- some suspects report delays in accessing a lawyer
- financial eligibility criteria can be restrictive
- calls for greater state funding and lawyer training programs

## Case Study – Poland cont.

- difference as to the scope of the term accused and suspect
- lack of effective access to a lawyer for the suspect
- lack of confidentiality of contacts between the suspected or accused person and their lawyer, whether during meetings, correspondence, telephone conversations or other forms of communication permitted under national law
- lack of an adequate procedure for questioning a suspect without legal counsel, including the challenge such an act and its evidentiary effect
- failure to ensure an effective right for persons subject to a European Arrest Warrant to have a lawyer appointed in the issuing State

# Future Improvements

- enhance training for legal aid lawyers
- ensure faster processing of legal aid requests
- improve funding for public legal aid services
- strengthen monitoring of legal aid quality
- increase awareness campaigns on rights to legal aid
- legislative proposals:
  - a lawyer shall be appointed ex officio before any procedural steps involving that detainee are taken
  - such an appointment of may be made by the chairman or the court clerk of the district court in which district the proceedings are conducted, and in urgent cases also by another district court

# Conclusions

- Directive (EU) 2016/1919 strengthens legal aid access in criminal proceedings.
- effective implementation ensures fair trial rights for all
- challenges remain in funding, quality, and consistency across Member States
- ongoing reforms are necessary to enhance legal aid systems

# Questions & Discussion

- what are the biggest challenges in legal aid implementation?
- how can the EU improve legal aid consistency across Member States?
- are there examples of best practices from your country?



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

**Piotr Turowicz**

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

**Warsaw, 20-21 February 2025**



Co-funded the European Union

# Introduction

- European Arrest Warrant (EAW) is a legal framework for cross-border extradition within the EU
- it aims to simplify and speed up the surrender of suspects and convicted persons
- 3 key directives ensure procedural rights and fair trials:
  - Directive 2013/48/EU: Right of access to a lawyer
  - Directive (EU) 2016/343: Presumption of innocence
  - Directive (EU) 2016/1919: Legal aid for suspects and accused persons
- a framework for cooperation between Member States based on the principle of mutual recognition and mutual trust does not in practice provide a guarantee that the required standards are met in respect of the legal status of suspects and accused persons
- EAW procedure allows for an assessment of the state of the rule of law in a particular Member State and its effects go beyond an exchange of views between the issuing and executing state
  - thus, EAW procedure becomes the object of examination in view of the legality of functioning of the given judiciary system and its impact on the rights of the citizens

# European Arrest Warrant (EAW) Overview

- introduced in 2002 under Council Framework Decision 2002/584/JHA
- replaces lengthy extradition procedures with a faster, standardized process
- based on mutual recognition of judicial decisions across EU Member States
- requires compliance with fundamental rights and fair trial guarantees (existence of guarantees of the rule of law, respect for the fundamental rights of EU citizens – freedom, security, justice)
- is issued for the purpose of conducting criminal proceedings or enforcing a custodial sentence or detention order
- cannot be challenged, except for the orders in evidence procedure
- may be issued only by authorised bodies – „judicial authority”

# Directive 2013/48/EU: Right of Access to a Lawyer

- ensures suspects and accused persons can consult a lawyer at all stages of criminal proceedings
- guarantees lawyer assistance in European Arrest Warrant cases
- Member States must allow requested persons to appoint a lawyer both in the executing and issuing country
- EAW's fast-track nature can limit effective legal consultation before surrender
- right to inform at least one person of the deprivation of their liberty – it is hard in practice

# Challenges in Implementing Directive 2013/48/EU

- requested persons often lack sufficient time to consult a lawyer before surrender
- legal representation in both issuing and executing states is not always ensured
- language barriers and differing legal systems create additional obstacles, language should be clearer and more understandable for detainees or suspects
- some Member States impose restrictions on access to legal counsel before extradition hearings
- Directive 2014/41 (on EAW) states that the order is executed in accordance with the law of the executing State, which in practice may mean that it is not possible for the lawyer to participate in the action even if such access would be guaranteed under national law
- also factual difficulties matters such as geographical distance, costs of travel, foreign substitution or translation

# Challenges in Implementing Directive – cont.

## 2013/48/EU

- procedural provisions should:
  - clearly indicate the possibility of access to a lawyer in relation to various procedural activities for persons who are potential suspects and are very probably going to become formal suspects
  - provide for the possibility to repeat the act of interrogation of a person in the presence of his or her lawyer if this act was carried out previously in violation of his or her right of access to a lawyer
  - ensure the requirement of confidentiality is achieved
  - include a rule to oblige the recording of interrogations conducted without the presence of a lawyer

# Directive (EU) 2016/343: Presumption of Innocence

- establishes the right to be presumed innocent until proven guilty
- protects against public authorities implying guilt before conviction, so no public statement saying that someone is guilty is allowed
- ensures suspects have the right to be present at trial and not incriminate themselves
- EAW system may impact the presumption of innocence due to automatic extradition requests
- Member States should ensure that suspects and accused persons are presumed innocent until proved guilty according to law, so any evidence contrary to the law cannot be taken into account by the court. This also applies to the so-called 'fruits of the poisoned tree', i.e. evidence obtained illegally (e.g. as a result of illegally used wiretapping or other means of surveillance).

# Impact of EAW on Presumption of Innocence

- requested persons may be detained before trial, affecting their presumed innocence
- public perception of guilt can arise from pre-trial extradition procedures
- differences in judicial practices across Member States can lead to inconsistencies in applying the directive

# Directive (EU) 2016/1919: Right to Legal Aid

- ensures access to free legal assistance for suspects and accused persons who cannot afford representation
- regulates the important issue of *ex officio* legal assistance, including *ex officio* defence
- requires timely legal aid decisions and clear eligibility criteria
- EAW process complicates legal aid access due to differences in national legal aid systems

# Legal Aid Challenges in EAW Cases

- lack of harmonization in legal aid provision across the EU
- requested persons may not receive adequate legal assistance in the issuing state
- delays in processing legal aid applications can impact fair trial rights
- some Member States impose restrictive financial thresholds for legal aid eligibility

# Case Study: Poland

- Poland has implemented all three directives, but challenges remain
- legal aid in EAW cases is available but sometimes delayed, not sufficient, complicated and therefore non accessible
- some requested persons report difficulties in accessing legal representation before surrender
- presumption of innocence is at risk when public authorities comment on ongoing cases

# Future of EAW and Procedural Rights

- calls for stronger safeguards to align EAW with fair trial rights
- increased cooperation between issuing and executing states to ensure legal representation
- potential reforms to address discrepancies in legal aid access across Member States
- greater judicial oversight to protect presumption of innocence and right to a lawyer

# Conclusions

- European Arrest Warrant is a crucial tool for cross-border justice
- however, its implementation must align with fundamental rights protections
- effective legal representation, legal aid and the presumption of innocence must be safeguarded
- future reforms should focus on strengthening procedural rights in EAW cases
- a lot to improve and develop to achieve the minimum standards level. It is not only about necessary and appropriate modifications in the sphere of domestic legal solutions, but also about changes to a very important dimension of law enforcement and judicial authorities' practice, i.e. on how to interpret and apply national provisions which are already in force

# Questions & Discussion

- how can Member States improve legal aid access for requested persons in those future difficult years?
- are there best practices that ensure fair trial rights in EAW cases?
- should the EAW framework be reformed to provide stronger procedural safeguards?



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

**Gergely Tihamér Takács**

**Presentations on the influence of the 3 EU Directives  
on procedural rights in Hungarian Law**

**Warsaw, 20-21 February 2025**



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## Introduction: The Impact of EU Law on Hungarian Criminal Procedure

### •Objective of Comparative Law:

- Understanding different countries' legal systems to improve national practices.
- Recognizing good practices in other jurisdictions for application at home.

### •EU Legal Obligations:

- Every EU member state must adopt and apply EU directives and regulations.
- **Key EU Directives in Criminal Procedure:**
  - 2013/48/EU
  - 2016/343/EU
  - 2016/1919/EU
- Aim: Ensure basic rights for suspects and defendants, set minimum standards while respecting national systems.

### •Impact on Hungarian Law:

- Integration of EU directives into Hungarian new procedural act since July 1, 2018.
- Legislative and practical reforms to improve suspects' rights and legal representation.

### •Critical Viewpoint:

- I will highlight deviations in practice and point out potential issues undermining the directives' effective application in Hungary and points for improvement.

## **Directive 2013/48/EU – Right of Access to a Lawyer**

### **1. Aim & Content of the Directive**

- Ensures suspects' right to legal representation from the beginning of criminal proceedings.
- Legal assistance must be provided, regardless of financial status.
- Defense counsel must be present during interrogations to support suspects' rights.

### **2. Impact on Hungarian Legal System**

- Governed by Act XC of 2017 (Criminal Procedure Code).
- Directive expanded defense rights, now covering the investigation phase.

- **Article 3:** Right to access a lawyer for suspects and accused, ensuring effective defense.

## 1. Developments in Hungary in Criminal Proceedings

- Suspects can choose their lawyer from the beginning of the investigation – no restrictions
- Authorities must wait for the lawyer before conducting an interrogation.
- **Constitutional Court ruling:** Lawyers must be notified 1 hour before procedural acts.

### Practical Issues

- Irregularities (e.g., anonymous calls from authorities to lawyers).
- Efforts to address abuses through internal regulations.

## 2. Administrative Offense Proceedings

- Directive extends to administrative offenses: suspects have the right to legal representation.
- Written information on the right to legal aid provided upon custody.
- Mandatory representation if case goes to court (appointed by police if needed).

## Directive 2013/48/EU - Right to Confidentiality and Right to Inform Third Party

### Article 4: Confidentiality

- Hungary respects communication confidentiality
- **Challenges in Practice:**
  - In prisons and courthouses, the limited consultation rooms and surveillance by guards/police sometimes compromise confidentiality.

### •Article 5: Right to Inform a Third Party of Deprivation of Liberty

- Suspects deprived of liberty have the right to inform a chosen person (e.g., relative, employer) about their detention without undue delay.
- **Hungarian Practice:**
  - The suspect must specify who should be notified.
  - Notification is made via phone at the time of detention.

### Key Takeaways:

- Legal guarantees exist but are sometimes compromised by practical issues.

## **Article 6: The right to communicate with third persons while deprived of liberty**

### **•Hungarian rule:**

- If detained, within 72 hours they are entitled to a 15-minute consultation with a close relative.
- However, if this is not completed within 72 hours, registration of contact person is delayed by up to 3-4 weeks due to internal procedural issues in prisons.

**Article 7: Communication with consular authorities** - Fully implemented and applied in Hungary.

## **Article 9: Waiver**

**•Directive:** Suspects have the opportunity to waive the presence of a lawyer in certain cases (e.g., minors) and make a statement without legal counsel.

### **•Hungarian Practice Issues:**

- While defense lawyers can attend procedural acts during the investigation, it is not always mandatory.
- Many defense lawyers prioritize other hearings or personal matters due to low fees.
- Suspects often don't fully understand the consequences, as the investigating officer may not emphasize this.

## Article 10: Right of Access to a Lawyer in European Arrest Warrant Proceedings

- Proper protection for suspects in both executing and issuing member states.
- Communication between defense lawyers from both countries is essential for effective defense.

### Hungarian System:

- Hungary as executing state, a lawyer is appointed immediately upon detention.
- Hungary as issuing state, authorities notify the other member state about the lawyer's identity.
- Practical issue: Authorities often fail to automatically notify or share information with the defense lawyer.

### ECHR Decisions – Art. 10:

#### 1. Z.H. v. Hungary (2012):

1. Violation of personal freedom and failure to provide appropriate legal assistance to a disabled suspect.
2. Court emphasized the need for adequate legal protection and information to exercise defense rights.

#### 2. Bojin v. Hungary (2016):

1. Failure to inform suspect of rights and provide proper legal representation during interrogation.
2. Resulted in a Hungarian legal reform ensuring timely legal assistance at all stages of investigation.

## Directive (EU) 2016/343 on Strengthening Presumption of Innocence & Right to be Present at Trial



- Strengthens the presumption of innocence in criminal proceedings.
- Ensures suspects are treated with respect, without prejudice.

### Impact on Hungarian Legal System

- Presumption of Innocence:** Enshrined already in Hungarian Constitution and Criminal Procedure Act.
- Efficiency vs. Guarantees:**
  - **Goal:** Increase efficiency in criminal proceedings.
  - **Challenge:** Prosecution's dominant role impacts fairness and guarantees.

### Stats from Hungarian Criminal System:

- 2022: **Prosecution conviction rate 98.9%**, court decisions align with prosecution charges in 87.4% of cases.
- 2023: **Prosecution conviction rate 99.2%**, court decisions align with prosecution charges in 88.5% of cases.

**Key Question:** Can such high success rates align with the presumption of innocence and reasonable doubt?

## Directive (EU) 2016/343 - Public References to Guilt, Presentation of Suspects, Burden of Proof

### Article 4: Public References to Guilt



- Key Principle:** No public statements should refer to a person as guilty until proven in court.
- Hungarian Practice:** Despite civil remedies available, law enforcement often presents suspects' criminal activities as facts during early investigation stages, especially after large operations.

### Article 5: Presentation of Suspects and Accused Persons

- Key Principle:** Suspects should not be presented as guilty in public or court through physical restraints.
- Hungarian Practice:** Defendants without a final judgment can wear civilian clothing during procedural acts, and handcuffs are typically removed at the judge's discretion, depending on the transport staff's decision.

### Article 6: Burden of Proof

- Key Principle:** Prosecution bears the burden of proof. Any doubt should benefit the defendant.
- Hungarian System:** While the prosecution carries the burden of proof, judges often follow the indictment and investigate its provability, rather than just deciding on guilt or innocence. This approach is rooted in previous procedural laws since 1998.

## Directive 2016/343/EU - Presumption of Innocence & Right to Be Present at Trial

### Article 7: Right to Remain Silent & Not to Incriminate Oneself

- Mandatory briefing before every interrogation.
- Failure to provide the briefing = the statement cannot be used.

### Article 8: Right to Be Present at Trial

- Change in 2018:** Right to attend trial instead of an obligation.
- Defendant can waive attendance under certain conditions.
- Trials in absentia:** Possible if defendant cannot be located despite efforts.
- Issue:** Defense attorney can't verify the real efforts to locate defendant.

### Article 9: Right to a New Trial

- For trials in absentia:** Defendant can request a retrial within 30 days.
- Problems:**
  - **"Time of awareness":** Courts may consider mere prison reception as sufficient notice.
  - **Retrials:** Often treated as a formality.

## Directive (EU) 2016/1919 on Legal Aid

### Purpose and Content:

- The directive ensures legal representation for suspects in both national and cross-border criminal proceedings.

### Article 4: Legal Aid in Criminal Proceedings

#### • Legal Aid for Suspects:

- Suspects and accused persons without sufficient resources are entitled to legal aid if justice requires it.

#### Appointment of a Defense Lawyer:

#### Three Main Causes for Appointment:

- **Seriousness of the Case:**
  - When the case is serious enough that legal representation is necessary.
- **Request by Suspect or Prosecutor:**
  - If either party requests it.
- **Personal Circumstances of the Suspect:**
  - For example, if the person is a minor, speaks a foreign language, or is detained.

## Directive (EU) 2016/1919 on Legal Aid (Continued)

**Participation of a defense lawyer is mandatory** in the criminal procedure if:

- Imprisonment for five+ years,
- The accused is in custody,
- The accused is hearing impaired, deaf-blind, blind, speech impaired, incapable of communication,
- Not speaking Hungarian,
- The accused is otherwise unable to defend themselves personally,
- The court, prosecutor, or investigating authority has appointed a defense lawyer at the request of the accused or for other reasons deemed necessary,
- The law specifically provides for it.

### ***„Article 5: Legal aid in European arrest warrant proceedings***

Already explained the Hungarian rules for this at the first directive.

## Article 6: Decisions on Legal Aid:

### •Decisions on Legal Aid:

- Authorities must decide on legal aid applications **without undue delay**.
- Decisions must respect the rights of the defense.

## Appointment of Defense Lawyer in Criminal Procedures:

### •Automatic Appointment:

- In criminal proceedings, if legal representation is mandatory, a lawyer is appointed automatically without prior assessment.
- **Costs of Legal Aid:**
  - In Hungary, the state covers the appointed lawyer's fees.
  - If the defendant is found guilty, they must reimburse criminal costs, including the lawyer's fees.

## Issues with Personal Cost Exemption:

### •Narrow Criteria for Exemption:

## New System:

- Under the latest law, defense lawyers are no longer appointed by the authorities.
- The territorial bar association now appoints the lawyer.
- Electronic system.

## Article 7: Quality of Legal Aid Services and Training

### Significant Changes in Continuing Education for Defense Lawyers:

#### •Introduction of Mandatory Continuing Education:

- A significant change occurred five years ago in Hungary when a system of continuing education for lawyers was introduced. Prior to this, no such system existed.
- Now, lawyers must accumulate annual credit points, but these points can be earned from any area of law, not specifically criminal law.
- This has led to greater participation in courses, and the quality of these programs has notably improved.

#### •Challenges in Criminal Procedure Training:

- No specific criminal procedure training for those on the appointed defense lawyer list.
- Defenders with lack of experience in criminal cases.

## Closing Remarks

### •Impact of EU Directives on Hungarian Law:

- The three key EU directives have significantly transformed Hungarian criminal procedure law, especially concerning the rights of suspects.
- These directives have helped bring Hungary's legal system more in line with European standards, guaranteeing the legal protection of suspects and defendants throughout the process.

### •Future Developments:

- Going forward, Hungary should continue evolving its legal framework in line with EU legislation and ECHR rulings to ensure legal guarantees are upheld in practice.

### •Practical Challenges:

- Practical challenges remain, and the hope is that the insights shared in this discussion highlight the ongoing issues faced by defense lawyers in Hungary.



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

**Monika Szwarc**

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

**Warsaw, 20-21 February 2025**



Co-funded the European Union

## WHY – knowledge on EU directive is necessary (it needs to be implemented anyway)

- uniform interpretation of EU directive in all Member States
- conformity of national law with EU law in proceedings before national courts

! why national courts are important

! role of professional lawyer in the proceedings before national courts

# HOW TO APPLY EU LAW EFFECTIVELY

- case with EU element?
- reconstruction of EU law standard (relevant provisions +interpretation)
- reconstruction of national law standard (relevant provisions+interpretation)
- comparison – national standard conform with EU standard
- in case of conflict – consistent interpretation of national law (*von Colson* case-law)
- when consistent interpretation not possible – direct effect and primacy of EU law
- when non-application of national provision possible ? (Popławski II)

## General context of Dir. 2016/343

- minimum rules, Member States may provide a higher level of protection; in any case not lower than standards of the Charter of Fundamental Rights or the European Convention of Human Rights (Article 1, recital 9 and 48)
- application of the Charter – in all cases which are implementation of EU law by a given Member State (Article 51(1) of the CFR)
- application of provisions of the CFR with reference to provisions of the ECHR (and applicable case-law of the ECtHR) (recital 47)
- Article 47 (2) and (3), Article 48 of the CFR – interpretation with due account of Article 6 of the ECHR as a minimum threshold of protection (C-377/18, *AH*, para 41; C-688/18 *TX, UW*, paras 34-35)

## Scope of Dir. 2016/343

**Who:** natural persons who are suspects or accused persons in criminal proceedings

**What:** 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 2)

**YES:** decision on lawfulness of the Continuation of the pre-trial detention (C-310/18 PPU, *Milev*, para 40)

**YES:** a procedure under the national code of criminal procedure with the view to decide on the compulsory committal to a psychiatric hospital (penal purpose, safety grounds, C-467/18 *EP*, para 71)

**NO:** a procedure for the committal to a psychiatric hospital (under non-criminal law), implemented independently of any criminal proceedings (C-467/18, *EP*, para 66)

# Presumption of innocence

- General presumption of innocence (Article 3)

art. 3 of Dir. 2016/343 requires that in judicial proceedings for the committal to a psychiatric hospital (on therapeutic and safety grounds) of a person who, in a state of insanity have committed acts representing danger to society, the public prosecutor provides proofs that the person whose committal is sought is the perpetrator of acts deemed to constitute such a danger (C-467/18 *EP*, para 75)

**what is not governed by the directive:** the degree of certainty which the national court must have concerning the perpetrator of the offence, rules governing examination of various forms of evidence, the extent of the statement of reasons (C-310/18 PPU *Milev*, para 48)

## Presumption of innocence

- Prohibition of public references to guilt (article 4)
- without prejudice to decisions on pre-trial detention, provided that such decisions do not refer to the suspect or accused person as being guilty
- before taking a preliminary decision of a procedural nature, the judicial authorities might first have to verify that there is sufficient incriminating evidence (recital 16)

# Presumption of innocence

- directive does not preclude the adoption of preliminary decisions of procedural nature, such as a decision that pre-trial decision should continue, which is based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty (C-310/18 PPU *Milev*, para 48);
- article 4(1) of Dir. 2016/343 does not preclude a situation, where an agreement with the prosecutor to be approved by the court mentions both persons whose guilt has been established and persons whose guilt is still under consideration in the criminal process on the conditions:
  - 1) the reference is necessary for the categorisation of the legal liability of the person who entered in the agreement and
  - 2) the same agreement makes it clear that those other persons are being prosecuted in separate criminal proceedings and their guilt has not been legally established (C-377/18, *AH*, para 50)

## Right to remain silent and right not to incriminate oneself common minimum rules governing these rights

Article 7(4) of Dir. 2016/343: MSs may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons

C-467/19 PPU QR: Article 7(4) is a possibility and not an obligation to enable concluding an agreement of an accused person with a prosecutor

when EU law does not apply – „implementation of EU law”?

# Right to be present at the trial

**General rule:** Article 8 (1) of Dir. 2016/343; national law may impose an obligation to be present, but it is a matter for national law alone (C-420/20, *HN*, para 42)

## Trial in absence of suspect of accused person allowed when

- Such person was informed (in due time), of the trial and of the consequences of non-appearance
- The suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State (art. 8 (2) of Dir. 2016/343)

## C-688/18 *TX*, *UW* + ECtHR standard:

„a waiver of of the right to take part in the hearing must be established unequivocally and be attended by minimum safeguards commensurate with its seriousness; it must not run counter to any important public interest” (Sejdovic v. Italy, application no. 5658100/06)

# Trial in absence of suspect or accused in cases involving third-country nationals

**Q:** A third-country national prosecuted for forgery of documents at the border, criminal code require him to be present at his trial, but according to immigration legislation he should be removed from the territory of the MS where he is prosecuted – what about the right to be present at the trial?

**A:** not enabling that person to be authorised to enter (despite the prohibition), would deprive that person of any real possibility to exercise this right and deprive the conditions in Article 8(2) of the Dir. 2016/343 of any practical effect

Article 8(2) precludes the national legislation which permits a trial to be held in the absence of the suspect or accused person in such a situation (C-420/20 *HN*, paras 59, 66)

**???** What are practical implications for such incompatibility of national law before national crimina court???

## Trial in absence of suspect or accused in cases involving third-country nationals

**Q:** A third-country national was examined as a witness during the pre-trial stage of criminal proceedings, according to national law, without participation of the accused person and his lawyer; then, due to their illegal presence in this MS they were deported; during the judicial stage of criminal proceedings the examination of these witnesses in the presence of the accused person is impossible (no longer in the territory of this MS); is this „the right to be a participant or the right to be a spectator”?

**A:** Article 8(1) + Articles 47 and 48(2) of the CFR preclude the national legislation which allows the national court to base its decision on guilt or innocence of the accused person on the witness testimony obtained in the above circumstances, unless...

**C-348/21 HYA, para 62**

# What happens when national law is not conform with EU Directive

1) conform interpretation of national law

2) direct effect – art. 8(4) and 9 of the Dir. 2016/343 have direct effect

*„any person having the right to a new trial may assert that right against the Member State concerned, before national courts, either where that Member State has failed to transpose the directive into national law within the period prescribed or where it has transposed the directive incorrectly” (C-569/20, IR, 28)*

3) non-application of national provision if it is contrary to directly effective provision of the EU directive



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

**Yiannis Polychronis**

**Presentation on the application of the European  
Arrest Warrant in Cyprus**

**Warsaw, 20-21 February 2025**



Co-funded the European Union

# Historical Background in relation with the Republic of Cyprus.

## EU Accession

Cyprus joined the EU on May 1st, 2004, and immediately incorporated the EAW framework decision into its national law system. English was declared an official language for EAW submissions.

## Constitutional Amendments

Before the enactment of the legislation for the EAW the Constitution of Cyprus explicitly prohibited the extradition of Cypriot citizens, a provision that was common in many member states at the time of the adoption of the Constitution of Cyprus. The Constitution was amended in 2013 to allow for the arrest of individuals based on an EAW without a prior national arrest warrant. This amendment was necessary to comply with the EAW framework decision.

# Extradition of Cypriot Citizens.

## Constitutional Prohibition

The Constitution of Cyprus initially prohibited the extradition of Cypriot citizens. This provision was amended in 2006 to allow for extradition, but only for events occurring after Cyprus's EU accession.

## Supreme Court Ruling

In the case of Attorney General of the Republic v. Kostas Konstantinou (2005), the Supreme Court ruled that an EAW could not be executed against a Cypriot citizen without the prior amendment of the Constitution.

## Full Compliance

The Constitution was amended again in 2013 to remove the limitation on extradition of Cypriot citizens, achieving full compliance with the EAW framework decision.



# The problematic of potential Violation of Fundamental Rights.

The issue of potential violation of fundamental rights by the issuing member state has been raised in Cypriot courts.

While Cypriot courts generally have a high execution rate of EAWs, they have also rejected requests in cases where it was proven that extradition would violate the requested individual's fundamental rights.

Below, I will refer to cases where requests for the execution of EAWs were rejected because it was proven that the extradition would amount to a violation of the fundamental rights of the requested individual:





# 1. Convictions in Absentia.

- 1 In the Case of: The Attorney General and XXX, Political Appeal No. 230/2019, dated March 3, 2020 the Supreme Court rejected a request for extradition to Greece based on a conviction in absentia, citing inadequate legal safeguards for the requested individual.
- 2 The court ruled that the safeguards provided by the Greek authorities did not allow the requested individual to challenge the conviction and have the case retried, only through invoking force majeure.
- 3 This decision was followed in 2021, in the Case of: The Attorney General of the Republic v. Stavros Georgiou, Political Appeal No. 317/2020, February 17, 2021 where the Supreme Court again rejected an extradition request from Greece due to insufficient legal safeguards for the requested individual.

## 2. Member States with Systemic Problems.



### ROMANIA

In the case of Benyamin Steinmetz v. Attorney General of the Republic, dated November 3<sup>rd</sup>, 2023 the Cyprus Court of Appeal overturned a decision to extradite an individual to Romania, citing concerns about inhuman or degrading treatment in Romanian prisons. The Cypriot Court of the Appeal applied the test established by the European Court of Justice in the Aranyosi C-404/15, 05.04.2016



### POLAND

In the case of TOMASZ BOGDAN BIENIOSZEK v. Attorney General of the Republic, C- 2/24, 26/3/2024, Cypriot courts acknowledged a systemic problem in Poland regarding the independence of the judiciary, but ultimately decided that there was no real risk of violating the appellant's right to a fair trial.



### LITHUANIA

In the case of Attorney General of the Republic v VIACHESLAV NOVIKOV, dated on 20 of December 2024 the Cyprus Court of Appeal upheld a decision to reject extradition to Lithuania, citing concerns about violence among inmates in Lithuanian prisons.



# The Role of Cypriot Courts.

Cypriot courts play a crucial role in safeguarding fundamental rights in EAW cases. They are obligated to protect these rights when there is evidence of insufficient protection in the issuing member state.

This includes ensuring that the requested individual has a fair trial and is not subjected to inhuman or degrading treatment.

# Key Takeaways.

1

The EAW is a vital tool for cross-border criminal justice cooperation, but it must be implemented in a way that respects fundamental rights.

2

Cypriot courts have a responsibility to examine EAW requests and ensure that the requested individual's rights are protected.

3

Member states with systemic problems in their justice systems must address these issues to ensure fair and humane treatment of individuals subject to EAWs.

# CONCLUSION.

Continued dialogue and collaboration between member states are essential to ensure that the EAW framework is implemented effectively and fairly. This includes addressing concerns about potential violations of fundamental rights and strengthening safeguards for requested individuals. Towards this direction, all those involved in the matter must work.

THANK YOU !

I'M OPEN TO QUESTIONS!