TRAVAR INFOSHEETS

ON THE APPLICATION OF THREE EU PROCEDURAL RIGHTS DIRECTIVES (ACCESS TO A LAWYER, PRESUMPTION OF INNOCENCE, LEGAL AID) IN 9 EU MEMBER STATES

OCTOBER 2025

CO-FUNDED BY THE EUROPEAN UNION

Copyright

Publisher
©European Lawyers Foundation, October 2025
Viale Alessandro Guidoni 61, 50127 Florence, Italy
www.elf-fae.eu

Authors
Rupert Manhart (Austria), Asya Mandzhukova (Bulgaria), Demetris Lochias (Cyprus), Noémie Saidi Cottier (France), Alexis Anagnostakis (Greece), Gergely Tihamér Takács (Hungary), Piotr Chrzczonowicz (Poland), Laura Stanila (Romania) and Salvador Guerrero Palomares (Spain)

Contributors
Alonso Hernandez-Pinzon (European Lawyers Foundation), Jonathan Goldsmith (European Lawyers Foundation) and Vasileios Stathopoulos (European Lawyers Foundation)

Disclaimer
The project is co-funded by the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission or of any other organisation

Table of Contents

Introduction

Between 2020 and 2022, ELF and 7 EU Bars implemented the CrimiLAW project, which produced national infosheets on the application of three EU procedural rights directives (access to a lawyer, presumption of innocence, and legal aid) in their respective EU Member States. Building on the success of this publication, the TRAVAR project aims to update the existing infosheets (Cyprus, France, Greece, Hungary, Poland and Spain) and produce three new chapters (Austria, Bulgaria and Romania).

For the production of the infosheets, partners appointed national experts on EU criminal law who were responsible for drafting their own Member State's infosheet. Each national infosheet was divided into three blocks, one for each EU directive. The national infosheets which follow are the work of the following experts:

— Austria, Rupert Manhart,
— Bulgaria, Asya Mandzhukova
— Cyprus, Demetris Lochias
— France, Noémie Saidi Cottier
— Greece, Alexis Anagnostakis
— Hungary, Gergely Tihamér Takács
— Poland, Piotr Chrzczonowicz
— Romania, Laura Stanila
— Spain, Salvador Guerrero Palomares

We express our gratitude to these experts for the extraordinary work they have undertaken. To extend its impact beyond the TRAVAR project, this publication will be freely available for downloading on ELF's website. We hope it will prove a useful tool for lawyers dealing with cross-border criminal law cases in the EU, which would justify the work and enthusiasm that went into its production.

Austria

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

Austria has amended its laws several times in order to implement the three directives.

The right of access to a lawyer was fully implemented only after the Commission had started infringement proceedings. The Code of Criminal Procedure (StPO) made it possible to abstain from calling a defence counsel if waiting would lead to an "unreasonable prolongation of the detention", which loophole was closed in 2024. Section 157 (2) StPO prohibits the circumvention of the right of defence counsel to refuse to give evidence; as this protection extends also to documents and information that are within the control of the accused it considerably strengthens the right of access to a lawyer. A good example of how access to a lawyer can be guaranteed is the agreement between the Federal Ministry of Justice and the Austrian Bar on the provision of defence lawyers on standby.

The Directive on the presumption of innocence and the right to be present at trial in criminal proceedings required implementation as regards certain aspects of the right to take part in a trial. The presumption of innocence is well protected in criminal proceedings. Certain doubts exist as regards administrative offences.

Legal aid is well developed and can be guaranteed in all phases of criminal prosecution. In administrative criminal proceedings however, legal aid is only provided for proceedings before the administrative court, but not for administrative criminal proceedings before the authorities.

Principle sources of law
Directive 2013/48/EU: — Criminal Procedure Amendment Act I 2016 (Federal Law Gazette I No. 26/2016) — Criminal Procedure Amendment Act II 2016 (Federal Law Gazette I No. 121/2016) — Federal Law Gazette I No. 34/2024 Directive (EU) 2016/343 — Criminal Procedure Amendment Act 2018 (Federal Law Gazette I No. 27/2018) — Criminal Procedure Amendment Act 2024 (Federal Law Gazette I No. 157/2024) Directive 2013/48/EU — Criminal law EU Adaptation Act 2020 (Federal Law Gazette I No 20/2020)

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

Application of the Directive

Directive 2013/48/EU, which stipulates the right of access to a lawyer in criminal proceedings, in proceedings for the execution of the European Arrest Warrant and the right to notification and communication during deprivation of liberty, was implemented in Austria through several legislative amendments. It was implemented in several sources of law in Austria:

- In criminal procedure law inter alia through amendments to Code of Criminal Procedure (StPO)
- In administrative criminal law through Section 32a of the Administrative Offences Act (VStG) and other paragraphs
- In financial criminal law through Sections 77, 78, 84, 85 and 89 of the Financial Crimes Act (FinStrG)
- In judicial cooperation with EU Member States through Section 16a, Section 21 and Section 30a Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EUJZG)
- In the Extradition and Mutual Legal Assistance Act (ARHG) through Sections 9, 29, 31 and 32

The Code of Criminal Procedure (StPO), as the most important source of law, has been adapted to the requirements of the Directive through several amendments. The amendments related in particular to Sections 50, 59, 157, 163, 164, 171, 174 and 249 of the Code of Criminal Procedure (StPO). The implementation was mainly carried out by the Criminal Procedure Amendment Act I 2016 (Federal Law Gazette I No. 26/2016) and other legislative amendments such as Criminal Procedure Amendment Act II 2016 (Federal Law Gazette I No. 121/2016) and Federal Law Gazette I No. 34/2024.

Highlights

Until recently, there was a significant implementation gap: Section 164(2) of the Code of Criminal Procedure (StPO) made it possible to abstain from calling a defence counsel if waiting would lead to an "unreasonable prolongation of the detention". This exception was not compatible with the Directive, which only allows exceptions in "exceptional circumstances" and only for the purpose of "immediate action by the investigating authorities". This loophole was closed on 18.04.2024 by an amendment to the law. It is now possible to dispense with the involvement of a defence lawyer only if "immediate questioning or other immediate investigations appear absolutely necessary in order to avert a significant impairment of the investigation or of evidence". Thus, the option to waive the right to call a defence lawyer because this could lead to an extension of the detention was abolished.

One particularly important change was the introduction of the prohibition of circumvention in Section 157 (2) of the Code of Criminal Procedure (StPO). This prohibits the circumvention of the right of defence counsel to refuse to give evidence. The protection was extended to documents and information that are within the control of the accused or a co-accused. These documents are protected regardless of whether they are in the possession of the accused or the defence counsel, provided that they were created for the purpose of consultation or defence.

Section 32a of the Administrative Offences Act (VStG) stipulates that defendants have the right to contact a defence lawyer at any stage of the proceedings. i.e to contact a defence lawyer, to authorise him or her, to consult with him or her unsupervised. Pursuant to Section 32 para. 1 VStG, a "defendant" is any person suspected of an administrative offence from the first act of prosecution

directed against them until the conclusion of the criminal case. The legal implementation in the Administrative Offences Act was expressly mentioned as an implementation of Directive 2013/48/EU.

Criminal Procedure Amendment Act I 2016 (Federal Law Gazette I No. 26/2016 - BGBl I Nr 26/2016)

The Criminal Procedure Amendment Act I 2016 (Federal Law Gazette I No. 26/2016) mainly focused on the implementation of Directive 2013/48/EU.

— Strengthening the ban on circumventing the right to refuse to testify:

With the Criminal Procedure Amendment Act I 2016, Section 157 (2) StPO was extended to strengthen the prohibition on circumventing the right of persons subject to professional secrecy to refuse to testify. This amendment ensures that written or stored information exchanged between legal counsel and the accused enjoys the same protection as information exchanged verbally.

— Improvement of defence counsel's rights upon arrest:

The new provision in Section 59 of the Code of Criminal Procedure stipulates that arrested suspects must be allowed to notify and consult a defence lawyer before being questioned. The accused may waive this right, but must be informed of the consequences of this waiver and the possibility of revoking it at any time.

— Establishment of the lawyer on-call service:

A central element of the amendment to the law was the legal establishment of the lawyer on-call service (defence lawyer emergency call), which has existed since 2008 and enables accused persons to contact a "defence lawyer on call". The bar associations keep lists of these on-call defence lawyers and ensure that they can be contacted at any time.

Under certain circumstances, the defendant does not have to bear the costs of the "defence lawyer on standby", in particular if he or she is not financially able to do so or if the defendant is vulnerable.

— Possibility of limiting contact with the defence lawyer:

Contact with defence counsel can be restricted until the time of admission to prison, but only to the extent necessary for the granting of power of attorney and general legal information and only if there is a risk of significant impairment of the investigation. A written justification for this restriction must be sent to the accused within 24 hours.

Criminal Procedure Amendment Act II 2016 (Federal Law Gazette I No. 121/2016 - BGBl I Nr 121/2016)

It entered into force on January 1, 2017 and led to changes in several Austrian legal acts, including the Code of Criminal Procedure (StPO) and the EU-JZG (Judicial Cooperation in Criminal Matters with the Member States of the EU).

The most important improvements concerned Section 59 (1) and (4) and Section 174 (1) of the Code of Criminal Procedure. Particularly relevant was the amendment that an arrested suspect who does not yet have a defence lawyer must be given the opportunity to inform and consult a defence lawyer before being questioned. After being taken to prison, the accused must be guaranteed immediate notification of and access to a defence lawyer.

The amendment also improved access to legal assistance in extradition and surrender proceedings. By referring to Section 59 of the Code of Criminal Procedure, it was clarified that the person concerned, who is not yet legally represented, is entitled to access to legal assistance from the time of arrest or presentation for questioning.

Federal Law Gazette I No. 34/2024 (BGBl I Nr 34/2024)

The amendment brought significant changes to the Austrian Code of Criminal Procedure (StPO), in particular with regard to the rights of the accused and access to legal counsel.

In Section 59 (1) of the Code of Criminal Procedure, the provisions regarding the duty to instruct the accused were amended. Section 164 (2) of the Code of Criminal Procedure contains further clarification regarding the right of the accused to have a defence lawyer present during questioning (see above). Section 164 (2) of the Code of Criminal Procedure contains further clarification regarding the right of the accused to have a defence lawyer present during questioning.

Good practices

Agreement between the Federal Ministry of Justice and the Austrian Bar on the legal on-call service ("Rechtsanwaltlicher Bereitschaftsdienst")

The Directive obliges Austria to ensure that suspects have immediate access to legal counsel, in particular prior to their questioning by the police or other authorities, during identification measures or crime scene reconstructions, immediately after deprivation of liberty and in good time before their appearance in court. The regional Bar associations keep lists of "defence lawyers on standby". In order to ensure practical implementation, an agreement was concluded between the Federal Ministry of Justice and the Austrian Bar on the legal on-call service ("Rechtsanwaltlicher Bereitschaftsdienst"). For vulnerable defendants and under certain conditions, the costs of this on-call service are not charged to the defendant (Section 59 Code of Criminal Procedure (StPO)). Thanks to the combined legal adjustments and the establishment of the on-call service, Austria has now largely implemented the requirements of Directive 2013/48/EU, after previously existing gaps were closed.

Protection of documents regardless of whether they are in the possession of the accused or defence counsel

Section 157 (2) StPO prohibits the circumvention of the right of defence counsel to refuse to give evidence. The protection extends to documents and information that are within the control of the accused. These documents are protected regardless of whether they are in the possession of the accused or defence counsel, provided that they were created for the purpose of consultation or defence.

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

Application of the Directive

Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings was implemented in Austria by Criminal Procedure Amendment Act 2018 (Federal Law Gazette I No. 27/2018). Specifically, this law amended Section 221 (1) and Section 430 (5) of the Code of Criminal Procedure (StPO) in order to implement the requirements of the directive into Austrian law.

Further transpositions were made through amendments to Sections 286 (1) and (2), 294 (5), 296 (3) and 471 of the Code of Criminal Procedure by Criminal Procedure Amendment Act 2024 (Federal Law Gazette I No. 157/2024).

Overview

The directive aims to strengthen two key aspects of criminal proceedings:

- The presumption of innocence as a fundamental basic right in criminal proceedings.
- The right of the accused to be present at the trial.

It was considered that only the second aspect – the right of the accused to be present at the trial – required amendments, in order to safeguard this right throughout all types of criminal proceedings and instances. As regards presumption of innocence, a specific transposition text for Directive 2016/343/EU was not adopted, since Austria considered that its law was in conformity with Community law. The presumption of innocence is a fundamental legal principle in Austrian criminal proceedings. It was expressly enshrined by the reform of the Code of Criminal Procedure, in force since January 1st, 2008, in Section 8 of the Code of Criminal Procedure, according to which "every person shall be presumed innocent until convicted by a final judgment". Previously, this principle was not explicitly included in the Code of Criminal Procedure, but was repeatedly described by the Constitutional Court as "a principle that governs the entire Austrian legal system" (VfSlg 11.062/1986, 14.260/1995)

The presumption of innocence is protected on several levels:

- Under constitutional law via Art 6 para 2 ECHR (European Convention on Human Rights)
- Under Union law through Art 48 para 1 CFR (Charter of Fundamental Rights)
- Under simple law through Section 8 Code of Criminal Procedure (StPO)
- Through the implementation of Directive 2016/343/EU

Key aspects of the protection of the presumption of innocence

- Information to the public/media:

Informing the media about ongoing criminal proceedings is only permissible if the timing and content of such information does not violate the personal rights of the persons concerned, the principle of the presumption of innocence or the right to a fair trial. This applies both in judicial criminal proceedings and in administrative criminal proceedings (Section 35b of the Public Prosecutor's Act (StAG), § 34a Administrative Penal Act (VStG)).

- Protection against self-incrimination:

An important aspect of the presumption of innocence is the right not to be forced to incriminate oneself (*nemo tenetur*). The ECtHR derives the prohibition of coercion to self-incriminate directly from the presumption of innocence. This right was also enshrined in Directive 2016/343/EU as an important aspect of the presumption of innocence (Art. 7) (VfSlg 5235/1966, 9950/84, 10.394/1985).

— Continued validity after termination of proceedings:

In principle, the presumption of innocence continues to apply even after the proceedings have been terminated. A person released from prosecution has the right not to be treated as guilty by state bodies with regard to the allegations (OGH Bsw 61985/12, 12 Os 128/22y (RS0134284)).

— Independence and impartiality of judges:

The independence and impartiality of judges is an essential prerequisite for safeguarding the presumption of innocence. The ECJ has ruled that the independence and impartiality of judges are essential prerequisites for guaranteeing the presumption of innocence.

— Burden of proof:

The presumption of innocence also affects the burden of proof. If a court has doubts about the guilt of the accused, it must rule in favour of the accused. This can be seen, for example, in the teleological reduction of Section 2 (1) (b) of the Criminal Law Compensation Act (StEG), according to which an examination of the lack of suspicion must be omitted in the case of compensation claims following acquittals (OGH , AUSL EGMR 15 Os 97/04, 13 Os 77/03, 11 Os 44/03 (RS0117963)).

Protection under Administrative Criminal Law

Section 34a of the Administrative Penal Act (VStG) stipulates that information to the media is only permissible if its timing and content do not violate the personal rights of the persons concerned, the principle of the presumption of innocence or the right to a fair trial.

The presumption of guilt for "disobedience offences" is anchored in Section 5 para. 1 second sentence of the Administrative Penal Act (VStG). It states that negligence is to be assumed without further ado in the event of a violation of a prohibition or non-compliance with a commandment if the perpetrator does not credibly demonstrate that he is not at fault. This is a rebuttable presumption that shifts the burden of proof.

However, the presumption of guilt is generally considered as a violation of the presumption of innocence, as the burden of proof for the realisation of the objective facts remains fully with the authority. It does not have the effect that a suspect must prove his innocence; rather, the authority must a) prove that the (objective) facts of the case have been committed by the accused and b) if there are indications that cast doubt on his culpability, also clarify the question of culpability *ex officio* (VwGH 20.2.1967, 615/66, VwSlg 7087 A/1967; VwGH 17.01.2024, Ra 2023/02/0228).

Good practices

Information to the media is only permissible if its timing and content do not violate the personal rights of the persons concerned, the principle of the presumption of innocence or the right to a fair trial.

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings has been implemented in Austria through several legal provisions in various areas of law.

Implementation mainly took place by Criminal law EU Adaptation Act 2020 (Federal Law Gazette I No 20/2020) through amendments to the Code of Criminal Procedure (StPO), in particular through Section 59 para. 5, Section 61 (2), Section 62 (2a) and Section 171(4)(2). It should have been implemented by May 5, 2019.
In other areas of law, the Directive was transposed by:

- Section 29(3) Extradition and Mutual Legal Assistance Act (ARHG)
- Sections 5 to 38 of Judicial cooperation in criminal matters with EU Member States (EU-JZG)
- Section 77 (3a) Financial Crimes Act (FinStrG)

The Code of Criminal Procedure already contained comprehensive provisions on the appointment of a legal aid lawyer for the accused in criminal proceedings (see in particular sections 61 et seq. of the Code of Criminal Procedure). The amendments to the Code of Criminal Procedure, the EU-JZG and the ARHG intended to fully comply with Directive (EU) 2016/1919.

Code of Criminal Procedure (StPO)

According to Article 4 (4) of the Legal Aid Directive, Section 59 (5) of the Code of Criminal Procedure was amended to the effect that the accused does not have to bear the costs for the involvement of a "defence counsel on standby" under certain conditions. This applies for questioning on the conditions of pre-trial detention. Once the accused has been remanded in custody, the accused already had to be granted legal aid by the court according to § 61 para. 1 no. 1 of the Code of Criminal Procedure (StPO). Vulnerable defendants also do not have to pay the costs for the involvement of a "defence counsel on standby". Specifically, persons who are blind, deaf, mute or similarly disabled or are unable to make decisions due to mental illness or a comparable impairment are covered. On this occasion, the criterion of language of the court, which made clear that the fact that the defendant did not understand the language of the court did not mean that he or she required a defence counsel, was also dropped (RIS-Justiz RS0124386).

A significant change was the introduction of Section 62 (2a), which, in implementation of Directive 2016/1919/EU (legal aid) and Directive 2016/800/EU (juvenile criminal proceedings), stipulates that a legal aid lawyer must be "provided without delay" and must be granted an appropriate preparation period.

Juvenile Court Act (JGG)

Special provisions on the necessary defence for juvenile defendants were created or revised in the Juvenile Courts Act:

- The cases of necessary defence have been considerably expanded
- Legal representatives are granted extended rights of participation
- The economic criteria for the assignment of a legal aid lawyer are less strict

The provisions of Section 39 JGG stipulate that in proceedings against juveniles, a defence counsel must be appointed in certain cases, and if the defence is not otherwise provided for, a defence counsel must be appointed *ex officio*. In all cases in which the costs would impede the juvenile's progress, a legal aid lawyer must be appointed.

Judicial Cooperation in Criminal Matters with the Member States of the EU (EU-JZG)

If the person has been assigned a legal aid lawyer in accordance with section 61 (2) of the Code of Criminal Procedure, the activities also include, if necessary, the support of their defence counsel in the executing state.

Administrative Criminal Law

In administrative criminal proceedings, it is problematic that legal aid under Austrian law is only provided for proceedings before the administrative court, but not for administrative criminal proceedings before the authorities. According to Article 4 of Directive 2016/1919/EU, the provision of a defence lawyer free of charge should also be possible in proceedings before the authority, not only in court proceedings. Due to the expiry of the transposition period, legal aid must now be granted in direct application of Art. 4 of the Directive.

Good practices

The system of "defence counsel on standby" allows defendants to have timely access to defence, in many cases for free. While legal aid is usually not paid directly to the lawyer, but remunerated by a contribution to the lawyer's pension systems, defence counsel on standby receive remuneration both for their standby availability as well as for the time spent with the detained person.

Bulgaria

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

All main procedural rights under the three Directives have been long established to one or another extent in Bulgarian national legislation. So, as far as Bulgaria is concerned, the purpose of the three Directives was to clarify, expand and add value and efficiency to these already existing procedural rights.

This goal was not equally achieved.

While the system of legal aid was well detailed, at least in theory, before the adoption of the Legal Aid Directive and only required minor amendments, the national provisions on the presumption of innocence, the right to be present at trial and access to a lawyer are still short of the scope, equivalence and effectiveness required by the respective two procedural Directives, evidence of which are the pending infringement procedures against Bulgaria for incorrect and incomplete implementation of the Presumption of Innocence Directive (INFR(2023)2093) and of the Right of Access to a Lawyer Directive (INFR(2024)2003).

One of the significant issues hindering the full implementation of these Directives, noted by the European Commission as well, is the lack of the procedural figure of "*a suspect*" in Bulgarian criminal procedure.

Apart from the formal transposition of the Directives, problems occur with their practical application even where the relevant national legislation is in place. These relate mainly to access to a lawyer in the early hours of detention (right to access to a lawyer), the public reference to guilt (presumption of innocence), and the quality and financial provision for legal aid.

Principle sources of law
— Constitution of the Republic of Bulgaria — Criminal procedure code (PCP) — Act on the Ministry of Interior — Act on the extradition and the European Arrest Warrant — Legal Aid Act — Act on the responsibility of the state and the municipalities for damages

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

Application of the Directive

The right of access to a lawyer is a fundamental right in Bulgarian national law to the extent that it is enshrined in the Bulgarian Constitution, whose article 56 states that "*Every citizen has the right to defence when his rights or legitimate interests are violated or threatened. In state institutions, he may also appear with a defence attorney.*"

Even before the adoption of the Directive on the right of access to a lawyer, this right was explicitly granted to the accused (Art. 55 CPC), to detained persons (Art. 72, para. 5 of the Act on the Ministry of Interior), to persons subject to a European Arrest Warrant (Art. 43, para. 4 of the Act on the EAW) as well as in certain cases to those questioned as witnesses (Art. 121, para. 2 CPC).

In addition, even before the Directive, those detained without charge had the right to a telephone call to inform a third party of their detention, as well as to contact consular authorities, if they are not Bulgarian citizens - Art. 74, para. 2, b. "d" and "e" of the Act on the Ministry of Interior. Accordingly, the detained accused had the right to have their family, their employer and the Ministry of Foreign Affairs notified of their detention, if the accused was not a Bulgarian citizen - Art. 63, para. 7 CPC and art. 386, par. 4 CPC, applicable to minors.

In 2019, but not before infringement proceedings were initiated by the European Commission against Bulgaria for failure to transpose the Directive on the Right of Access to a Lawyer, legislative amendments were undertaken in several laws aimed at unifying, clarifying, expanding and bringing into line with the Directive the right of detainees to a lawyer, to inform a third party, to contact a third party and to inform the consular authorities in the event of the detention of a foreign citizen.

Thus:

- In the Act of the Ministry of Interior, Art. 72, para. 5, the obligation of the detaining authorities to inform the detainee of the right to refuse a lawyer and the consequences thereof was added, and the right to information and contact with consular authorities under Art. 7, par. 1 of the Directive was fully transposed in Art. 74, para. 2, b. "e"

- In the CPC, Art. 55, para. 2, the right of the accused to a lawyer was specified, explicitly stating that the accused has the right to information that will facilitate their choice of one, that they have the right to freely communicate with their lawyer, to meet with the lawyer in private, to receive advice and other legal assistance, including before and during the interrogation and any other procedural action involving the accused. In Art. 63, para. 7, item 1, it was specified that the accused may notify their family or a third person of their detention. The right under Art. 7, para. 1 of the Directive was fully transposed into Art. 63, para. 8 of the Criminal Procedure Code, and in the following paras. 9, 10 and 11, derogations from this right were provided for, with the possibility of a judicial appeal against the same

- In various laws granting specific rights to authorities other than the police to detain persons, the rights of these persons to a lawyer and to inform consular authorities upon their detention were provided for or supplemented - Customs Act, Art. 16a, para. 5 - 8, Act on the National Security Agency - Art. 124b, para. 2, item 6 and para. 9, Military Police Act, Art. 13, para. 2

- In the Act on the EAW Art. 43, para. 5 was added, transposing the right to a lawyer in the issuing Member State pursuant to Art. 10, para. 4 of the Directive

In 2019 and then in 2023 art. 386 of the CPC, as well as art. 74a of the Act on the Ministry of Interior, applicable to minors, were consequently amended to meet the requirements of art. 5, para. 2 of the Directive for informing another adult of the detention, but still on 13.03.2024 the Commission informed Bulgaria that this implementation was not correct.

Despite the seemingly massive legislative amendments, aimed at implementation of Directive 2013/48/EU, there are significant criticisms as to the way in which it has been transposed. Thus, due to the absence of the figure of a suspect in Bulgarian criminal proceedings, the rights under the Directive, as provided for in national law, do not extend to suspects. As a result, and despite the existing procedural possibilities for suspects to exercise their right of access a lawyer, in practice this right is much more limited than provided for in the Directive. Bulgaria was informed of this non-compliance by the European Commission on 03.10.2024 within the pending Infringement proceedings against the member-state (INFR(2024)2003). Furthermore, on 07 May 2025, the European Commission announced that it has decided to refer Bulgaria to the CJEU for failing to correctly transpose the Directive into its national law.

Furthermore, on a practical level, despite the existing legal framework, access to a lawyer in the early hours of a person's detention in police stations is often obstructed for reasons that could be described as "organisational", but, in reality, stem from deliberate delay and failure of the police authorities to provide assistance to the lawyer to visit the client. Lawyers standing in front of police stations, waiting to be admitted, is a common sight. In these first minutes and hours of detention, it is largely commonplace that procedural actions such as personal searches, which include explanations from the detained person about the items found on him or her, or protocols for voluntary delivery, again including personal explanations from the detained person, are carried out without a lawyer. In these early minutes and hours of detention, the person often signs a declaration waiving their right to a lawyer, under influence by police officers that they do not need one or that it will only aggravate their situation. Proving that the refusal of a lawyer was made under pressure is almost impossible.

The confidentiality, guaranteed by art. 4 of the Directive, also represents a practical issue. Police stations rarely provide separate premises for meetings between lawyers and their clients, and their communication usually takes place in the corridor outside the investigator's office or even inside it, in the absence of the investigator. In prisons lawyers usually communicate with their client by phone with poor sound, through a glass partition, together with other lawyers and detainees.

Good practices

Despite the fact that Bulgarian legislation does not provide protection to suspects, this deficiency is diminished to a certain extent by the constitutional right to defence in all cases in which a citizen feels that their rights and interests are threatened and by the constitutional right to appear with a lawyer before any institution – Art. 56 of the Constitution of the Republic of Bulgaria. Generally, while 5-10 years ago various obstacles were created by the authorities in the practical application of this broad constitutional right, in recent years officials have learned that this right is irrevocable and currently lawyers are admitted even during interrogation within informal checks and before a person has gained any procedural capacity.

Additionally, in 2005, when the figure of "*suspect*" was removed from the newly adopted Criminal Procedure Code, the new legislation provided for the right of the witness to consult with a lawyer, when he/she considers that his/her right to incriminate himself/herself may be affected (art. 122, para. 2). This right was further upgraded with the right to appear with a lawyer for questioning before the investigation authority. Thus, actual suspects, interrogated as "witnesses", may still benefit from the right of access to a lawyer, albeit on a different national legal ground. Nevertheless, witnesses, subjected to confrontation with another witness or accused person for example, are not always allowed to participate with their lawyer accompanying them. One should also note the Judgment of the CJEU in Case C-209/22, which states that in some cases, such as the particular case of a roadside check, the Directive shall on the one hand apply and the person shall be deemed a "suspect" within the meaning of the Directive, regardless of the existing national provisions or lack of such. On the other hand, the same judgment states that such cases are not actually contexts in which the person – an actual suspect - should have had the right of access to a lawyer, although in such case the Bulgarian court should examine whether the presence of a lawyer was objectively necessary for the suspect to be able to exercise their defence rights practically and effectively.

Important case law of the CJEU, providing for further clarification of the application of the figure of "suspect" within the meaning of the Directive in Bulgarian legal practice, is contained in the following judgments (List as of 22.04.2025):

- C-467/2018
- C-608/2021
- C-209/2022

In 2023 the letter of rights, provided in another procedural Directive – Directive 2012/13/EU on the Right to Information in Criminal Proceedings - was finally adopted in the Instruction of the Ministry of Interior on the set of rules for detention. Although adopted in implementation of another Directive, this letter of rights finally provided for a clear, precise and exhaustive explanation of all procedural rights of detainees, including the rights under the Directive on the Right of Access to a Lawyer. This letter of rights must be presented to detainees upon their arrest.

The right of access to a lawyer is a fundamental right in Bulgarian criminal proceedings. As such, breach of this right entails inadmissibility of evidence collected through such a breach – Art. 105, para. 2 of the CPC. Nevertheless, such evidence remains on the case file and although formally excluded from the body of evidence, it can be seen by the judge/s. This procedural guarantee is not effective enough in cases of voluntary waiver of the right to a lawyer under police pressure.

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

Application of the Directive

The presumption of innocence is a long-established principle in Bulgarian law, laid down in:

- Art. 31, para. 3 of the Constitution of the Republic of Bulgaria
- Art. 16 of the Criminal Procedure Code

Both provisions state that the accused shall be presumed innocent until proven guilty by a final verdict.

A manifestation of the principle provided for in Art. 6, para. 2 of the Directive can also be found in art. 303, para. 2 of the CPC, which provides that the court shall find the defendant not guilty if the accusation is not proven beyond a reasonable doubt.

Another manifestation of the principle provided for in Art. 7, para. 1 of the Directive can be found in Art. 55, para. 1 of the CPC, which provides for the right of the accused person to refuse to give explanations about the accusation.

The national definition of the presumption of innocence however does not reflect the broader scope of Directive 2016/343, since little to no legislative changes were adopted for its proper implementation.

Thus, in its current national version, the presumption of innocence does not extend to suspects in Bulgaria. The figure of the suspect was formally abolished in Bulgarian criminal proceedings more than ten years ago and at present there is no explicit procedural norm guaranteeing the right of suspects to benefit from this principle.

Furthermore, no legislative change was adopted to the CPC to transpose the explicit prohibition under Art. 4 of the Directive on presenting the accused and suspects as guilty in public statements from the authorities before their guilt has been proven in accordance with the law. At the same time, the same law contains Art. 198, which allows for the unconditional disclosure of investigation materials only with the permission of the prosecutor and without any possibility for the person affected by such disclosure to challenge the permission in court.

Also, there are no explicit legal provisions in Bulgarian law to prohibit the presentation of suspects and accused persons as guilty in court or before the public, through the use of physical restraint measures, in accordance with art. 5 of the Directive.

Bulgaria has not transposed the Directive properly as regards the right to be present at trial, either. More precisely, there is no legal provision providing for the obligation to inform a person who has been tried in absence about the decision and the possibility of appealing the decision and the right to a new trial, in accordance with art. 8, para. 4 of the Directive. Furthermore, the Bulgarian law (art. 423, para 3 of the CPC) provides that proceedings relating to the reopening of criminal proceedings shall be discontinued if the person convicted in absentia fails to appear at trial without a valid reason.

Because of the failure of Bulgaria to transpose the above provisions of the Directive, currently an infringement procedure is pending against the state (INFR(2023)2093).

There is currently a pending interpretative case before the Supreme Court of Cassation, which must answer the question of whether the state should be liable for damages against a person who, although not officially declared an accused, is in practice the only suspect.

Good practices

Tip 1: The wording of Art. 3 of the Directive and the additional explanations contained in paragraph 12 of the Preamble to the Directive enable the addressees of the presumption of innocence to be determined, and these are not only officially accused persons, but also any other person, from the moment of his/her arrest or from the moment in which the competent authorities, through actions or acts, including unofficial ones, have made it clear that the given person is suspected of having committed a crime or even of having been suspected of having committed such a crime. Therefore, the presumption of innocence should also extend to persons detained for 24 hours with an arrest warrant under art. 72 – art. 74 of the Act on the Ministry of Interior, as well as to those who have the status of a "witness" in criminal proceedings under the CPC, when the circumstances of the case indicate that they are prime suspects. The latter have the right not to incriminate themselves and to refuse to give evidence on this ground (art. 121, para. 1 of the CPC). In 2019 the right not to incriminate oneself was also explicitly provided for in art. 72, para. 5 of the Act on the Ministry of Interior, in relation to 24-hour police arrests.

Tip 2: Although the CPC was not amended in accordance with Art. 4 of the Directive, the Act on the Liability of the State for Damages Act was nevertheless amended in 2023 as in Art. 2, para. 1, item 8 it provided for a new basis for state liability for damages caused to citizens, namely - in cases of an established violation committed by a pre-trial body through the disclosure of materials on the investigation in violation of the presumption of innocence or in a public statement in which the accused person is presented as guilty. Thus, at present there is no explicit prohibition rule, but there is a remedy.

Tip 3: In its judgment as of 16.01.2025 on Case C-400/23 the CJEU practically declared that:

1) the current national legislation of Bulgaria, which provides that when a person is convicted *in absentia* and is given a custodial sentence where the conditions laid down in Article 8(2) of the Directive were not satisfied, that person shall be entitled to request a new trial, but is required to appear in person before the court, or else his/her request will be rejected without further action being taken, does not meet the requirements for effectiveness and equivalence.

2) In accordance with Article 8(2) of the Directive, a copy of the decision rendered in absentia is to be provided to the person concerned at the time that person is informed of that decision or shortly thereafter, as well as clear information 1) that he or she is entitled to a new trial and 2) about the proceedings allowing him or her to request such a trial.

This judgment could be cited in reopening proceedings under art. 423 of the CPC and where necessary, the court could be requested not to apply the restrictive national rule of art. 423, para. 3 on the ground that it contradicts EU legislation.

Other judgments of the CJEU in relation to the Presumption of Innocence Directive in the context of Bulgarian legislation (List as of 22.04.2025):

- C-439/16 PPU
- C-310/18 PPU
- C-688/18

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

The Right to Legal Aid Directive is the only one of the three directives, covered by this Infosheet, for which there is no pending Infringement proceedings against Bulgaria. Indeed, the legal aid system was relatively well detailed in Bulgarian legislation even before the adoption of Directive (EU) 2016/1919 - both in a dedicated Legal Aid Act and in the main procedural law in criminal proceedings - the Criminal Procedure Code (CPC).

After the adoption of the Directive, the only significant changes, aimed at bringing Bulgarian legislation into line with the Directive, were adopted in March 2024. These are:

- the explicit inclusion in Art. 55 of the CPC of the right of the accused to legal aid and the right of the latter to receive information about the conditions for obtaining it under the Legal Aid Act
- the explicit provision in Art. 23, para. 2 and Art. 25, para. 1 of the Legal Aid Act, that a person who has used legal aid as an accused, defendant or party in another type of judicial proceedings, on the ground that such person lacks funds, and wishes to have a lawyer and the interests of justice require this, the latter shall not be liable for reimbursement of the costs of legal aid in the event of conviction

Currently, Bulgarian legislation provides for two cases in which legal aid is granted to persons in criminal and related proceedings (Art. 21, item 2 and item 4 of the Legal Aid Act):

- in cases of procedural representation
- in cases of detention of persons under the Act on the Ministry of Interior, the Military Police Act, the Customs Act and the State National Security Agency Act

In turn, the right to legal aid in cases of procedural representation is also divided into two cases (Art. 23, para. 1 and para. 2 of the Legal Aid Act):

- in cases where legal aid is mandatory by law
- in cases where the accused or defendant in a criminal case does not have the means to pay for a lawyer, wishes to have one and the interests of justice require it

According to Art. 94, para. 1 of the CPC, legal aid is mandatory in criminal proceedings when one of the following applies:

1. the accused is a minor
2. the accused suffers from physical or mental disabilities that prevent him/her from defending him/herself
3. the case concerns a crime punishable by imprisonment for not less than ten years or another more severe punishment
4. the accused does not speak Bulgarian
5. the interests of more than one accused are contradictory and one of them has a defence attorney

6. a request has been made for the indefinite detention of the accused, or the accused is detained

7. the case is being heard in the absence of the accused

8. the accused is unable to pay for a lawyer, wishes to have one and the interests of justice require this.

In the cases of items 4 and 5, the accused/defendant may waive his/her mandatory defence.

The provisions of the Legal Aid Act are drafted in such a way that they practically also cover proceedings on requests for the surrender of persons on the basis of an issued European Arrest Warrant, insofar as these proceedings are also criminal. Nevertheless, and for the avoidance of any doubt, it would be appropriate for the European Arrest Warrant Act to be specifically amended and, similarly to the CPC, to expressly provide for both the right of the arrested requested person to legal aid and his/her right to be informed of the conditions for its provision, including in the issuing member state, as per the requirements of art. 5 of the Directive.

The right to legal aid cases of detention of persons under the Act on the Ministry of Interior, the Military Police Act, the Customs Act and the State National Security Agency Act as per Art. 21, item 4 of the Legal Aid Act ensures partial coverage of the right to legal aid to some suspects. However, this would apply only to those suspects who have been deprived of their liberty on one legal ground or another. In contradiction to Art. 2, para. 1, letter "c" and para. 3 of the Directive and as far as the figure of suspect does not exist in Bulgarian legislation, those persons, who are factual suspects and are not detained, but are required to participate in identity parades, confrontations or reconstruction of crime scenes, will not be entitled to legal aid, as such persons are not protected by specific national legal provisions, guaranteeing their right of access to a lawyer under Directive 2013/48/EU.

The Legal Aid Act (Art. 23, para. 3 and para. 5) contains legal provisions corresponding to the rules for assessment of the financial inability of the person to appoint a lawyer, provided for in Art. 4, para. 2 and para. 3 of the Directive.

The Legal Aid Act (Art. 25 – Art. 30) also contains detailed procedures, ensuring the swift provision of legal aid, as well as the right to challenge refusals thereof, in accordance with Art. 4, para. 5, Art. 6 and Art. 8 of the Directive.

The national legal rules, somewhat corresponding to the requirements of Art. 7 of the Directive on quality of legal aid and on training of lawyers providing legal aid, are found in Art. 30, Art. 37 and Art. 38 of the Legal Aid Act. The Legal Aid Bureau, on its side, makes efforts to provide regular training and to improve the qualifications of registered legal aid lawyers.

Despite the existing legal provisions and these efforts, however, insufficient financing, extremely low remuneration and often excessive delays in payment of remuneration compromise the quality and effectiveness of legal aid on all levels.

Good practices

Although the strict interpretation of national legislation leads to the conclusion that persons eligible for legal aid are not supposed to reimburse the costs of legal aid only in certain cases (when they have the capacity of defendants or accused and they cannot afford a lawyer, wish to have one and the interests of justice require it), meaning that detained persons who have been provided legal aid on the ground that they have been detained should pay for legal aid, the Legal Aid Bureau in Bulgaria does not make use of its right to claim for such reimbursement.

Cyprus

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

Generally, there have been varying levels of importance and value added through the implementation of the directives in question. It must be noted that the Directive on the right of access to a lawyer (Directive 2013/48/EU), has not been implemented fully. Under Cypriot law, the right is only safeguarded for arrested persons or persons deprived of their liberty. Under the directive, the right is provided for suspects, from the moment they are notified that they are suspected persons. This is an important omission. The matter has of course been dealt with by the Supreme Court, which has directly applied the Directive, interpreting it as applying to suspects who are not deprived of their liberty.

The Directive on the right to legal aid (Directive (EU) 2016/1919) is the directive which has had the biggest impact on the national system, as it has led to the amendment of existing Cypriot legislation in a manner whereby arrested persons and suspects now have a right to legal aid, prior to being brought before a competent criminal court and before being interrogated or any evidence-gathering acts by the investigative authorities.

Directive (EU) 2016/343 has also of course brought about amendments, mainly to the Criminal Procedure Law. However, the Cypriot Constitution in conjunction with Article 6 of the European Convention on Human Rights, as well as national case-law (which adopts and applies relevant European Court of Human Rights judgments) already provided significant protection of the right to be presumed innocent. Therefore, the amendments, although bearing some significance, have mainly served to reiterate the right, rather than adding to it.

Principle sources of law
— Rights of Suspects, Persons Arrested or Deprived of Their Liberty Law 163(I)/2005 — European Arrest Warrants and Extradition of Wanted Persons Between Member States of the European Union, Law 133(I)/2004 — Criminal Procedure Law, Cap. 155 — Legal Aid Law 165(I)/2002 — Administration of Justice Law 33(I)/1964

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

Application of the Directive

In the Republic of Cyprus, the general right of access to a lawyer was protected from the establishment of the Republic, by way of Article 11.4 of the Constitution, which provides for the right of an arrested person to have access to a lawyer of their choice. A similar protection is afforded to defendants before criminal courts, by way of Article 12.5(c) of the Constitution.

Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant (hereinafter "EAW") proceedings and on the right to have a third party informed upon deprivation of liberty, has been applied in the Cypriot national legal system by amendments made to Law 163(I)/2005, titled the "Rights of Suspects, Persons Arrested or Deprived of Their Liberty Law" as well as to Law 133(I)/2004, titled the "European Arrest Warrants and Extradition of Wanted Persons Between Member States of the European Union Procedures Law".

Various rights protected by the said directive are introduced into the national system by those two Cypriot laws. The rights of suspects who are deprived of liberty are protected by Law 163/2005, whereas Law 133/2004 protects those arrested pursuant to a European Arrest Warrant.

Law 163/2005 applies only to persons who have been **arrested or are deprived of their liberty**. The directive, however, clearly states that it is to apply to suspects or accused persons from the moment they are made aware that they are suspected or accused of having committed a criminal offence. Therefore, the harmonisation process by the Cypriot Parliament has not been completed in a manner which is consistent with the directive itself. In fact, the only amendment made in respect of persons who are suspected of having committed a criminal offence has been to the **title** of the law. Specifically, whilst the title of the law includes suspects (not yet arrested or deprived of liberty), nonetheless the text of the law remains unaltered. This, in the author's opinion, is a very important omission on the Cypriot Parliament's behalf.

However, it should be noted that the Supreme Court of Cyprus, in its landmark judgment in FLH v. The Republic, Criminal Appeal 4/2020, Dated 31/01/2022, ruled that the harmonisation process pursuant to Directive 2013/48/EU was indeed obsolete, in applying only to those somehow deprived of their liberty. It went on to decide that, given this erroneous application of the Directive under national legislation, it would directly apply the Directive. It therefore ruled that a statement taken from a person who alleged they had been raped, who had become a suspect in the eyes of the police authorities during questioning for the offence of causing public mischief (knowingly giving a false statement to the police), ought to have been informed of their rights as a suspect, which included, most importantly, the right to access a lawyer. That statement was therefore deemed inadmissible.

Despite that judgment in 2022, the Cypriot Parliament is yet to amend the law to reflect the erroneous application of the Directive.

Nonetheless, there is much added value to the national legal system due to the introduction of the directive. First, Law 163/2005 afforded only limited protection to suspects deprived of their liberty. For example, prior to the amendments made to the Cypriot law, there was no right of a suspect to come into contact with family members, nor was there any provision allowing a suspect of foreign nationality to contact the consular authorities of his or her country in the Republic. These are welcome additions that are of huge value - especially the latter, as it is often very difficult for a foreign national to exercise rights comprehensively. The fact that there is a right to inform and seek help from consular authorities will no doubt boost mutual trust between Member States in each other's criminal justice systems.

Law 163/2005 has of course, since its amendment, expanded the rights afforded to arrested persons (and suspects of course, considering the Supreme Court's judgment outlined above), granting them rights to have access to a lawyer before any evidence-gathering acts by the police authorities as

well as access to a lawyer before being interrogated by an officer. Additionally, the law has been amended to allow a personal meeting between an arrested person and the lawyer of their choice. The arrested person also has the right to have their lawyer present during evidence-gathering acts by the investigative authorities, as well as to have the lawyer take part by way of clarifications in the interrogation of an arrested person. This is important as it very often happens that a suspect being interrogated will be in a state of distress and confusion. The presence of a defence lawyer, clarifying certain points, will no doubt aid suspects in that respect.

The added value of the directive is high. Whilst the provisions of the Cypriot Constitution, the relevant Supreme Court case-law, Article 6 of the European Convention on Human Rights (ECHR) and the relevant European Court of Human Rights (ECtHR) case-law overlap with the directive at various points, nonetheless, in Cyprus at least, there needed to be a specific list of rights for those who are arrested or suspected of having committed a criminal offence.

Indeed, whilst most of the rights are not new, investigative officers were frequently unaware of the relevant Supreme Court case law, meaning there were many cases in which arrested persons would argue that their constitutional rights were violated during the investigative phase of proceedings and would seek to have relevant evidence deemed inadmissible. With the implementation of this directive however, the police authorities now follow strict "checklists", which they have drawn up based on the amended laws. Thus, arrested persons are usually afforded most of the rights provided for by the directive, which are clear and unambiguous, given the legal certainty now in place.

Undoubtedly, the rights protected under the directive are much better protected in light of the implementation of the directive into national law. Apart from the obvious reasons which can be drawn from what has already been mentioned above, the added factor of a potential ruling by the Court of Justice of the European Union (CJEU) on a point of law means that Cypriot courts must be very careful when examining complaints of a violation of a right protected by the directive. Unfortunately, there are times in Cyprus where the courts might prefer to "overlook" certain procedural missteps, rather than see the "criminal" exonerated. With the added value of a CJEU ruling on a specific point, when a point of law is argued based on a European legal instrument, then of course there is little scope for such occurrences.

Thus, the added procedural protection afforded by EU legislation is of significant value.

Good practices

- In light of the Supreme Court judgment in FLH v. The Republic, Appeal Number 4/2020, Law 163/2005 applies to suspects and not only arrested persons
- Where the police suspect a person has committed any criminal offence, they must provide that person with their rights in writing, in their preferred language. This document is readily available in a plethora of languages and is handed to the suspect prior to any evidence gathering acts and specifically prior to taking any statements. This document of course includes information that the suspect has a right to access a lawyer of their choice
- The rights conferred on suspects applies uniformly to those arrested under a European Arrest Warrant. Police authorities do not discriminate between those suspected within the Cypriot jurisdiction or those wanted by other Member States
- Most lawyers are very proactive in how they defend the rights of suspects and almost always dictate or schedule any interrogations of clients to a time and date which allows them to be present, if the client so wishes. In the vast majority of instances, the police will therefore call counsel representing a suspect who may be in police custody, informing them of their intention to take any additional statements from the former

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

Application of the Directive

This directive has been implemented by way of amendments made to the Criminal Procedure Law (Cap. 155) and also to Law 163/2005. Specifically, 3 new articles were added to the Criminal Procedure Law, Articles 3A, 3B and 3C. They deal with the right to be presumed innocent (3A), the prohibition of public references to the guilt of a suspect or accused person (3B) and the right against self-incrimination (3C). Furthermore, Article 3(1)(e1) of Law 163/2005 establishes an obligation of a police officer to inform an arrested person (or suspect) of their right to silence. Indeed, Article 33 of the same law, provides that it is a criminal offence, punishable with imprisonment of up to 6 months or a fine not exceeding €1700 for a police officer to violate the right of a suspect to be informed of their rights under Article 3 (above).

These rights were, of course, already safeguarded by the Constitution of Cyprus (Article 12.1 & 30) and the relevant provisions of the ECHR.

As regards the right of an accused to be present at their trial, this right was already safeguarded by Article 63 of the Criminal Procedure Law. Cyprus, being a common law jurisdiction, has a very different attitude, regarding it, mostly, to be a necessity that an accused be present at his or her trial. In fact, very few cases are ever heard or proceed in the absence of an accused person, with most cases adjourned and/or even discontinued pending arrest where an accused is not present. Some cases are dismissed by judges where the prosecution has been unable to locate and arrest the accused and bring him or her before the court. Only recently have these rules been relaxed somewhat, with trial in absence warnings being issued to accused persons. This is the way in cases dealing with minor offences, however, which are punishable with monetary sentences.

Further, given the fact that only very few cases are ever dealt with in the absence of an accused, there has never been a need for a mechanism which deals with the "re-opening" of cases and the procedural guarantee provided for in Article 9 of the directive. Nonetheless, given that some minor cases do now proceed in the absence of the accused, such a mechanism is desirable. To date however, it is unfortunately missing from the Cypriot criminal justice system. One can, in fact, only seek leave to appeal to the Court of Appeal in such cases, with a very low success rate based on the relevant case-law.

Article 9 of the Directive includes the possibility of new evidence being produced at any such retrial. Whilst not aimed at implementing those provisions, it is important to note that in 2023, the Cypriot legal system underwent major reform. Specifically, a new second tier of justice was established via the Court of Appeal, whereas the Supreme Court was split into two separate courts, the Supreme Court and the Supreme Constitutional Court. Under section 9(3)(d) of the Administration of Justice Law 33(I)/1964 (as amended), the new Supreme Court has the power to order a retrial of criminal proceedings which ended in a conviction, by either the Court of Appeal or a Court of First Instance, where new evidence comes to light which could, potentially, overturn the decision either in part or wholly. Again, whilst not enacted with Article 9 of the Directive in mind, this provision does overlap enough with those safeguards to be mentioned.

Therefore, reflecting the above, whilst added procedural guarantees from EU legislative acts are always welcome, the reality is that the directive and its implementation have not made a significant difference to the criminal justice system in Cyprus, as these rights were already adequately protected under the Constitution and the Criminal Procedure Law. The added value, therefore, of the directive in the national legal system is negligible, given the structure of the criminal justice system in place in the Republic.

Despite the above, one cannot deny that the added protection at EU law level certainly does enhance the level of protection. The importance of a Union legal instrument is undeniable. Therefore, the right of having a point of law decided by the CJEU is an important one, as it allows an accused person who complains of a violation of a procedural safeguard provided for by the directive to have the point decided at the highest possible level of justice.

Good practices

- Cyprus, being a common law jurisdiction, has always perceived the presence of an accused person before a Court as a responsibility, not just a right. Therefore, in their vast majority and always in serious matters, a case will be postponed or even discontinued pending the bringing of an accused person before a court
- Cases where new evidence emerges which could potentially overturn a conviction can be "re-opened", in light of the recent reforms of the Cypriot justice system
- Given the Cypriot Constitution's protection of the right to be presumed innocent, in line with Article 6 of the ECHR, the right is deeply ingrained in the legal philosophy and culture of the island
- There are strict provisions establishing criminal liability on police officers who violate the rights of suspects

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

The Directive on the right to legal aid has undoubtedly had the biggest impact on the national system. Whilst there already was an adequate legal aid system in Cyprus prior to the implementation of the directive, it has, nonetheless, both expanded and improved the legal aid procedure in Cyprus.

The directive has been implemented by way of amendments to existing legislation. Amendments were made to Law 163/2005 and also to the Legal Aid Law (Law 165(I)/2002).

Law 163/2005 has been amended so that where a person has been arrested, they may apply for legal aid at the police station and have free access to a lawyer **before** being brought before a court. This is of vital importance as it allows an arrested person or a person deprived of their liberty the opportunity to access a lawyer through legal aid at the earliest possible opportunity and of course, prior to any interrogations or evidence-gathering acts on behalf of the police. This includes suspects who are not deprived of their liberty but are wanted for questioning.

In spite of the above, Article 3A of Law 163/2005 provides that where the arrested person is brought before a competent court within 24 hours of their arrest, the legal aid application is finally determined and approved by the competent court. It is unclear what the situation might be where an application is then turned down by the court and what happens to the legal representation of the arrested person, or indeed if the lawyer is allowed to claim expenses for having visited the arrested person prior to the latter being brought before a competent court.

A person must be informed of their right to legal aid the moment they are arrested, under Article 3(1)(c) of Law 163/2005. Again, as mentioned previously, it is a criminal offence for a police officer to omit to inform an arrested person of their rights under Article 3, under Article 33, which provides for imprisonment of up to 6 months or a fine not exceeding €1700.

Further, the Legal Aid Law referred to above has been amended so that those who are subject to European Arrest Warrant Proceedings are also entitled to apply for legal aid (Article 4A). What is especially important is that the right of a requested person to legal aid in the Republic of Cyprus, in cases where it is the Republic that is the requesting state, is also recognised.

The Cypriot Legal Aid Law provides that a person who is eligible for legal aid may appoint the lawyer of their choice. The court will only appoint a lawyer where the suspect, arrested or accused person, does not opt to choose a lawyer.

Courts in Cyprus usually apply a means test to determine eligibility for legal aid. However, there has always been a power vested in criminal courts to appoint a lawyer for an accused person, where the interests of justice so require. This power has been in the Criminal Procedure Law since its creation and of course predates the directive. Thus, there is in place a merits test, as per the directive.

All in all, the added value of the Legal Aid Directive has been significant, as it has expanded legal aid to cover requested persons by way of European Arrest Warrants, where the Republic of Cyprus is both the issuing and the requesting state. Additionally, it has led to the amendment of Law 163/2005, whereby suspects and arrested persons can have access to legal aid lawyers **immediately** and before being brought before a competent court, which means they are able to fully exercise their right to legal representation before any evidence-gathering acts, as per the directive.

What is disappointing, at this stage at least, is the lack of any implementation of the articles of the directive which provide for the quality of legal services provided, and of course training for those

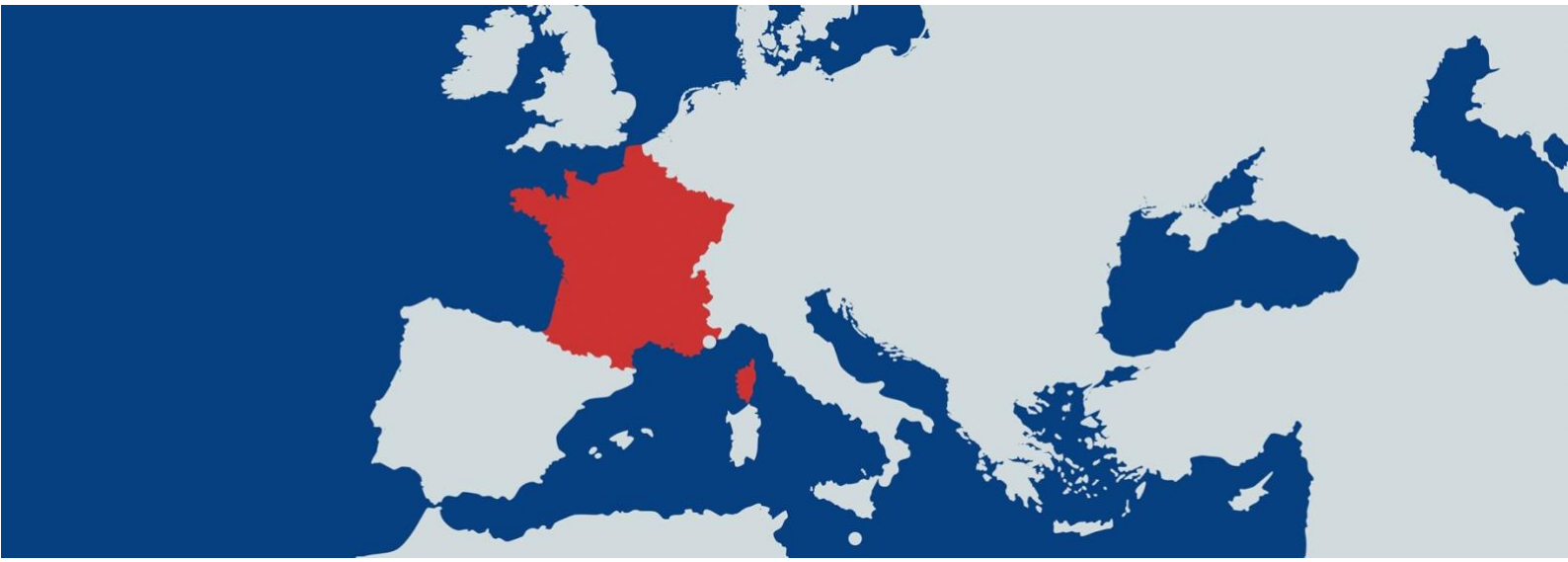
involved in the decision-making process. Indeed, a common problem in the determination of legal aid applications is where it is determined that the applicant has **some** source of income. In those situations, it is often the case that applications are rejected, without the courts taking into consideration the standard and cost of living in Cyprus, other expenses the applicant may have, and the other considerations provided for in the means test of the directive. This is likely a consequence of lack of training on the part of those involved in the decision-making process and illustrates that the directive's provisions concerning adequate training are of vital importance.

Overall, however, and despite the fact that certain provisions of the directive have not been implemented fully, it is clear that the right to legal aid has been enhanced to an important degree by the directive, especially in the case of arrested persons and their right to legal aid (and consequently the right to legal representation) before any evidence-gathering acts or interrogations. Likewise, the enhanced right to legal aid in European Arrest Warrant proceedings, in cases where Cyprus is both the issuing or requesting state, is of huge value. If the general spirit of the directive can also be implemented through rigorous training of judges and those involved in the determination of legal aid applications, then the Cypriot criminal justice system will further benefit.

Good practices

- Where the police suspect a person has committed any criminal offence, they must provide that person with their rights in writing, in their preferred language. This document is readily available in a plethora of languages and is handed to the suspect prior to any evidence gathering acts and specifically prior to taking any statements. This document of course includes information that the suspect has a right to access a lawyer of their choice, as well as their right to legal aid, if they do not have the means to cover legal expenses themselves
- It is a criminal offence for an officer to omit to inform an arrested person that they have the right to legal aid (amongst other rights)
- The right to legal aid in Cyprus includes the right of a suspect to a lawyer of their choice (where legal aid has been approved), although that is under the condition that a lawyer accepts such an appointment under legal aid
- All court procedures are effectively paused where an accused person informs a Court of their intention to apply to receive legal aid. The Courts will not even take a plea from an accused person in the vast majority of cases pending the determination of a legal aid application, which is usually dealt with expeditiously

France



Infosheets on the Application of Three EU Procedural Rights Directives

Summary

As regards the application of the three directives referred to, the only one that required a real change in French legislation is Directive 2013/48/EU on access to a lawyer. It prompted great strides in French positive law, and in particular has settled the question of the right to a lawyer in a free hearing ("*audition libre*") or when a suspect is brought before the prosecutor at the time when the consequences of deprivation of liberty are decided. It has also strengthened the right of suspects to the assistance of a lawyer during the investigation and inquiry, and improved the right of persons deprived of liberty to inform and communicate with a third party.

Directives 2016/343/EU and 2016/1919/EU on the right to be presumed innocent and the benefit of legal aid, respectively, did not have the effect of significantly transforming our law, insofar as it was considered that French law was already in line with European law.

It is true that the law on legal aid already provided for the minimum standards set out in Directive 2016/1919/EU. As regards the presumption of innocence, many provisions were already codified, and the legislator considered that it was not necessary to introduce new provisions. However, the issue of the right to be presumed innocent still needs to be improved.

Principle sources of law

- Criminal code
- Procedural criminal code
- Civil code

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

Application of the Directive

Directive 2013/48/EU was transposed into French law by a law of May 27, 2014, at the same time as Directive 2012/13/EU on information in criminal proceedings.

It was then transposed by a law of June 3, 2016 and a decree of October 28, 2016.

Finally, it was further transposed by a law of April 22, 2024.

For decades, the harmonisation of rules on the fundamental rights of suspects in the Member States had been carried out through the case law of the European Court of Human Rights.

French criminal procedure had been thus thoroughly reformed under the influence of ECHR case law through the adoption of the law of April 14, 2011 on police custody.

Nevertheless, this law did not take into account all the lessons of European jurisprudence.

The transposition of the two directives mentioned above marked the entry into force of the European Union in French criminal procedure, and enabled French law to fully recognise the procedural rights of suspects.

I. The law of May 27, 2014

The law of May 27, 2014 allowed for the creation of a true status for suspects heard outside the framework of police custody – called free suspect ("*suspect libre*") - effectively ensuring the protection of the rights of all suspects, regardless of their hearing setting.

The main consequence of the transposition of the 2013/48/EU directive was that suspects in free hearings now benefit from a wide range of rights, including the right to the assistance of a lawyer if the offence for which the suspect is heard is punishable by imprisonment.

In practice, a suspect can only be freely heard ("*audition libre*") on the facts after having been informed of his or her rights, and in particular the right to be assisted by a lawyer.

The suspect can then be assisted by a lawyer (chosen by the suspect or appointed by the court) during the hearing or when heard at the same time as victims or other suspects ('confrontation').

Under the same conditions as in police custody, the lawyer has the right to speak with the client before the hearing or confrontation, to ask questions at the end of the hearing or confrontation, and to submit written observations that must be attached to the case file.

In addition, the transposition laws provided, for foreign persons in custody in France, the right to notify the consular authorities of the State of which they are nationals and to communicate with them.

II. The 2016 law and decree

The 2016 law and decree have, on the one hand, strengthened the right of suspects to the assistance of a lawyer during the investigation and inquiry, and on the other hand improved the right of persons deprived of liberty to inform and communicate with a third party.

A. Assistance of a lawyer

Based on the 2016 transposition law, every suspect has the right to the assistance of a lawyer (chosen or court-appointed) when participating in a crime reconstruction operation, and for the

lawyer to be present alongside the judicial police officer and the witness during a suspect identification session.

The person must be informed of these rights before these operations are carried out. At the close of operations, the lawyer may submit written observations which will be attached to the proceedings.

In addition, if a European Arrest Warrant is issued by France, and if the person arrested in the executing Member State so requests, the Public Prosecutor's Office must provide him/her with all relevant information enabling him/her to choose a lawyer or to have a lawyer appointed by the court.

If France is the executing state, the Public Prosecutor must also inform the arrested person that he/she may be assisted by a lawyer in the issuing Member State. If the person so requests, the request is immediately forwarded to the competent judicial authority in the issuing Member State.

Finally, it is now provided that a person who is the subject of a free hearing, police custody or prosecution, and who has not initially requested the assistance of a lawyer, may subsequently change his or her position and make such a request at any time.

B. Right to inform and communicate with third parties

Concerning the right to communicate with a third party during police custody, the right to notify a third party was already provided for in French law. The new provisions indicate that the judicial police officer can decide on the modalities of this interview, and can refuse to notify a third party when this would facilitate the commission of an offence. However, if the request concerns consular authorities, the judicial police officer may never oppose it beyond the forty-eighth hour of custody.

In addition, the framework for the decision of the competent judicial authority to postpone informing the parent or employer of the person in custody has been reinforced (it is allowed only if if this decision is, in view of the circumstances, indispensable in order to collect or preserve evidence or to prevent a serious attack on the life, liberty or physical integrity of a person).

After 48 hours, the decision to extend the postponement must be made by a judge.

However, on September 23, 2021, the Commission decided to open an infringement procedure against France (as well as 3 other Member States) by sending a letter of formal notice, on the grounds that France had not correctly transposed Directive 2013/48/EU. The Commission considered that certain national transposition measures notified by the four Member States fall short of the requirements of the directive. In particular, the Commission has identified shortcomings in relation to possible derogations from the right of access to a lawyer as well as from the right to have a third person informed when being deprived of liberty. The Member States have two months from the notification to reply and take the necessary measures to address the shortcomings identified by the Commission. Failing this, the Commission may decide to go to the next stage of infringement proceedings by sending a reasoned opinion.

III. The law of April 22, 2024

The 2024 law, like the previous one, has, on the one hand, strengthened the right of suspects to the assistance of a lawyer during police custody, and on the other hand improved the right of persons deprived of liberty to inform and communicate with a third party (family member, friends employer or colleagues).

A. Assistance of a lawyer during police custody

Based on the 2024 law, every suspect who is detained in police custody has the right to the assistance of a lawyer (chosen or court-appointed), from the start of the procedure or at any time during it.

It is important to note that if the appointed lawyer either cannot be contacted or declares that he/she is unable to attend within two hours of being notified, or if the person in custody has asked to be

assisted by a court-appointed lawyer, the President of the bar association has to be informed and shall appoint a court-appointed lawyer.

In addition, the obligation to have a lawyer present during the hearings and the confrontations linked to police custody has been generalised: if the person in custody requests the assistance of a lawyer, these measures cannot begin without the lawyer's presence.

However, there is an exception, and the judge may postpone the lawyer's presence for these measures, if this appears essential for the treatment of the case, either to avoid a situation that might compromise criminal proceedings, or to prevent imminent and serious harm to the life, liberty, or physical integrity of a person. The lawyer's presence may be deferred for 12 or 24 hours, depending on the gravity of the case, but always with the judge's written and motivated authorisation.

B. Right to inform and communicate to third parties

As previously stated, the right to communicate and notify a third party during police custody was already provided for in French law. The 2024 law introduced among its changes the extension of this right to a third party who can be "any person".

It is important to note also, that the person contacted by the detainee, who can therefore be anyone, also has the right to designate the lawyer who will defend the interests of the detainee in police custody, provided that the latter confirms the said appointment.

Good practices

Since the law of April 22, 2024, France has aligned itself with European standards on the right to a lawyer in police custody, by putting an end to the two-hour waiting period that allowed a person in police custody to be questioned without the presence of a lawyer after this period had expired. Indeed prior to July 1, 2024, the date on which the law came into force, the lawyer's presence at the hearing was in fact conditional on his/her arrival at the police station before the expiry of a two-hour period from the moment he or she was notified of the custody.

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

Application of the Directive

The deadline for transposition of the directive was April 1, 2018.

This deadline has not been met by many Member States, including France, which has still not adopted a specific transposition text for Directive 2016/343/EU, since it considers that its law was in conformity with Community law.

In France, the right to the presumption of innocence is governed by:

- Article 9 of the Declaration of the Rights of Man and of the Citizen of 1789
- Article 9-1 of the Civil Code
- Article 226-13 and Article R. 642-1 of the Criminal Code
- Article 65 and Article 413 bis Customs Code

as well as provisions of the Code of Criminal Procedure, as in the preliminary article.

The law of June 15, 2000 reinforced the protection of the presumption of innocence. The text of the law of June 15, 2000 harmonised French legislation with European standards. The reform included the introduction of appeals against the verdicts of the assize courts ("*Cour d'assises*") and the strengthening of the protection of the presumption of innocence of persons implicated by the justice system.

There are certain procedural exceptions, concerning the characterisation of certain offences. For example, an individual who cannot prove that he/she has sufficient means to support himself/herself, while living with a person who habitually engages in prostitution, is deemed to be commiting the offence of procuring. Similarly, in customs matters, goods that are prohibited or heavily taxed in France are deemed to have been smuggled if they are discovered within the customs radius without a valid travel document. These are presumption of guilt, but the French constitutional court has validated them as they are exceptional and can be contested, by not being irrebuttable.

Given the frequent and systematic use of cubicles (glass cages) in correctional courtrooms, after April 1, 2018 the European Commission was alerted by French lawyers as the body responsible for monitoring the implementation of Union law, concerning the problems of implementation of Directive 2016/343, and particularly its Articles 5 & 10 (having regard to the fact that the use of glass cages in a trial is within the discretionary power of the presiding judge).

On June 12, 2018 the Commission responded that it was currently analysing France's implementation measures and that it would take all appropriate measures to ensure the effective application of the Directive.

However, as of today, this question put to the Commission does not seem to have been answered.

Good practices

A number of measures have been put in place to prevent breaches of the presumption of innocence:

- **Summary proceedings**, enabling the judge to prescribe in summary proceedings any measures to put an end to an infringement of the presumption of innocence, which may result from the public presentation of a person as guilty, giving rise to an investigation, when he/she has not yet been convicted of any offence.

- **Notification of the right to remain silent,** and not to contribute to one's own incrimination: any person suspected or prosecuted must be notified of the right to remain silent on the facts of which he/she is accused before any observations are taken and before any questioning takes places. (This is fairly recent in France and is becoming more widespread in many proceedings.)

In the event of infringement of the principle, the French legislator has provided for means of redress:

- **Pecuniary compensation**: the code of criminal procedure provides for compensation to be paid to a person who has been remanded in custody during proceedings, and that have ended in dismissal, acquittal or release.

- **Moral reparation** : the investigating judge may order, at the request of the person concerned or, with that person's consent, on his own initiative or at the request of the public prosecutor, either the publication of all or part of his decision to dismiss the case, or the insertion of a statement informing the public of the reasons of and the decision, in one or more newspapers designated by him.

With a view to improvement, a working group on the presumption of innocence was set up in 2021, on the intiative of the then Minister of Justice, which submitted a report on October 14, 2021. It put forward 40 proposals to prevent infringements of this legal principle. These focused, among other things, on adapting the civil and criminal law system to cope with the increase in infringements, particularly when commited online.

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

Directive 2016/1919/EU had to be transposed into national law by the Member States by 25 May 2019. France has not transposed this directive.

In France, this issue was already provided for by:

- Law No. 91-647 of July 10, 1991
- Decree No. 91-1266 of December 19, 1991
- Decree No. 2005-790 of July 12, 2005

In fact, the law in France was already largely in line with the European provisions on legal aid, which already went beyond the minimum standards provided for by Directive 2016/1919/EU. That said, since the directive was issued, two noteworthy events have occurred: a report on legal aid in France and a 2020 decree reforming legal aid:

- Deployment of the Legal Aid Information System (SIAJ)

The "Emergency Mission" report (May 2025) confirms that the SIAJ is gradually being rolled out in many courts. The aim is to speed up the processing of applications and improve communication between litigants, lawyers, and courts.

- Decree No. 2020-1717 of December 28, 2020, implementing Law No. 91-647 of July 10, 1991 on legal aid and relating to legal aid and assistance from a lawyer in non-judicial proceedings

This decree has entered into force from January 1, 2022. It overhauls legal aid (conditions, procedure, notification, documentation), completely rewrites the rules applicable to judicial and non-judicial proceedings, updates the ceilings, etc.

Good practices

In France, legal aid :

- does not depend on the seriousness of the offence
- is granted within a reasonable period of time, including before any questioning, in particular by the police, or before certain investigative or evidence-gathering measures, as provided for in the directive
- may be granted provisionally (this is automatic for persons in police custody)
- is continued in the event of an appeal being lodged
- gives the beneficiary the right to the assistance of court officers and to exemption from the fees and expenses that he or she would normally have to bear
- gives the person a free choice of lawyer and the right to change lawyers
- is granted to minors
- may be appealed in the event of a refusal or delay of decision

— is guaranteed to all, even foreigners. Indeed since a decision of May 28, 2024 of the French constitutional council, legal aid is guaranteed to all persons residing in France, even though the residence is illegal. By this decision, the council censured as contrary to the principle of equality before the law, legislative provisions excluding foreigners who were not legally resident in France from legal aid, except in special cases defined by the law.

Greece

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

The EU Procedural Rights Directives have been incorporated into the internal legal order by the introduction of the domestic Laws 4478/2017, 4569/2019 and 4689/2020, as approved in the years 2017, 2019 and 2020 respectively. The above provisions have also been included in an almost identical format in the New Code of Criminal Procedure (CCP), in force from 01/07/2019 and currently in place.

Objectively, the letter and spirit of the rights of the directives have been integrated into the above-mentioned domestic legislation to a very large degree. However, certain elements provided by the directives appear not to have been included explicitly in the domestic laws and so have been omitted from implementation.

The basic concept of the issues raised in the directives (e.g. access to a lawyer, the presumption of innocence, and legal aid) was widely accepted in domestic theory and practice long before the introduction of the directive's provisions. However, in the process of the integration of the directives into the domestic legal framework, certain critical points of these principles and values were more specifically mapped out and developed in more detail, for the better protection and interpretation of the rights.

Principle sources of law
— Article 47 - Law 4478/2017 - Subject matter and scope (Articles 1 and 2 of Directive 2013/48/EU) — Article 48 - Law 4478/2017 - The right of access to a lawyer in criminal proceedings (Articles 3 and 9 of Directive 2013/48/EU) — Article 49 - Law 4478/2017 - Amendment of Article 100 of the Code of Criminal Procedure (Article 4 of Directive 2013/48/EU) — Article 50 - Law 4478/2017 - Addition of Article 99B to the Code of Criminal Procedure (Articles 5, 7, 8 and 13 of Directive 2013/48/EU) — Article 51 - Law 4478/2017 - Addition of Article 99C to the Code of Criminal Procedure (Articles 6, 7 and 8 of Directive 2013/48/EU) — Article 52 - Law 4478/2017 - Amendment of Article 96 of the Code of Criminal Procedure (Article 9 of Directive 2013/48/EU) — Article 53 - Law 4478/2017 - Right of access to a lawyer, information of a third party and communication with third parties in the European arrest warrant proceedings (Article 10 of Directive 2013/48/EU)

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

Application of the Directive

This directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision 2002/584/JHA ('European arrest warrant proceedings') to have access to a lawyer, to have a third party informed of their deprivation of liberty, and to communicate with third persons and with consular authorities while deprived of liberty.

After the introduction of Directive 2013/48/EU in the national legal system, the following provisions were put in place:

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, b) the right to receive free legal advice and the conditions for it, c) the right to be informed about the accusation, d) the right to interpretation and translation, and e) the right to remain silent and not to incriminate themselves.

2. The information in accordance with para. 1 is to be 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 generated to specify that the information has been communicated to the suspect or accused individual and must be 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

    b) the right and conditions to provide free legal advice

    c) the right to information about the accusation

    d) the right to interpretation and translation

    e) the right to remain silent and not to incriminate themselves

    f) the right of access to the material of the case file

    g) the right to inform the consular authorities and an additional person of their choice

    (h) the right to emergency medical care

    (i) the maximum number of hours or days during which the accused person may be deprived of liberty before being brought before a judicial authority, and

    (j) information on the possibilities of challenging the lawfulness of the arrest or detention.

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.

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

1. An accused person deprived of his liberty shall have the right to communicate, without undue delay, with at least one third person indicated by him. In exceptional cases and to prevent the imminent danger referred to in para. 2 of the previous Article, the competent authorities may limit or suspend the exercise of the above right. In this case, it shall first be examined whether the accused person can communicate with another person, as indicated by him.

2. An accused person who is a foreigner and deprived of his liberty shall have the right to communicate, without undue delay, with the consular authorities of the State of which he is a national. He shall also have the right to be visited by his consular authorities, communicate and correspond with them, and have his legal representation arranged by them, provided that those authorities have no objection.

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 shall have the obligation to appoint ex officio a lawyer for the accused person accused of a felony, unless the latter expressly and irrevocably declares that he waives this right. He shall have the same obligation in misdemeanours if the accused expressly requests it.

   If the accused in a felony or misdemeanour is a minor, the investigating judge is obliged to appoint a defence counsel ex officio, without the possibility of waiving this right.

4. Under no circumstances may the communication of the accused person with their lawyer be forbidden. This communication is completely confidential.

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.

Article 15 of the Law 3251/2004 about EAW Proceedings

Arrest and rights of the wanted person

1. When a wanted person is arrested based on a European arrest warrant, he or she shall immediately be provided with a document containing information on his or her rights and shall be taken without delay to the prosecutor of the court of appeal.

   The appeal prosecutor shall, after verifying his identity, inform him of the existence and content of the warrant, of his right to have recourse to the services of a legal representative and an interpreter in the executing Member State and the issuing Member State, of his right to inform a third person and to communicate with third persons and with the consular authorities of the State of which he is a national, and of the possibility for him to consent to being brought to the issuing State under Article 17 of this Regulation. The above information and the statements made by the requested person shall be the subject of a report under the conditions laid down in Articles 148 to 153 of the Code of Criminal Procedure. (Note: as amended by Article 11 of Law 4236/2014, Government Gazette A 33/11.2.2014 (Article 5 of Directive 2012/13/EU) and by Article 53(1) of Law 4478/2017.)

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 appeal prosecutor in the executing Member State shall inform the competent authority of the issuing Member State without delay. The appeal prosecutor in that Member State shall, without undue delay, provide the requested person with information to facilitate the appointment of a lawyer. The arrested person shall be entitled to request and receive copies of all documents himself or through his lawyer at his own expense. (As amended by Article 33 Law 4947/2022, effective as of 22/6/2022.)

   '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.'

Non-Incorporated Provisions: Exceptional Circumstances for Derogation

A significant point of divergence between the Directive and the Greek Code of Criminal Procedure concerns the explicit provision for exceptional circumstances that would allow for temporary derogation from the right of access to a lawyer at the pre-trial stage. The Directive outlines specific scenarios where such derogation might be permissible, including:

- geographical remoteness making access to a lawyer impossible without undue delay
- an urgent need to avert serious adverse consequences for the life, liberty, or physical integrity of a person
- an imperative immediate action to prevent substantial jeopardy to criminal proceedings

These specific exceptional circumstances, as introduced by the Directive, have not been explicitly incorporated into the Greek Code of Criminal Procedure. This means that the Greek legal framework lacks clear, codified provisions detailing when and how such temporary derogations can be applied, potentially leading to interpretational challenges.

Good practices

- Right of Access to a Lawyer

Mandatory Ex Officio Appointment for Felonies with No Waiver for Minors:

For persons accused of a felony, a lawyer must be appointed *ex officio* (by official duty), unless the accused explicitly and irrevocably waives this right.

Crucially, for minors accused of any felony or misdemeanour, an *ex officio* defence counsel must be appointed, and this right cannot be waived. This provides an exceptionally strong safeguard for vulnerable individuals, ensuring they always have legal representation regardless of their or their guardians' wishes.

— Absolute Confidentiality of Lawyer-Client Communication with Exclusionary Rule:

Any evidence obtained through surveillance or control of lawyer-client communication is strictly prohibited from use and renders the entire process invalid if used. This robust exclusionary rule provides a strong disincentive against infringing upon this confidentiality, going beyond merely stating confidentiality to actively nullifying any attempt to breach it through evidence collection.

— Presumption of Innocence

Protection Against Public Authority Statements:

The Greek system specifically addresses violations of the presumption of innocence by public authorities. Public authorities are prohibited from making statements that prompt the public to believe in a person's guilt or predict the judgment of a case. This aims to prevent official pronouncements from prejudicing a fair trial, a critical aspect of safeguarding the presumption of innocence that might not be as explicitly or robustly codified in all other EU systems.

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

Application of the Directive

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.

After the introduction of Directive 2016/343/EU in the national legal system, the following provisions were put in place (with recent changes to the Code of Criminal Procedure noted where relevant – for instance, the presumption of innocence is located in Article 71 of the CCP and not in Article 72A of the CCP):

- Article 5 - Law 4596/2019 - Purpose, object and scope (Articles 1, 2 of Directive 2016/343/EU)
- Article 6 - Law 4596/2019 - Presumption of innocence (Article 3 of Directive 2016/343/EU)
- Article 7 - Law 4596/2019 - Public references to the guilt of a person (articles 4 and 10 par. 1 of Directive 2016/ 343/EU)
- Article 8 - Law 4596/2019 - Burden of proof in criminal proceedings (Article 6 of Directive 2016/343/EU) (The article providing for the burden of proof is 178(2) CCP instead of 177 A.)
- Article 9 - Law 4596/2019 - Right to remain silent and not to incriminate oneself (Article 7 of Directive 2016/343/EU) (The article providing for the above right is 104 CCP instead of 103 A.)
- Article 10 - Law 4596/2019 - Guarantees for the appearance of the accused in criminal proceedings (Article 8 of Directive 2016/343/EU) (The new provision is that of 155(3) CCP, last subparagraph.)

Specifically: The actual search for the residence or domicile of the accused, if it has not been declared following Articles 156 and 273, shall be carried out by all reasonable means, at least based on the address declared in the last tax return and the relevant data registered in the information systems of the Ministry of Finance.

In paragraph 2 of article 10, due to the change of 340 p.3 with that of 340 p.4, a second subparagraph has been added to paragraph 4 and provides as follows: For the application of this provision, the information of the accused before the commencement of the proceedings in the hearing shall also cover each subsequent procedural phase until the final judgment at first instance.

The added value of the introduction of the directive consists of the better articulation, interpretation and protection of the following rights which already existed, more specifically:

- Suspects and accused persons are presumed innocent until proven guilty under the law.
- The accused has no obligation to prove their innocence, and the Court is not obliged to justify why it was not convinced of the guilt.
- The presumption of innocence horizontally crosses all the phases from the preliminary procedure to the final conviction, in which case the final revocation of the presumption of innocence arises.

- All procedural measures against the suspect/accused person, up to their irrevocable conviction, must be taken in the light of the presumption of innocence, in view of the "open" nature of criminal proceedings.

The directive brought about the following changes in Greece:

- Judges and prosecutors examine *ex officio* all evidence of the grounds of guilt or innocence of the accused, as well as any evidence concerning their personality which affects the sentencing.

- The accused is not obliged to provide evidence of the facts alleged in their favour.

- Judges and prosecutors are obliged to investigate any evidence or evidence cited in their favour by the accused, if this is useful to establish the truth.

- Any doubt as to guilt shall be for the benefit of the accused or suspect.

- The suspect or accused person has the right to remain silent and not to incriminate him- or herself.

- The exercise of the right not to incriminate oneself does not prevent the lawful gathering of evidence, which exists regardless of the will of suspects and accused persons. The exercise of the right to remain silent and not to incriminate oneself cannot be used at the expense of suspects and accused persons.

- 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 presumption of innocence applies until an irrevocable court decision or irrevocable verdict (Article 5 & 2a of Law 4596/2019). 2. This presumption can only be violated by public authorities, not by individuals. (Articles 4&1 of Directive 2016/343 and 7 of Law 4596/2019).

- Public authorities violate the presumption of innocence in only two cases.

    a. When they PROMPT the public to believe in the guilt of a person.

    b. When they assess the facts by which they PREDICT the judgment of the case.

- To establish the civil liability of the State, in addition to the unlawfulness (State inducement or prejudice), a causal link between the State's unlawfulness and the defendant's damage is required, which consists, in particular, of his conviction and is highly unprovable.

- The private individual may not challenge the presumption of innocence. In principle, the fundamental right in question does not in principle trifurcate.

The private individual has the right to free expression concerning a person convicted at first instance with particularly wide limits, when it is a public and especially a political person.

Good practices

- Ex Officio Examination of Evidence

As explained above, judges and prosecutors examine *ex officio* all evidence of the grounds of guilt or innocence of the accused, as well as any evidence concerning their personality which affects the sentencing.

— Legal Recourse for Infringement of the Presumption of Innocence

As explained above, the suspect or accused person has the right to bring an action for damages before the competent Court in order to remedy the damage they suffered as a result of the infringement of their presumption of innocence by statements of public authorities.

— Civil Liability of the State in cases of violation of the presumption of innocence

Again, the circumstances in which this arises are explained above.

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

— Article 41 - Law 4689/2020 - Beneficiaries of legal aid (Article 1 of the Directive)

— Article 42 - Law 4689/2020 - Application for legal aid and ex officio appointment of a lawyer (Articles 1 and 2 of the Directive)

— Article 43 - Law 4689/2020 - Appointment of a lawyer or legal aid lawyer (article 7 par. 1-3 of the Directive)

— Article 44 - Law 4689/2020 - Imputation of expenses in case of legal aid with untrue elements (Article 4 par. 2, 3 and article 5 par. 3 of the Directive)

— Article 45 - Law 4689/2020 - Procedure for granting legal aid in criminal matters (Articles 2, 3, 4, 5, 6, 7, 8 and 9 of the Directive)

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 European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (requested persons).

The added value of the introduction of the directive consists of the better articulation, interpretation and protection of the rights contained in the directive.

After the introduction of the directive, a specific provision was included, 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 and representation for the suspect or accused person – at any stage of the criminal proceedings and for any crime.

According to the Law 3226/2004, which pre-existed the directive, the provision of legal aid in criminal matters consists of the appointment of a lawyer.

The beneficiary of legal aid shall be any suspect or accused person, irrespective of their nationality or place of residence or habitual residence, provided that the following conditions are met:

a) the average annual personal or family income of the last three (3) years does not exceed:

   i) for a single person, the amount of six thousand (6,000) euros, increased by one thousand (1,000) euros for each dependent child and up to four (4) children, or

   ii) for a married person or one who is part of a cohabitation agreement, the amount of eight thousand (8,000) euros, increased by one thousand (1,000) euros for each dependent child and up to four (4) children

b) at the stage of the preliminary examination, the preliminary investigation referred to in Article 245 para. 2 of the CCP, and the main interrogation, an offence is investigated for which a sentence of deprivation of liberty is provided for of at least two (2) years and the person is called for explanations as a suspect or to submit their defence as an accused, or an investigative act is carried out, during which the accused and/or the counsel are entitled to attend, such as, inter alia, during: (i) an identification parade, (ii) witness cross-examination, or (iii) reconstruction of the crime;

c) at the stage of the main proceedings at first instance, the hearing concerns an offence for which a sentence of deprivation of liberty is provided of at least two (2) years;

d) in appeal cases for an offence for which there is a penalty of deprivation of liberty of at least two (2) years or the accused has been sentenced to a custodial sentence of at least six (6) months, as well as in the case where an appeal has been lodged against an acquittal and the trial concerns an offence for which a penalty is provided for deprivation of liberty of at least two (2) years.

The beneficiary of legal aid is also any requested person under an application for extradition from another State or a European arrest warrant issued or executed by the Greek authorities, irrespective of their nationality or place of residence or habitual residence, provided that the above economic criteria are met.

In the case of a requested person pursuant to an application for extradition by another State, a legal aid counsel is appointed from the moment of the arrest of the requested person until the person's surrender or until the decision not to extradite them becomes final.

The beneficiary of legal aid can also be a victim of crime entitled to the support of the prosecution (private prosecution) under similar financial conditions.

Beneficiaries of legal aid regarding any criminal claims also include the victims of the criminal acts provided for in Articles 187A, 187B (terrorism offences), 323A (human trafficking), 324 (child abduction), 339 (sexual acts with minors), 342 (child abuse), 348 par. 2 (facilitation of child abuse), 348A (child pornography), 351A of the Penal Code (sexual act with a minor with payment), and articles 29 para. 5, 6 and 30 of Law 4251/2014 (immigration offences), as well as the minor victims of the acts provided for in articles 336 (rape), 338 (child sexual abuse), 343 (sexual abuse), 345 (sexual acts between relatives), 348 (facilitation of child abuse), 348B (child pornography), 348C (child solicitation for sexual reasons) and 349 (pimping) of the Penal Code.

The element of quality of legal aid services and training, introduced by the directive, is still not mentioned in the CCP.

The same applies to the State's obligation to 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, and to take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.

The above provisions about quality of legal aid services and training, according to the correct assessment, have also not been fully incorporated into practical implementation in the internal criminal legal order.

Good practices

— Experience of lawyers providing legal aid

In order to be entitled to inclusion in the legal aid scheme, lawyers should have at least five (5) appearances before the court as defence or prosecution lawyers, and in appeal cases before the Supreme Court the lawyer also must have been awarded the competence to appear and plead before the Supreme Court.

— Automatic Entitlement at Any Stage and for Any Crime

As explained above, legal aid eligibility extends to any suspect or accused person, irrespective of their nationality or place of residence or habitual residence, at any stage of the criminal proceedings and for any crime, provided that certain conditions are met on issues including income and severity of sentence.

— Specific Categories of Beneficiaries

As explained above, there is a wide range of potential beneficiaries, including victims of crime in a range of specified offences and under certain conditions.

Hungary

Infosheets on the Application of Three EU Procedural Rights Directives

Summary
Generally, the 3 directives are quite well implemented in the Hungarian legal environment at the theoretical level. The benefits gained can be summarised as it follows: (1) the right of access to a lawyer in criminal proceedings is better protected, specifically with: a) new and precise rules granting access to a lawyer in a 'timely manner'; b) legal provisions aimed at ensuring the effectiveness of the defence and c) the introduction of the new notion and procedural status/position of 'person who could be reasonably accused of the commission of a crime', which enables full compliance with the directive's scope; (2) better compliance with the right to be presumed innocent, with clearer rules in the Criminal Procedure Code granting the application of the principle of presumption of innocence, indirectly also through the possible use of videoconferencing, and amendment of the internal law enforcement regulation on the rules of transporting detained persons; (3) improved application and quality of the right of legal aid, due to the directive's indirect effect on the newly introduced system of assigning public defenders and the new compulsory legal education for every lawyer to ensure good quality of services. However, there are still discrepancies in everyday practice regarding compliance with the directives.

Principle sources of law
— Criminal Procedural Code, Act XC of 2017 (Be.) — Act CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the EU — Act XCIV of 1994 on the Police (Rtv.)

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

Application of the Directive

The rights guaranteed by the directive concerned had already been ensured – at least formally – in the Hungarian legal system prior to its implementation. Thus, Hungary reported that it had fully implemented the directive by the deadline of 27 November 2016, indicating 12 transposition measures, the vast majority of them aiming to clarify the previously applicable legal provisions and/or making them more concrete and precise in the light of the directive.

However, since then a new Criminal Procedural Code, Act XC of 2017 on Criminal Procedure (hereafter referred to as: 'Be.') was introduced with effect from 1 July 2018. This new criminal procedural act guarantees the rights mentioned in the directive with clearer and more precise provisions – which will be discussed in the following paragraphs. On the same topic, and relating to the procedure to be followed for European Arrest Warrants, Act CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the EU (hereafter referred to as 'EUbütv.') principally applies the rules of Be., and the separate provisions stipulate only where the rules derogate from Be.

The directive primarily defines minimum standards concerning the following matters:

A. The right of access to a lawyer in criminal proceedings (Art. 3, 4, 8, 9, 10);

Article 3 para. 1 of the Directive provides 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*'. The previous regulation had been widely criticised for being inadequate in ensuring compliance with the criteria of a 'practical' and 'effective' defence, as the 'timely manner' of access to a private lawyer/to a public defender was not guaranteed in practice.

In the light of this, to comply with the directive, the new Be. made the applicable rules more precise, as follows:

- Section 113 para. 3-4 of the Be. stipulate rules for informing/summoning the participants in the criminal procedure about procedural steps and provide that:
  - i) primarily the notice should be sent to the concerned person at least 5 days prior to the procedural step, but
  - ii) during the investigation, if the urgency of the matter makes it reasonable, this deadline could be reduced to 24 hours, and
  - iii) in case of urgent procedural steps affecting the suspect/accused person, the notice could be sent to the defence lawyer only 2 hours before the procedural step.
- Section 39 para. 6 of the Be. stipulates that in order to ensure the actual applicability of the right to prepare a defence strategy and to consult privately with the suspect, the investigating authority, the court or the prosecutor's office shall postpone the enforcement of a procedural step/measure for at least 1 hour if the defence lawyer and the suspect did not have the opportunity - without any fault on their part – to exercise these rights prior to the procedural step/measure.

Considering these provisions, the 'timely manner' of accessing a lawyer seems to be ensured. However, from a practical point of view, the 2 hour deadline for notice to the defence lawyer prior to a procedural step, e. g. during the night, may fail to work. In addition to that, the participation of a defence lawyer during a suspect's interrogation while under investigation is not a compulsory

legal requirement as the interview could go ahead even in the absence of the lawyer, provided that the defence counsel has been lawfully given prior notice of the interview.

To solve this problem, Section 387 para. 3 of the Be. provides that if the suspect indicates during his/her interrogation that he/she wants to appoint a defence lawyer or asks for a public defender, the authorities are obliged to notify immediately such a defence lawyer (or to take the necessary steps to order a public defender) and shall suspend the enforcement of the suspect's interview until the defence counsel's appearance, waiting at least 2 hours. However, the suspect's interview can be continued if the defence counsel does not appear within the defined timeframe, or the suspect approves the continuation of the interview without the defence counsel's presence. It is quite debatable whether these provisions fully comply with Article 3 para. 6 defining the reasons justifying the temporary limitation of the right of access to a lawyer (urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or the immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings).

The previous Hungarian Criminal Procedure Code did not establish either the procedural position or the status of those who have not yet been accused and interrogated by the investigating authority (the starting point of being a 'suspect'). Yet the investigation was still focused on their suspicious activity, which was not in full compliance with the directive's provisions, i.e. Section 2. Therefore, the new Be. introduced the new notion of the 'person who could reasonably be accused of the commission of a crime'. Pursuant to Section 38 para. 3, under 'persons who could reasonably be accused of the commission of a crime', the target is those whose arrest/detention has been ordered or an arrest warrant has been issued against them or who have been summoned for interview as a suspect during the investigation – until the suspect's interview and the disclosure of the actual accusation against them. Section 386 of the Be. stipulates the rights of the 'persons who could reasonably be accused of the commission of a crime', which cover the following:

1) the right to request information about their procedural rights,

2) the right to appoint a defence counsel or request a public defender,

3) the right to consult with their defence lawyer freely, without monitoring. Parallel to that, defence counsel are entitled to get in touch with these persons and to consult freely with them.

B. The right to have a third person informed of the deprivation of liberty (Art. 5,8 and Art. 10 para. 3);

C. The right to communicate with consular authorities (Art. 7 and Art. 10 para. 3).

The minimum standards set out by the directive concerning the right to have a third person informed of the deprivation of liberty, and the right to communicate with consular authorities, had been guaranteed by the previous criminal procedure code, too, and are ensured by the new Be.

Considering the above, the most relevant added value of the introduction of the directive into the Hungarian national legal system could be summarised as follows:

1) precise rules granting actual access to a lawyer (despite some practical concerns);

2) new rules to improve the 'timely manner' of accessing a lawyer;

3) clarified legal provisions aimed at ensuring the effectiveness of the defence, i.e. granting the possibility of postponing procedural steps to enable free consultation between the defence counsel and the suspect to prepare for the procedure;

4) a new notion and procedural status/position of 'person who could reasonably be accused of the commission of a crime', which enables full compliance with the directive's scope.

Accordingly, it can be concluded that the rights referred to in the directive, specifically aspects of the right of access to a lawyer in criminal proceedings, are better protected in our jurisdiction after the implementation measures.

Good practices

A) Section 387 para. 3 of the Be. provides that, if the suspect indicates during his/her interrogation that he/she wants to appoint a defence lawyer or asks for a public defender, the authorities are obliged to notify immediately such a defence lawyer (or to take the necessary steps to order a public defender) and shall suspend the enforcement of the suspect's interview until the defence counsel's appearance, waiting at least 2 hours.

B) The Hungarian legal system since 2018 ensures:

1) precise rules granting actual access to a lawyer (despite some practical concerns);

2) new rules to improve the 'timely manner' of accessing a lawyer;

3) clarified legal provisions aimed at ensuring the effectiveness of the defence, i.e. granting the possibility of postponing procedural steps to enable free consultation between the defence counsel and the suspect to prepare for the procedure;

4) a new notion and procedural status/position of 'person who could reasonably be accused of the commission of a crime', which enables full compliance with the directive's scope.

5) practices whereby suspects have immediate access to legal counsel, in particular prior to their questioning by the police or other authorities, during identification measures or crime scene reconstructions, immediately after deprivation of liberty and in good time before their appearance in court. The regional Bar Associations keep lists of 'defence lawyers on standby'. For vulnerable defendants and under certain conditions, the costs of this on-call service are not charged to the defendant.

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

Application of the Directive

The implementation date of the above directive was 1 April 2018, whilst the Member States were obliged first to provide data by 1 April 2020 about the enforcement of the directive's provisions, and after that every 3 years. The Commission was also obliged to submit a report about these data to the European Parliament and to the Council by 1 April 2021. Despite these obligations, the Commission's report mentions that – except for Austria – none of the Member States provided data about the implementation of the directive. Hungary mentioned all in all 23 transposition measures which had been introduced to ensure compliance with the directive by 1 April 2018. However, the vast majority of the legal instruments mentioned seems to have a rather theoretical significance and/or relationship with the directive, not to mention the fundamental change in the legal environment due to the new Be. entering into effect on 1 July 2018.

The Commission reported that 'the approach to the Directive's implementation is different between the Member States. Some of the Member States – beside the legal or practical enforcement measures – have introduced concrete legal measures with the direct aim of the transposition of the rights mentioned in the Directive. Other Member States deemed that the already applicable provisions more or less comply with the criteria of the Directive, and decided not to take concrete measures for the Directive's implementation'. Hungary decided to choose a so-called middle way in implementation: several implementation measures have been formally indicated without actual effect and/or relationship with the directive.

Therefore, considering the lack of relevant data related to the actual enforcement of the directive's provisions and the change in the Hungarian legal framework, it is hard to estimate the actual effect of the directive, and so the basis of evaluation has to be 'everyday' legal practice.

The Commission's report lists the personal scope of the norm as the first problematic issue. Considering this, the Be.'s wording that 'nobody could be deemed guilty, until his/her culpability has been established by the court's final decision' complies with the directive's provisions. Moreover, the introduction of the new notion of 'person who could reasonably be accused of the commission of a crime' solves the problem of *de facto* suspects.

According to the Commission's report and to the author's experience, the most problematic issue concerning the rights referred to in the directive is the detrimental presentation of suspects and accused persons, specifically the unreasonable use of measures of physical restraint. This issue is rather connected to the transportation of suspects, as judges generally permit suspension of these measures during the trial. The formal legal provision of Section 48 of Act XXXIV of 1994 on the police stipulates strict rules concerning the use of handcuffs, which can in principle be justified only for the following reasons: a) to avoid self-destruction, b) to avoid attack, c) to avoid escape, d) to break resistance. An amendment to the internal service regulation of the police in December 2015 limited the use of handcuffs – at least in theory – exclusively to these reasons.

Despite these rules, the everyday practice is that the authorities generally apply handcuffs during the concerned person's transport and escort to events related to the proceedings. This also leads to the ambiguous situation that, even after an acquittal and/or termination of the previously applied coercive measure (e.g. preliminary detention), the concerned person has to travel back with the authority to the enforcement institution to gain immediate access to his/her deposited belongings, and during this journey – despite his/her innocence having been established – has to obey the authorities' measures, e. g. wear handcuffs due to the 'prevailing practical standards'. Further, pursuant to internal law enforcement rules in effect in 2018, a so-called lunge (or leash) should be applied during the escort of even those detained persons with seriously reduced mobility (e. g. using walkers). Fortunately, this regulation was overruled in early 2021 by a new internal regulation, which means that now, prior to transporting the detained person, the competent officer has to evaluate the concrete situation and the unique attributes of the detained person and has to make a case-by-case assessment on the use of coercive measures/instruments.

Accordingly, it can be concluded that the rights referred to in the directive are – definitely from a theoretical point of view, and more or less from a practical perspective – better protected in our jurisdiction as a result of the directive, but in practice full compliance with the directive's standards is not guaranteed.

Good practices

The new Procedural Act introduced the use of videoconferencing during the hearing of suspects or accused persons, which seems to ease the above problem from a practical point of view, as in that case no transport will take place, and so neither will physical restraint be applied against the concerned person.

Considering the above, the most relevant added value of the introduction of the directive in the Hungarian national legal system could be summarised as follows:

(1) clearer rules in the Criminal Procedure Code granting the application of the principle of presumption of innocence, indirectly also through the possible use of videoconferencing, and

(2) amendment of the internal law enforcement regulation on the rules of transporting detained persons.

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

The implementation date of the above directive was 25 May 2019, and the Member States were obliged to provide the first data by 25 May 2021 about the enforcement of the directive's provisions, and after that every 3 years. The Commission is obliged to submit a report based on the data provided by the Member States to the European Parliament and to the Council by 25 May 2022. Unfortunately, we have no information about the data allegedly provided by Hungary on the enforcement of the directive, whilst the Commission has almost one year left to prepare its report. Consequently, we have at present no access to reliable and objective data about the implementation and real enforcement of the directive's provisions.

Hungary referred to 28 transposition measures which had been introduced to ensure compliance with the directive by 25 May 2019. However, the vast majority of the legal instruments mentioned seem to have a rather theoretical significance and/or a broad relationship with the directive. Moreover, there was a fundamental change in the legal environment due to the introduction of the new Criminal Procedure Code, beside the new Civil Procedure Code and new Administrative Procedure Code. Therefore, the supplementary legal norms accompanying the new procedural codes, which define in detail the criteria for requesting (free) legal aid, could be deemed the directive's most relevant transposition measures. It should also be considered that there is a strong relationship and interconnection between this directive and Directive 2013/48/EU – the latter being relatively well implemented in the Hungarian legal system, as discussed under point 1.

Evaluating the concrete implementation and effect of the directive, the vast majority of the rights defined in the directive are ensured in Hungary both on the level of formal legal provisions, and on the practical level. This means that the possibility of legal aid is granted both for suspects/accused and the requested persons in principle and in practice as well, whilst the preconditions for granting access to free legal aid are in compliance with the directive's standards.

The most problematic issue is related to the enforcement of Article 7 on the quality of legal aid and training. Prior to the new Criminal Procedure Code entering into force, the system of legal aid, e.g. the assignment of public defenders, was within the sole competence of the authorities concerned, meaning that the authorities had the opportunity to decide whom to assign as public defender, how often, and to which cases. This previous system was a basis of real abuse and/or discrimination. Moreover, prior to the new Be. and the reforms related to the new statute, there was no compulsory continuing legal education for lawyers. This meant that, once a lawyer passed the bar exam in Hungary, he/she could practise in all fields of law without any further training. The lack of proper continuing legal education might also have contributed to partial non-compliance with the directive's standards.

Considering the above, the introduction of the new Be. and the accompanying reforms could be deemed as milestones in the implementation of the standards of Article 7 of the directive. The new Be. introduced a whole new system for the assignment of public defenders which is meant to be independent from the authorities and is based on the concept that, following notification by the competent authorities, the regional bar has the right to assign a public defender to the case. Moreover, the Hungarian Bar introduced compulsory continuing legal education for every lawyer, which must be kept up every year in order to continue in practice. Therefore, these new instruments seem to tackle effectively the problems explained above.

However, the following issues should also be considered:

a) in cases when the independently assigned public defender is not available, the authorities have the possibility to assign directly a so-called 'deputy' defender, meaning that the total independence of the public defender from the authorities may not be fully guaranteed, and

b) despite the new system of assigning public defenders being controlled by the Bar, the remuneration for public defenders' services remains extremely low compared to average market prices, and not all the activities necessary for providing an effective defence are compensated (e.g. no compensation is provided for personal consultations with the client in the office, preparation of written submissions, etc.) which has a highly adverse effect on the quality of the defence provided.

Therefore, the most relevant added value of the introduction of the directive in the Hungarian national legal system lies in its indirect effect on the recently introduced new legal instruments mentioned above. In summary, the effects are the following:

1) a newly introduced system of assigning public defenders, which is in principle independent from the authorities, and

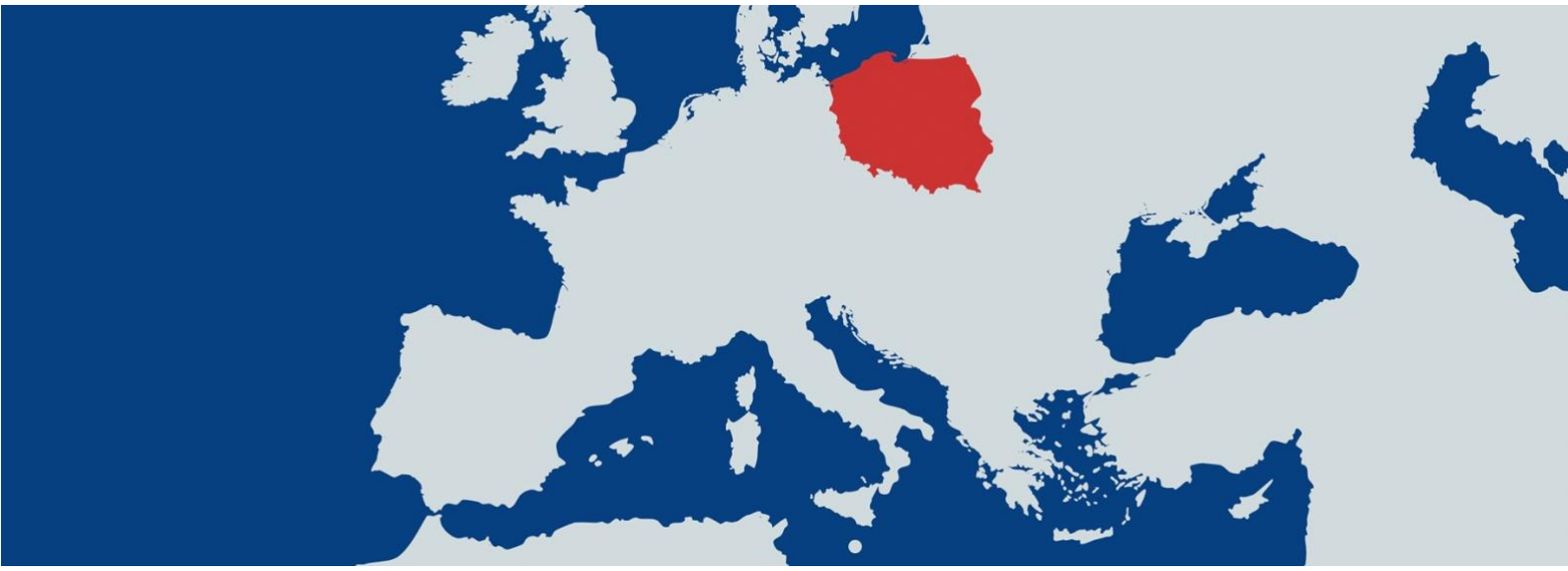
2) new compulsory legal education for every active lawyer to ensure good quality of services.

Accordingly, the rights referred to in the Directive are better protected in our jurisdiction as a result of the directive, specifically because the recently adopted new legal framework aims to ensure compliance with Article 7 as well as demanding good quality of legal aid services through proper continuing legal education of lawyers.

Good practices

Since 2018, the effect of the new procedural Act there is a whole new system for the assignment of public defenders which is meant to be independent from the authorities and is based on the concept that, following notification by the competent authorities, the regional bar has the right to assign a public defender to the case. Moreover, the Hungarian Bar introduced compulsory continuing legal education for every lawyer, which must be kept up every year in order to continue in practice.

Poland



Infosheets on the Application of Three EU Procedural Rights Directives

Summary

None of the three EU directives in question has been properly and fully implemented in the Polish domestic legal system as required by their relevant standards as well as when we take into consideration – where legitimate - standards promoted by the other European law instruments. Amendments to criminal procedural law, introduced in Poland in the last several years, brought many national solutions closer to the requirements set out in the minimum standards created at the EU level and – what is also remarkable - at the Council of Europe level in the field of criminal procedural safeguards. This also occurred in the area regulated by the three directives discussed in this study.

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

It is also important to remind those who apply the law that they must accept direct application of provisions of the three EU directives in an area which is not properly regulated. Inadequacies in the sphere of implementation of the three directives have been remarked upon in the academic studies on Polish criminal procedural law, in certain courts' judgments, in opinions and analyses prepared by non-governmental organisations dealing with human rights issues and by individual lawyers, and in official presentations by the Polish Ombudsman. However these views were not shared by former political decision-makers and – in spite the above-mentioned inadequacies being identified and observed by current political decision-makers (the Minister of Justice and the Polish Government) – they have not so far been successfully removed from domestic law and practice.

Principle sources of law

Principle sources of the domestic law in Poland:

- Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78 item 483 with subsequent amendments)
- Criminal Code of 6 June 1997 (consolidated text: Journal of Laws 2025 item 383)
- Code of Criminal Proceedings of 6 June 1997 (consolidated text: Journal of Laws 2025 item 46)
- Code of Criminal Enforcement of 6 June 1997 (consolidated text: Journal of Laws 2024 item 706)
- Code on Proceedings on Petty Offences of 24 August 2001 (consolidated text: Journal of Laws 2025 item 860)
- Ordinance of the Minister of Justice of 28 October 2020 on how to ensure legal assistance of *ex officio* lawyer for an accused person (Journal of Laws 2020 item 1681)
- Ordinance of the Minister of Justice of 14 May 2024 on incurring by the State Treasury or local self-government units the costs of unpaid legal assistance provided by an advocate (adwokat) *ex officio* (Journal of Laws 2024 item 763)
- Ordinance of the Minister of Justice of 14 May 2024 on incurring by the State Treasury or local self-government units the costs of unpaid legal assistance provided by an attorney-at-law (radca prawny) *ex officio* (Journal of Laws 2024 item 764)
- Ordinance of the Minister of Justice of 7 November 2024 on determining models of letters on rights and obligations of the suspect, injured person and witness (Journal of Laws 2024 item 1658)
- Ordinance of the Minister of Justice of 7 November 2024 on determining model of letter on rights of the detainee on the basis of the European Arrest Warrant and standard forms for written explanations regarding the scope of the rights of such person (Journal of Laws 2024 item 1660)

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

Application of the Directive

The directive in question sets out minimum standards for the right of access to a lawyer in criminal proceedings, guaranteeing suspects and accused persons the right to confidential contact and the assistance of a lawyer from the moment of their detention, the right to inform a third party (e.g. a family member) about the fact of their detention and to contact them while they are deprived of their liberty, and, in the case of foreigners, the right to contact their country's consular authorities for appropriate support from them.

The application of standards in this directive is of great importance for the fulfillment of demands of a fair and just trial, covered by various European instruments as well as Art. 42 section 2 and Art. 45 section 1 of the Polish Constitution.

So far, the directive has not been transposed into the Polish legal order in a way that would satisfy the minimum standards set out therein in every issue regulated by the instrument.

However, many solutions in Polish law harmonise with certain requirements of the directive (indeed are inspired by the provisions of the directive).

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

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

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

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

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

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

- Taking into account the circumstances in which temporary derogations are granted, they should be exceptional and dictated by the interest of the preparatory proceedings. A 'particularly motivated situation' may arise out of a suspicion that contacts between a suspect and his or her lawyer (or their correspondence) might be used for illegal purposes (to obstruct justice). 'The interest of the preparatory proceedings' means that the derogations are only

available if they affect the aims of preparatory proceedings (like detection and apprehension of other offenders or obtaining and securing the evidence in a criminal case). In the view of commentators on Polish criminal proceedings law, the principle of proportionality should be fully respected. It seems that - as a rule - practice in Poland keeps to the standard of exceptional circumstances as well as of the interest of the preparatory proceedings, but it is possible to observe some shortcomings and abuses. Temporary derogations (if they were provided by specific regulations on the grounds of the CCP) are granted in preparatory proceedings (therefore, at the pre-trial stage).

— The rules of the CPPO concerning the interrogation of a person during an investigation in the case of a petty offence (*see:* Art. 54 para. 6 CCP) do not provide for the participation of a lawyer during interrogation. Decisions concerning the application of derogations are not submitted to judicial review. However, decisions on derogations should be, it seems, duly reasoned and attached to files of the proceedings (*see:* Art.s 73 para. 2 and para. 3, 245 para. 1 and 317 para. 2 CCP). Unfortunately, there is no common practical standard in criminal proceedings for giving reasons for the decisions. It is possible to observe the existence of motives for decisions which are general, brief and which 'repeat' the premises indicated in the provisions themselves. In case of communication between a potentially suspected person (a detainee), suspect or accused person and a lawyer, the decisions of the relevant investigation authorities (police, public prosecutor) notifying their presence at such communication should be comprehensible, in other words adequately and clearly motivated (that is, not motivated only in general terms). Such decisions should be subject to a judicial review (which currently requires appropriate legislative amendments in domestic law shaping criminal proceedings, given the current wording of Art. 73 of the Code of Criminal Proceedings and Art. 245 of the Code of Criminal Proceedings). In this way, respect for legal professional privilege would be strengthened. The reservations referred to in Art. 73 para. 2 and para. 3 CCP cannot be maintained or made after 14 days from the date of the suspect's pre-trial detention.

— Considering the scope of the directive, in the case of a petty offence, a detainee shall have, on his or her demand, the possibility to contact - in an accessible form – a lawyer as well as to communicate (to talk) with that lawyer directly (*see:* Art. 46 para. 4 CPPO). A detention authority can impose a condition that its representative will be present during this communication. Unfortunately, neither the mentioned regulation of the CPPO (nor any other one in the same code) introduces any demands for giving reasons for such a condition. In the code, the Polish law-maker has not indicated the time limits for such a condition. It means that, in practice, the presence of a representative of the authority during the conversation between a detainee and his or her defence lawyer is possible not only exceptionally, and this condition is not limited in time. So, the regulation does not indicate the time limitation of a derogation and does not even require 'particular motivation' of the derogation. This could contravene especially the condition of proportionality and necessity and, in consequence, the principle of the fairness of proceedings.

— A person in pre-trial detention, including a foreigner, has the right to communicate with, among others, a lawyer or with the relevant consular office or diplomatic representation in the absence of others or by correspondence. The authority at whose disposal a person in pre-trial detention remains may reserve its representative's or other authorised person's presence at the visit (*see:* Art. 215 para. 1 and para. 1a of the Code of Criminal Enforcement of 6 June 1997 – hereinafter CCE). The criminal enforcement law does not provide a legal solution indicating the possibility of a judicial review of the decision of the above-mentioned authority regarding the presence of his/her or an authorised person at the visit.

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

- The right to challenge a decision about refusal of consent to visit a person in a pre-trial detention by a person closest to him or her is guaranteed for a person in pre-trial detention and for the person closest to him or her who applies for the visit (if a person in a pre-trial detention is at the disposal of the court – *see*: Art. 217 para 1c CCE). Unfortunately, it is not expressly stated that the right to visit (to communicate) with a person closest to a person in a pre-trial detention (a relative) should be possible without undue delay. The visit from a relative is just one aspect of communication with such a third person and the other aspects are excluded through the silence of the provisions.

- Correspondence between a person in a pre-trial detention and the lawyer established or appointed in the case in which the pre-trial detention was applied shall be sent directly to the addressee, unless the authority at whose disposal the provisional detainee remains, in particularly motivated cases, orders otherwise (see: Art. 217b para. 1a CCE).

- A suspect or an accused person in a pre-trial detention has the right to use a self-dialing telephone as his/her only means of communication, for example, to contact a lawyer (Art. 217c para. 1a CCE). The authority at whose disposal such a person remains shall issue a consent order for the use of a self-dialing telephone, unless there is a fear that it will be used to unlawfully obstruct criminal proceedings or to commit a crime (in particular, incitement to commit a crime) – *see:* Art. 217c para. 2 CCE). An order denying or revoking a consent to use such a telephone may be a subject of a judicial review of the court at whose disposal a person in a pre-trial detention is being held (Art. 217c para. 4 CCE).

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

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

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

- In addition to providing letters of rights and obligations for detainees, suspects or accused persons in criminal proceedings, it would seem appropriate to give these persons – by proper representatives of investigation bodies - the opportunity to read these instructions before carrying out certain procedural actions, and to repeat in informal language, regarding their intellectual and emotional conditions, the instructions on the most important rights that such persons have in connection with a given action (making sure that the persons understand their rights)

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

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

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

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

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

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

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

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

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

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

It is also worth mentioning the document of the UN Committee against Torture (dated on 29 of August 2019, titled: 'Concluding observations on the seventh periodic report of Poland' [CAT/C/POL/CO/7]), where it was underlined that, in Poland, persons who are deprived of liberty still cannot exercise effectively in practice their right to contact with a lawyer before the first interrogation from the very first moment of their detention, there is a lack of assurance in police stations of the confidentiality of detainees' communication with lawyers (including consultation at the stage before the first interrogation), there is still an ineffective system of appointing lawyers, and there is a lack of judicial review of both decisions to temporarily limit confidentiality in communications between detainees and lawyers or decisions to interrogate suspects without lawyers. The lack of proper implementation of Directive 2013/48 through the appropriate legislative amendments and introduction of proper standards in order to improve functioning of the practice of criminal proceedings bodies - with the repetition of the detailed allegations indicated above - also found its way into in the Polish Ombudsman's letter to the Minister of Justice of the Republic of Poland dated on 8 of August 2024. So far - despite the Ministry of Justice's response to the Ombudsman in a letter dated on 27 of August 2024, which shows that the Ministry of Justice has

already taken advanced steps to fulfill the implementation demands - the desired state of play has not been implemented into the Polish internal legal order.

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

Good practices

- In the case of detention by the police, a detainee - a potentially suspected person (i.e. a person who is not yet a suspect in the formal sense) - should have a real opportunity to exercise his/her right to contact a lawyer (right of access to a lawyer). In this regard, a good solution in Poland is the existence of online lawyers' search engines, enabling users to access databases of lawyers (advocates or attorneys-at-law), created by professional lawyers' associations – the Supreme Bar Council and the National Bar Council of Attorneys-at-law, respectively. These search engines are easy-to-use and they allow speedy finding of an advocate or an attorney-at-law with personal details, along with the contact details of these lawyers and information about their specialisation in a given field of law. Currently, there are: the National Register of Advocates and Trainee Advocates (Krajowy Rejestr Adwokatów i Aplikantów Adwokackich, www.rejestradwokatow.pl) and the 'Find an Attorney-at-law' search engine (SzukajRadcy, www.szukajradcy.pl).

- In the exercise of the right of access to a lawyer, a lawyer generally has the opportunity to participate in the performance of the external examination of the body of a suspected person (a detainee), other examinations that do not involve interference to his/her bodily integrity, examinations combined with the performance of procedures on his/her body, when a police officer takes swabs of mucous membranes of the cheeks, blood, hair or other bodily secretions. In the absence of such a possibility, there should be the opportunity of a proper judicial review (here, legislative amendments in domestic law would be required).

- It should be incumbent on the relevant investigation authorities to inform a person subject to a European arrest warrant of his right to appoint a lawyer in the issuing Member State. This issue is not regulated in domestic law at the moment, but a directive-friendly interpretation of the existing legal regulations has led to an appropriate practice of proceedings here.

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

Application of the Directive

The purpose of the directive is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial. So far, this directive has not been implemented in the Polish legal order in a way that would satisfy the minimum standards set out therein in every issue regulated by it.

It is also worth adding that with the application of the EU standards demanded, it is inevitable to expect fewer indictments and more acquittals than with the application of the Polish procedure alone, especially since the directive, in addition to doubts about legal issues, also applies to the evaluation of evidence ('any doubt about guilt'), and not only to the facts revealed through that evidence, an area in which the Polish courts have so far been found wanting in their established view.

Needless to say that the application of standards of this directive is of great importance for various European instruments as well as Art. 42 sections 2 and 3 and Art. 45 section 1 of the Polish Constitution.

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

Before the deadline for implementation of the directive had expired, the Polish Ombudsman sent a standpoint letter to the Minister of Justice of the Republic of Poland, indicating the urgent need for necessary changes in Polish law in order to implement the directive. In response, the Ombudsman received a clear opinion of the Minister of Justice (dated on 18 October 2018) in the light of which the current criminal law regulations were considered sufficient for fulfillment of international obligations, and therefore no legislative work was planned.

The current legal situation in Poland regarding relevant issues indicated in the directive:

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

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

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

- The principle of the presumption of innocence shapes the entire model of criminal proceedings whose task is, above all, to detect a perpetrator of a crime and to hold him or her criminally

liable, as well as to shape the criminal proceedings in such a way that an innocent person will not bear liability (*see:* Art. 2 para. 1 point 1 CCP).

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

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

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

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

— The directive applies to persons who are suspects or accused persons. All the provisions regarding the suspect under the directive are intended to apply also to persons who could become suspects (there is a high probability that such persons become formal suspects), in other words to persons before they are criminally charged. Although these people do not make statements of the same nature as statements made by suspects or accused (i.e. explanations), self-incriminating statements made by them and placed on the record of their interrogation or in other procedural documents may have a negative impact on their subsequent procedural situation. Therefore, it is important that such people should have an

express guarantee of effective access to a lawyer and the right to defence. Admittedly, in the light of Art. 87 para. 2 CCP, it seems that they could have lawyers as their proxies, but this type of right is subject to the rationing provided for in Art. 87 para. 3 CCP (the court or, in preparatory proceedings, the public prosecutor may refuse to allow a proxy to participate in the proceedings if the bodies mentioned determine that the defence of interests of people who are non-parties to the proceedings does not require such participation). Enabling effective access to a lawyer by means of an appropriate amendment to the law for those who may turn into suspects in a given criminal proceeding would be a step towards decreasing the risk that such people make self-incriminating statements. It should also be mentioned that the Polish Criminal Code of 6 June 1997 (hereinafter CC) defines the offence of giving false statements by those who do it fearing criminal liability affecting them or their closest persons. This offence is punishable by deprivation of liberty from 3 months to 5 years (*see:* Art. 233 para. 1a CC). It seems that the scope of criminal liability here violates the directive's requirements aimed at strengthening the procedural guarantees and safeguards provided also for those who may - with a high probability - become suspects, but at the moment of criminal proceedings are witnesses. It is worth pointing out, however, that according to established court case law, a witness who gives false testimony out of fear of facing criminal liability does not commit an offence under Art. 233 § 1a CC if, in exercising his right of defence, he testifies untruthfully or conceals the truth, without at the same time realising with his behaviour the elements of a prohibited act specified in another provision of the law (see. e.g. the judgment of the Supreme Court - Criminal Chamber of 29 March 2023, ref. no. IV KK 530/21 or the judgment of the Supreme Court - Criminal Chamber of 10 January 2024, ref. no. III K 474/23).

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

— In Poland, the EU standard ensuring the right to be present at the trial and the right to a new trial in the absence of entitled persons at the trial is embodied in the existing legal regulations. Polish provisions of the CCP define the right of an accused to participate in the trial (*see:* Art. 374 para. 1 CCP). There exists a possibility to take part in a trial held remotely, i.e. with the use of technical devices that allow participation in such a trial with simultaneous direct transmission of images and sounds (*see:* Art. 374 para. 4 CCP). However, such a form of participation in a trial is exceptional - it may concern *inter alia* defendants who are deprived of liberty, the presiding judge decided to relieve them of their duty to appear at the trial and there are no technical obstacles to that.

— Court proceedings concluded with a definitive decision (a final judgment) may be resumed at the request of the accused submitted in due time, in which they found out about a decision which concerns them. This is possible if a case was heard in the absence of the accused who was not properly informed about the date of the trial, and for those who prove that they were unaware of the date and possibility of rendering a court decision in their absence (*see:* Art. 540b para. 1 CCP). This provision is applied only exceptionally, in a very few strictly specified situations, like – for instance – if there was a substituted service (*see:* Art. 540b para. 1 CCP). However, the exceptional derogation from application of this provision does not violate the minimum standard of the directive.

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

the Treaty on the Functioning of the European Union), initiated on 18 February 2021, have been opened against Poland in relation to implementation of the directive.

Good practices

- In the main, judges, applying the principle of fair and honest proceedings before the court, do not start from the assumption that the accused person has committed the charged criminal act (e.g. they make decisions on the application of preventive measures, including pre-trial detention, on this basis automatically). Usually the principle is maintained that the burden of proof is on the public prosecutor and that continuing and objectively existing doubts from the available and submitted evidence are resolved in favour of the accused.

- In proceedings before the court - in connection with the interpretation of Art. 5 para. 2 of the Code of Criminal Proceedings (principle *in dubio pro reo*) – the principle is applied regarding the prohibition of resolving doubts that cannot be removed to the detriment of the accused person (in accordance with the wording of the indicated provision), when such doubts are the result of inaccurate or incomplete evidence.

- When making procedural decisions with regard to suspects or accused persons, procedural authorities avoid forming their views about these individuals in the context of ongoing proceedings under the influence of media reports and pressure from the media or public opinion exerted through various means of expression.

- The effective exercise of the right to be present at the trial is linked to sufficient advance notice of the trial dates to the entitled persons. In Polish domestic law, there is a relevant normative standard in this regard (see Art. 353 para. 1 of the Code of Criminal Procedure) and in practice it is generally respected. Regarding the time issue, informing relevant parties about trial dates is principally done sufficiently in advance, so that at least 7 days elapse between the effective delivery of information about the trial date to its addressee service and its fulfilment (as required by the regulation indicated above).

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

Directive (EU) 2016/1919 concerns the issue of legal aid in criminal proceedings. It provides the right to legal aid (free legal assistance) for a specific category of persons involved in criminal proceedings who are unable to pay their own defence costs. This category includes potentially suspected persons, suspects and accused persons, as well as persons who are the subject of a request in a European Arrest Warrant procedure.

The application of standards of this directive is of great importance for various European instruments as well as Art. 42 section 2 and Art. 45 section 1 of the Polish Constitution.

So far, this directive has not been transposed into the Polish legal order in a way that would satisfy the minimum standards set out therein in every issue regulated by this instrument.

Directive (EU) 2016/1919 regulates the important issue of legal aid (i.e. free legal assistance or *ex officio* legal assistance, including *ex officio* defence).

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

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

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

- Potentially suspected persons ('suspects in fact') are not indicated *expressis verbis* in Polish law as beneficiaries of certain rights outlined in criminal procedural law.

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

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

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

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

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

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

- The remarks relating to the issues related to the achievement of the desired state of play (i.e. legal and practical standard) in the field of legal aid in criminal cases should also be extended to proper issues related to the effective exercising of the right of access to a lawyer in the context of adequate proceedings under the provisions of the Code of Proceedings on Petty Offences of 24 August 2004, which are discussed in this study in the section devoted to the problems of implementation of Directive 2013/48/EU.

- A separate legal act - the Ordinance of the Minister of Justice of 28 September 2020 - regulates the way an accused is provided with the assistance of a public defender (including the way of drawing up the list of lawyers providing legal assistance *ex officio* and the way to appoint a public defender), as well as the way to submit a request to court for appointing a

public defender, and the detailed procedure for adjudicating such a request. Lists of lawyers are submitted by the relevant bar councils to the president of the district court, regional court and appellate court covering the council's territory.

— In separate regulations, the Minister of Justice determines rates for costs of legal aid paid for by the State Treasury or local self-government units. These are the Ordinance of the Minister of Justice of 14 May 2024, for an *ex officio* 'adwokat' and the Ordinance of the Minister of Justice of 14 May 2024 for an *ex officio* 'radca prawny'. The rates for costs in criminal matters and petty offences are low although, recently, they have been increased slightly in comparison to those provided for in the previous ministerial ordinances (of October 2016). Legal professionals are of the view that these rates are inadequate. If *ex officio* legal assistance is not properly paid by the state, it may lead to lower quality work and reduction of lawyers' involvement in the cases of clients represented *ex officio*. The tendency to underpay *ex officio* criminal lawyers is unfortunately persistent. In Poland one can come across the stereotype of a 'good lawyer', who is a lawyer of choice, and a 'bad lawyer', who is an *ex officio* lawyer.

In the binding model forms of the letter on rights and obligations for suspects in criminal proceedings (stipulated by the Ordinance of the Minister of Justice of 7 November 2024 - Journal of Laws 2024 item 1658), which are used by criminal proceedings authorities, we find wordings indicating that the right to request an *ex officio* defence lawyer is available in both stages of criminal proceedings, i.e. in preparatory proceedings and in judicial one. The ordinance states that such a request may be submitted within 7 days from the date of service of the copy of the indictment (*see:* Art. 338b para. 1 and para. 2 CCP). The ordinance also indicates that a request for appointment of a public defender after the first date of a trial or hearing should be submitted within a time limit so that its consideration does not cause a change of date for the next trial or hearing (*see:* Art. 338b para. 3 CCP). It is worth adding that similar model forms of the letter on rights are addressed to persons detained on the basis of the European Arrest Warrant (they are contained in the Ordinance of the Minister of Justice of 7 November 2024 - Journal of Laws 2024 item 1660). It must be assumed that the way in which suspects or detainees on the basis of the European Arrest Warrant are instructed about their rights harmonises with expectation stemming from the directive's standard. The current model forms of the letter on rights and obligations for suspects as well as the current model forms of the letter of rights for detainees on the basis of the European Arrest Warrant contain instructions on rights (as well as obligations) anchored in criminal proceedings regulations which are presented in clear and comprehensible language. For the sake of transparency of these considerations, it should be stressed that the aforementioned ordinances distinguish between two separate types of model forms of the mentioned letters for suspects or detainees on the basis of the European Arrest Warrant: one of them is for persons under the age of 18 and another one is for persons over 18.

— Directive (EU) 2016/1919 indicates the introduction of a mechanism that would allow for the recognition of a request for the appointment of a public defender as well as ensuring the provision of time to provide defence before the first interrogation of a detained person, before specific investigative or evidentiary actions are carried out. Such a mechanism could take the shape of a system of *ad hoc* or temporary *ex officio* legal assistance (legal aid). In this regard, it would be necessary to ensure the fulfilment of the criterion of assessment of the financial situation (income, property, family situation of the person, the cost of the assistance of a lawyer, the standard of living in the concrete Member State), as well as reasonableness in terms of meeting the interests of justice (the gravity of the criminal act, the complexity of the criminal case and the severity of the threatened punishment) [*see:* motive (19) and Art. 4 of the directive].

— In the Polish internal legal system there is also a lack of solutions concerning the right to a 'dual defence' ('dual representation') in cases related to the European Arrest Warrant (hereinafter EAW), where legal aid in the issuing state is at stake. There is no statutory basis that would allow the subject of an EAW procedure to request and obtain legal aid when Poland is the issuing state, which certainly doesn't meet the standard of the directive. There is a need to ensure in the domestic legal order that a person wanted under an EAW issued by Polish authorities can receive legal aid in Poland from the moment of his or her detention under an EAW until his or her surrender or until the decision to refuse surrender becomes final (*see:* Art. 5 sections 1 and 2). Such a regulation would facilitate continuity of defence throughout criminal proceedings as well as in certain cases - in EAW proceedings – it would

allow lawyers (defenders) to fulfil effectively their duties regarding the execution of an EAW with the cooperation of a lawyer from the Member State where the warrant was issued.

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

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

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

Certain deficiencies in the implementation of Directive (EU) 2016/1919 through the necessary legislative amendments of Polish law in the sphere of legal aid were also clearly stressed in the Polish Ombudsman's letter to the Minister of Justice of the Republic of Poland dated on 8 of August 2024. So far - despite the Ministry of Justice's response to the Ombudsman in a letter dated on 27 of August 2024, which shows that the Ministry of Justice has already taken advanced steps to fulfill the implementation demands - the desired state of play has not been implemented into the Polish internal legal order.

Good practices

— Currently in Poland model forms of the letter on rights and obligations for suspects in criminal proceedings and the letter on rights addressed to persons detained on the basis of the European Arrest Warrant are available in 26 foreign languages (for instance, in English, French, Spanish, Italian or Swedish). Taking into account their contents, they are clear and comprehensible.

— In Poland there are available easy-to-use online lawyer search engines, enabling users to access databases of lawyers (advocates or attorneys-at-law), which were created by professional lawyers' associations – the Supreme Bar Council and the National Bar Council of Attorneys-at-law, respectively. Such search engines give the possibility to find quickly an advocate or an attorney-at-law through personal details, along with contact details and

information about their specialisation in a given field of law. Currently, there are: the National Register of Advocates and Trainee Advocates (Krajowy Rejestr Adwokatów i Aplikantów Adwokackich, www.rejestradwokatow.pl) and the 'Find an Attorney-at-law' search engine (SzukajRadcy, www.szukajradcy.pl).

Romania

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

The drafting of the Romanian Criminal Procedure Code and other related normative acts was carried out with the objectives of establishing an appropriate balance between the requirements for an efficient criminal procedure, the protection of elementary procedural rights, as well as fundamental human rights for participants in the criminal process and the uniform observance of the principles regarding a fair trial. However, Directive 2013/48/EU, Directive (EU) 2016/343 and Directive (EU) 2016/1919 established higher standards regarding the observance of the right to a fair trial in Romania and put pressure on the legal system, starting from the practical problems observed over time, to modify the legal framework in order to ensure their efficient implementation. At the same time, the Constitutional Court of Romania, as well as the Panel for resolving appeals in the interest of the law and the Panel for resolving legal issues within the High Court of Cassation and Justice of Romania, were important actors in this process; following the decisions of these courts, the criminal procedural legislation was successively amended.

The directives in question have been implemented, but not completely; there are still aspects that need to be improved in terms of guaranteeing the procedural rights of the suspect or defendant.

We will make specific references to the procedural and related legislation applicable in the field of each directive, we will then present the implementation stage and the problematical aspects, as well as relevant judicial practice, including ECHR jurisprudence regarding Romania.

Principle sources of law

The main sources of law regarding the field of implementation of the directives on procedural rights are:

- **The Romanian Constitution**
- **Criminal Procedure Code** – Law no. 135/2010 published in the Official Monitor no. 486 of 15 of July 2010, subsequently amended (RO, EN)
- **Law no. 51/1995 on the organisation and exercise of the profession of lawyer**, republished in the Official Monitor no. 210 of 28th of March 2017, updated by Law 255/2013 and others (RO, EN)
- **Law No. 302/2004 on international judicial cooperation in criminal matters**, published in the Official Monitor no. 993 of 14th of December 2017 (RO, EN)
- Other normative and administrative acts refered to in each chapter of the present infosheet.

Please note that the English versions of the laws referred to do not contain recent amendments, exept for the Constitution of Romania.

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

Application of the Directive

1. Brief Summary

Romania has implemented the main elements of Directive 2013/48/EU into its national legal system. Individuals suspected or accused of crimes have the right to be informed of their rights, to communicate confidentially with a lawyer, and to be assisted by a lawyer during key stages of the proceedings. However, practical challenges remain in consistent implementation, especially for vulnerable suspects and in cross-border cases.

2. Main Sources of Law

Relevant legal provisions for Romania to implement Directive 2013/48/EU are the following:

- **Constitution of Romania** – Art. 24 – Right to defence – guaranteeing the right to be defended by a chosen or ex officio lawyer.

- **Criminal Procedure Code** – Law no. 135/2010 published in the Official Monitor no. 486 of 15 of July 2010 (CPC in the following) provides a set of specific rules referring to the conditions set in order to ensure the proper aplication of the right to defence: art. 10 para. 1, art. 83, art. 78, art. 88-89, art. 90-92 and art. 108.

The suspect or defendant has the right to be assisted by one or more lawyers throughout the criminal investigation, the preliminary chamber procedure and the trial, and the judicial bodies are obliged to inform him/her of this right. Legal assistance is ensured when at least one of the lawyers is present.

The suspect or defendant may choose not to exercise his/her right to be assisted by a lawyer of his/her choice. Failure to exercise this right by the suspect or defendant must be voluntary and unequivocal, must be brought to the attention of the judicial body orally or in writing and does not prevent the subsequent exercise, at any time during the criminal trial, of the right to be assisted by a lawyer of choice.

Legal assistance is mandatory:

a) when the suspect or defendant is a minor, detained in a detention center or in an educational centre, when he/she is detained or arrested, even in another case, when the security measure of medical hospitalisation has been ordered against him/her, even in another case, as well as in other cases provided for by law;

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

c) during a procedure in the preliminary chamber and during the trial in cases in which the law provides for the crime committed a life sentence or a prison sentence of more than 5 years.

Throughout the criminal trial, when legal assistance is mandatory, if the chosen lawyer is unjustifiably absent, does not provide a replacement or unjustifiably refuses to exercise the defence, although the exercise of all procedural rights has been ensured, the judicial body shall take measures to appoint a lawyer *ex officio* to replace him, granting him a reasonable term and the necessary facilities for the preparation of an effective defence, mentioning this in a report or, as the case may be, in the conclusion of the hearing.

During the criminal investigation, the suspect's or defendant's lawyer has the right to assist in the performance of any criminal investigation, except for:

a) the situation in which special methods of surveillance or investigation are used, provided for in Chapter IV of Title IV of CPC;

b) a body search or vehicle search in the case of flagrant offences.

The absence of the lawyer shall not prevent the criminal investigation or the hearing from being carried out, if there is proof that the act was notified under the conditions of paragraph (2).

The suspect's or defendant's lawyer also has the right to participate in the hearing of any person by the judge of rights and freedoms, to formulate complaints, requests and memoranda.

During the preliminary chamber procedure and during the trial, the lawyer shall have the right to consult the case files, to assist the defendant, to exercise his/her procedural rights, to formulate complaints, requests, memoranda, exceptions and objections.

The suspect's or defendant's lawyer has the right to benefit from the time and facilities necessary to prepare and conduct an effective defence.

— **Law no. 51/1995 on the organisation and exercise of the profession of lawyer (updated by Law 255/2013 and others)**

According to the provisions of the special law, the lawyer is independent and is subject only to the law, the statute of the profession and the code of ethics and has the right to assist and represent natural and legal persons before the courts of the judicial authority and other jurisdictional bodies, criminal investigation bodies, public authorities and institutions, as well as before other natural or legal persons, who have the obligation to allow and ensure the lawyer unhindered conduct of his/her activity, under the conditions of the law. (Art. 2)

— **Ministry of Justice Order no. 1274/2017** (provides model information forms and clarifies obligations) published in the Official Monitor no. 786 of 4th October 2017

3. Implementation

Incomplete implementation by Law No. 236 of 5 December 2017 amending and supplementing Law No. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor no. 993 of 14th of December 2017.

The amending law modified art. 16, art. 90 and art. 104 of Law no. 302/2004 with direct implications for the right to defence, one of the most important being the possibility of the person, who is under arrest in the executing State, to exercise his/her right to appoint a lawyer in Romania. In this case the Romanian court issuing the European arrest warrant shall, upon request and without undue delay, transmit to the executing authority information on the list of lawyers entitled to practise in one of the member bars of the National Union of Bars in Romania. The information may also be transmitted in electronic form and the expenses are borne by the requested person.

It should be noted that the provisions of this regulation do not transpose the entire content of the directive, although the Ministry of Justice considered that all the provisions of Directive 2013/48/EU are found in national legislation, with the exception of art. 10 paragraphs (4), (5) and (6)[1].

Practically, the only provision transposed is that mentioned in art. 10 paragraphs (4), (5) and (6) of Directive 2013/48/EU, namely, to grant the possibility to the person requested on the basis of a European arrest warrant to appoint a lawyer in the issuing state of the European arrest warrant, who will assist the lawyer in the executing Member State

4. Issues

[1] Ministry of Justice: Explanatory Memorandum to the Law amending and supplementing Law No. 302/2004 on international judicial cooperation in criminal matters, republished, with subsequent amendments and supplements.

As regards the interpretation of the provisions of art. 92 CPC, we have identified a restrictive approach of the official bodies, which claims that the role of the lawyer is limited to a passive presence in the conduct of criminal prosecution acts, without the possibility of intervening. According to this view, the lawyer can only assist in the proceedings, without having the right to ask questions to the person being heard or to interact directly with the judicial body. There are numerous arguments in favour of a broader approach, according to which the rights of the lawyer should not be limited to mere formal assistance, but should also include the possibility of actively exercising the prerogatives of the client, regardless of procedural capacity – suspect, defendant, injured person, civil party or civilly liable party. The right to defence, in its entirety, would be seriously affected if the lawyer were reduced to a purely decorative element in the conduct of criminal prosecution acts, without being able to intervene concretely to protect the legitimate interests of the client. Also, multiple provisions of the Code of Criminal Procedure support the idea that the lawyer of the parties or the main procedural subjects has the right to actively participate in the performance of criminal prosecution acts.

A relevant example is Art. 110 of the Code of Criminal Procedure, which provides that "the statements of the suspect or defendant shall be recorded in writing. The statement shall note the questions asked during the hearing, mentioning who formulated them, as well as the time of the beginning and end of the hearing". If the legislator had intended the role of the lawyer to be a purely passive one, the express mention of the author of the questions would have been superfluous, since, in this case, only the judicial body would have been entitled to ask them.

Regarding the distinction between the terms *assistance* and *participation*, used in Art. 92 of the Code of Criminal Procedure, we consider that this is only apparent, as there are no indications that the legislator's intention was to restrict the lawyer's ability to ask questions to the person being heard exclusively during the trial phase. Moreover, such an interpretation derives from an excessively legalistic vision, being all the more unjustified as it has the effect of limiting the exercise of procedural rights and, in the case of the suspect and the defendant, restricting the right to defence. Such an approach not only does not meet the requirements of a fair trial, but is destructive, given that standards in the field of procedural fairness are constantly evolving in an upward direction.

5. Application of the Directive

The following table compares the Directive's requirements with Romanian law and observed practice:

Directive Requirement	Romanian Law	Practice
Right to access a lawyer before questioning	CPC Art. 83, 88–91	Generally respected, but sometimes delayed access.
Right to confidential communication	CPC Art. 89, Law no.51/1995	Access usually allowed, though private spaces not always available.
Right to be informed of rights	MJ Order 1274/2017	Standardised forms used; compliance improving.
Right to a lawyer in EAW cases (European Arrest Warrant)	Law 302/2004 as amended	Partially fulfilled.
Waiver of right to lawyer	CPC Art. 89	Waiver permitted but not always well-documented.

6. Relevant Case-Law

- ECHR – Case *Bota v. Romania*, decision of 12th October 2004, para. 1-3 – the limitation of the exercise of the right to assistance to lawyers only and the prohibition of other associations parallel to the bars was analysed. The Court considered that although the dissolution of the "Bonis Potra" Association, whose statute included the possibility of creating bars, represented an interference with the right guaranteed by Art. 11 of the Convention, a violation of the ECHR cannot be held, since the interference was provided for by law, pursued a legitimate aim and was necessary in a democratic society and proportionate to the aim pursued.

- ECHR – Case *Forum Maritime v. Romania*, decision of 4 October 2007, para. 129-138 – the Court held a violation of the principle of equality of arms guaranteed by Art. 6 para. 1 of the ECHR and, implicitly, of Art. 6 para. 3 lit. b ECHR due to the unfairness of the procedure carried out before Romanian criminal investigation bodies, through which the civil party or its lawyer (who was bound by professional secrecy) did not have access to the case file to study the evidence brought by the accused/defendant in the defence nor to that administered by the prosecutor.

- Constitutional Court of Romania - Decision 260/2005 - The Court held that, although the law is a liberal and independent profession, its exercise must be carried out within an organised framework, in accordance with pre-established rules, the observance of which must be ensured, including by the application of coercive measures, reasons that imposed the establishment of unitary organisational structures and the prohibition of the establishment in parallel of other structures intended to practise the same activity, without legal support. Such a legislative solution cannot be considered as coming into conflict with the right of association.

Good practices

1. Good Practices

- Some Romanian courts ensure early lawyer appointment via pre-approved rosters
- Legal information forms are made available in police custody centres
- National Union of Romanian Bar Associations (UNBR) offers training on early access rights
- Some NGOs monitor police stations to ensure compliance with access-to-lawyer rules

2. Checklist for Practitioners

- Has the suspect been informed of their right to a lawyer in writing and orally?
- Has a lawyer been granted confidential access before any questioning?
- Was a waiver of lawyer properly recorded and witnessed?
- Is the right to a lawyer in EAW proceedings ensured both in issuing and executing states?
- Are interpretation and translation services provided where needed?

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

Application of the Directive

1. Summary

Romanian law formally guarantees the presumption of innocence through both constitutional and procedural norms. Amendments were made to ensure that public authorities and officials refrain from referring to individuals as guilty before a final conviction, and that suspects' right to remain silent is respected. However, enforcement issues persist, especially concerning public communication and media influence on perception. Romania partially adopted the Directive: formal provisions safeguard against public references to guilt (e.g. media statements, procedural measures). However, no structured sanctions for breaches and occasional public mischaracterisations occur.

2. Main Sources of Law

— **Constitution of Romania**

Article 23 para.11: Presumption of innocence

”Until the court's decision of conviction becomes final, the person is considered innocent.”

— **Criminal Procedure Code** – Law no. 135/2010 published in the Official Monitor no. 486 of 15 of July 2010 (CPC in the following)

Art. 4 CPC - Presumption of innocence:

”(1) Every person is presumed innocent until proven guilty by a final criminal judgment.

(2) After all evidence has been taken, any doubt in forming the conviction of the judicial bodies shall be interpreted in favour of the suspect or defendant.”

Art. 118 CPC - The witness's right to remain silent and not to incriminate him/herself

(1) The witness has the right not to declare facts and circumstances that, if known, would incriminate him/her. The judicial body is obliged to inform him/her of this right before each hearing, under the conditions of Art. 120.

(2) Evidence obtained in violation of the provisions of paragraph (1) may not be used against the witness in any criminal proceedings. The provisions of Art. 102 paragraphs (3) and (4) shall apply accordingly.

(3) A witness statement given by a person who, in the same case, prior to the statement, had or subsequently acquired the status of suspect or defendant may not be used against him/her. The judicial bodies are obliged to mention, when recording the statement, the previous procedural status.

Following the admission of the exception of unconstitutionality by the decision of the Constitutional Court of Romania no. 236/2020, the text of Article 118 of the CPC, which did not regulate the witness's right to remain silent and not to incriminate him/herself, was amended as reproduced above by Law no. 201/2023 amending and supplementing Law no. 135/2010 on the Code of Criminal Procedure, as well as amending other normative acts, published in the Official Gazette no. 618 of July 6, 2023.

3. Application of the Directive

Implementation overview:

Directive Requirement	Romanian Law	Practice
Presumption of innocence in public statements	Decision no. 197/17.09.2019 of the Superior Council of Magistracy	Mixed compliance; some officials use accusatory language.
Burden of proof on prosecution	CPC Art. 99	Respected in trials; prosecutors must prove guilt.
Right to remain silent	CPC Art. 78, 83 lett.a	Generally respected; suspects informed pre-hearing.
Right not to incriminate oneself	CPC Art. 109(3)	Enforced during police questioning.
Trial in absentia safeguards	CPC Art. 364	Permitted if informed and represented.

4. Issues

There are some issues regarding the substance of a right to silence of a legal person. Thus, the Romanian Constitution provides in Art. 24 for the right to defence, a right that grants any "party involved in a trial, according to its interests and regardless of the nature of the trial, (...) the exercise of any other criminal procedural rights (...)" (Constitutional Court of Romania, Decision no. 519 of 6 July 2017). According to Art. 489 of the CPC, in the case of crimes committed by legal persons, the provisions regarding the criminal liability of a natural person are applied accordingly, including in terms of the preliminary chamber procedure. Chapter II of Title IV of the Special Part of the CPC - Procedure regarding the criminal liability of the legal person - Art. 489-503 of the CPC - does not make any mention of the procedural rights of the accused legal person. Thus, Art. 83 CPC regarding the rights of the defendant, both natural and legal persons, includes, among others, the right not to make any statement during the criminal trial (Art. 83 para. 1 let. a). According to Art. 82 CPC, the defendant is "the person against whom the criminal action was initiated", the Romanian legislator using the generic term "person", so that no distinction is made between a natural person and a legal person (*ubi lex non distinguit nec nos distinguere debemus*). Procedural rights, including the so-called right to silence of the defendant, are therefore recognised for both natural persons and legal persons. This is in fact also the general interpretation that the judicial bodies have applied in the case of indicted legal persons, the minutes attesting that the defendant, a natural person, has been informed of his/her procedural rights having an identical content to the minutes attesting that the defendant, a legal person, has been informed of its procedural rights.

Regarding the representation of the legal person in criminal proceedings - art. 491 CPC: "the legal person is represented in the performance of procedural and in-court acts by its legal representative. If criminal proceedings have been initiated against the legal representative of the legal person for the same or related acts, the legal person shall appoint a representative to represent it. In the latter case, if the legal person has not appointed a representative, the representative shall be appointed, as the case may be, by the prosecutor conducting or supervising the criminal investigation, by the preliminary chamber judge or by the court, from among the insolvency practitioners authorizsd by law."

However, Directive (EU) 2016/343 expressly excluded its applicability to legal persons in Art. 2. The European Parliament attempted to broaden its scope to cover legal persons. The Council, supported by the Commission, rejected the European Parliament's approach. The EU legislator considered that the needs and levels of protection of natural and legal persons with regard to certain aspects of the presumption of innocence may differ and that the rights deriving from the presumption of innocence do not accrue equally to both categories of persons.

5. Relevant Case-Law

- ECHR – Case *Caraian v. Romania* (judgment of 23 June 2015) – The Court held that the presumption of innocence was violated by the prosecutor's order holding the plaintiff guilty of complicity in fraud and forgery in documents despite a finding that the prosecution was time-barred.

- ECHR – Case *Teodor v. Romania* (judgment of 4 June 2013) – in this case the Court analysed the possibility of violating the presumption of innocence through the motivation of the decisions or through the language used in the judicial reasoning, if the civil courts raised a question mark regarding the plaintiff's innocence and thus violated the principle of the presumption of innocence.

- ECHR – Case of *Pavalache v. Romania* (judgment of 18 October 2011) – The Court held that the presumption of innocence was violated by the statements of the prosecutor who stated to journalists during the defendant's preventive arrest that "all the evidence converges towards establishing with certainty the applicant's guilt and that his conviction is required, no one and nothing being able to save him from criminal liability."

- Constitutional Court of Romania, Decision 676/2010 – Suspension from office of a public official following a referral to court is not incompatible with the presumption of innocence.

- Constitutional Court of Romania, Decision 633/2018 – In the circumstances where the provision of information in criminal cases is justified by the satisfaction of a public interest provided for by law, including that regarding the discovery of the truth in the case, the public communication of this information is made by the criminal investigation bodies or the court. This ensures a fair balance between the individual interest of the person targeted by a criminal investigation who benefits from the presumption of innocence, and the general interest of society. The communication must be made in such a way as not to present the person subject to judicial proceedings as guilty as long as there is no final decision in this regard.

- High Court of Cassation and Justice, criminal section, decision 3465 of June 27, 2007 - If the evidence regarding guilt is not certain, certain, complete, but there is doubt regarding the guilt of the defendant, the *in dubio pro reo* rule applies, according to which any doubt operates in favor of the defendant, and based on this, the solution that is required is the acquittal of the defendant by the court.

Good practices

1. Good Practices

- Guidelines from the Superior Council of Magistracy (CSM) urge neutral language in press releases.

- Decision of the plenary session of the Superior Council of Magistracy no. 197/ 17.09.2019 - Art. 25 - The communication of information regarding the status of criminal investigation acts can be made only after there is a suspect in the case, it must be limited to information regarding the initiation of the criminal investigation, the initiation of the criminal action, the taking/extension of detention, the completion of the criminal investigation, the decision to refer/not refer to trial, but may also include information regarding the person, the deed for which the person is detained, its legal classification and essentially the reasons that determined the taking of the respective measure/solution. In communicating with the media, during the criminal investigation, the Public Ministry must respect the presumption of innocence, the non-public nature of the criminal investigation and the non-discriminatory right to information.

- Some courts refuse to admit evidence publicly presented before trial (e.g. via media).

- UNBR (National Union of Romanian Bars) and human rights NGOs monitor violations and submit complaints regarding public officials' statements.

2. Checklist for Practitioners

- Are public statements avoiding presumption of guilt?
- Has the burden of proof been challenged if improperly shifted?
- Were the suspect's silence or refusal to testify used against them?
- Was the accused tried in absentia with adequate prior notice and representation?

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

1. Summary

Although the Directive's deadline was May 2019, Romania has yet to adopt comprehensive free legal aid for all suspects in EU contexts and vulnerable categories. Aid exists for indigent clients and detained persons.

Romania has partially transposed Directive (EU) 2016/1919 into its legal framework. Legal aid is provided through CPC and Law 51/1995 to defendants who lack sufficient resources or are in pre-trial detention. However, gaps persist in access to legal aid for minor offences, cross-border proceedings (e.g. EAW cases), and vulnerable suspects. Although courts and bar associations cooperate to implement legal aid, uniformity and quality control remain concerns.

2. Main Sources of Law

- **Constitution of Romania** – art. 24 - Right to defence – guarantees the right to defense providing for throughout the trial, the parties have the right to be assisted by a lawyer, chosen or appointed ex officio.

- **Criminal Procedure Code (CPP)**, Articles 89–95: Establish rules on appointment and access to legal aid.

In brief, the suspect or defendant has the right to be assisted by one or more lawyers throughout the criminal investigation, the preliminary chamber procedure and the trial, and the judicial bodies are obliged to inform him/her of this right. Legal assistance is mandatory in cases when the suspect or defendant is a minor, admitted to a detention centre or an educational centre, when he/she is detained or arrested, even in another case, when the security measure of medical hospitalisation has been ordered, even in another case, as well as in other cases provided for by law; if the judicial body considers that the suspect or defendant could not defend him/herself; and during the procedure in the preliminary chamber and during the trial in cases in which the law provides for the crime committed a life sentence or a prison sentence of more than 5 years. If the suspect or defendant has not chosen a defender in cases where legal assistance is mandatory according to law, the judicial body shall take measures to appoint a public defender. If the lawyer is unjustifiably absent, the judicial body or the Court shall take measures to appoint a public defender to replace him/her, granting him/her a reasonable term and the necessary facilities to prepare an effective defence, mentioning this in a report or, as the case may be, at the conclusion of the hearing.

- **Law 51/1995 governing the legal profession and access to free legal assistance**, Art. 40, Art. 57, Art. 70-72: establish a set of rules on the procedure of designating an *ex officio* lawyer.

In brief, providing legal assistance by the lawyer appointed *ex officio* or free of charge by the bar association is a professional obligation and may not be refused, except in case of conflict of interest or for other justified reasons. The requests for legal aid are approved by the Dean.

Legal assistance may take the following forms:

a) in criminal cases, in which defence is mandatory according to the provisions of the Code of Criminal Procedure

b) in cases other than criminal ones, as a way of granting public legal aid, under the conditions of the law

c) legal assistance through a lawyer, granted at the request of local public administration bodies.

In exceptional cases, if the rights of a person lacking material means would be prejudiced by delay, the Dean of the Bar Association may approve the granting of free specialised legal assistance.

In all these cases the legal assistance is provided solely by a lawyer registered in the Legal Aid Register.

- Government Ordinance no. 51/2008 on legal aid in civil matters, published in the Official Monitor no. 327 of 25th of April 2008 – Art. 8

Public legal aid aims to ensure the right to a fair trial and to guarantee equal access to justice. Public legal aid is granted in civil, commercial, administrative, labour and social security cases, as well as in other cases, except for criminal ones.

Relevance of the provisions of this normative act are in the field of contraventional/administrative cases which require the same guarantees as criminal ones.

Public legal aid shall be granted to persons whose average net monthly income per family member, in the last two months prior to the application, is below 300 lei, in this case, the amounts constituting public legal aid shall be advanced in full by the state. If the income is below 600 lei, the amounts constituting public legal aid shall be advanced by the state in a proportion of 50%. Public legal aid may also be granted in other situations, in proportion to the applicant's needs, if the certain or estimated costs of the process are likely to limit his or her effective access to justice.

- **Decision no. 1**80/17 December 2016 of the Council of the National Union of Bars of Romania – Art. 2-3

According to the decision of the professional forum, legal aid or extrajudicial aid is provided by lawyers from bars who formulate options in this regard, being exercised only by lawyers registered in the Legal Aid Register. The forms for legal aid are: mandatory legal aid; extrajudicial aid; free assistance.

3. Application of the Directive

Key implementation points:

Directive Requirement	Romanian Law	Practice
Legal aid for indigent suspects	CPC Art. 90–91; Law 51/1995	Available in courts and police, but not always timely.
Prompt access at detention	CPP Art. 89	Generally respected; depends on local bar coordination.
Cross-border legal aid (e.g. EAW)	Law 302/2004	Available due to the amendments through Law 51/2021
Legal aid for minor offences (penalty under 5 yrs)	CPP Art. 90 (lett.b)	Not automatic; requires court's evaluation.
Aid for vulnerable persons	Defined only for specific categories – CPC art. 93 (4,5)	Does not cover all crimes and offences. In some cases requires court's evaluation.

4. Relevant Case-law

- Decision no. 21/2016, published in the Official Gazette of Romania, Part I, no. 884 of 4 November 2016. The High Court of Cassation and Justice – Panel for resolving certain legal issues rules that in the interpretation and application of the provisions of Art. 90 letter c)

CPC, during the preliminary chamber procedure and during the trial, in cases in which the law provides for the crime committed a life sentence or a prison sentence of more than 5 years, legal assistance is mandatory for the defendant legal person, in relation to the provisions of art. 187 CC". The phrase "appropriate application" of the provisions of Art. 90 letter c) CPC cannot be interpreted to the detriment of the legal person, in the sense of excluding the accused legal person from mandatory legal assistance. To interpret the "proper application" of the provisions of Art. 90 letter c) CPC in the sense that they relate to the penalties applicable to the legal person according to art. 136 paragraphs (2) and (3) of the Criminal Code, and not to the penalties provided for in the incrimination norms, to which Art. 187 CC refers, means to exclude the legal person from compulsory legal assistance, by way of interpretation, without a legal basis. The conclusion of the mandatory nature of legal assistance for the defendant who is a legal person, during the preliminary chamber procedure and during the trial, in cases where the law provides for the crime committed a life sentence or a prison sentence of more than 5 years, is also supported by the case law of the ECtHR, which has established that, to the extent that a criminal charge is brought against a legal person, the guarantees offered by the Convention, including those established by Article 6 regarding the right to a fair trial (one of the components of this right being the right to defence), are also applicable to it. Relevant in this regard are the cases: *Fortum Oil and Gas Oy v. Finland* (the European Court held that it had assumed the opinion that Article 6 applies to legal persons in the same way as it applies to natural persons and a legal person may be considered as having committed a criminal offence, in the autonomous meaning that this expression has within the meaning of Article 6 of the Convention) and *PayKar Yev Haghtanak Ltd v. Armenia* (the European Court of Human Rights reiterated that, where remedies are regulated, Contracting States must ensure that legal and natural persons within their jurisdictions continue to enjoy the same guarantees of Article 6 before courts of appeal as before courts of first instance).

- Bucharest Court of Appeal - Criminal Decision no. 515 of 12 June 2020 - Wrongful rejection of the request to postpone the case formulated by the chosen defence counsel in cases where legal aid is not mandatory. In relation to the punishment limits provided for the offence provided for in Art. 336 of the Penal Code (1-5 years imprisonment), the Court notes that in the case there was no incident of mandatory legal aid provided for in Art. 90 of the Penal Code. Under these conditions, the conduct of the hearing in the absence of the defendant's chosen defence counsel cannot lead to the retention of a case of absolute nullity (which would determine the case to be sent for retrial according to art. 421 CPC, there being no case of absolute nullity provided for in Art. 281 paragraph (1) letter f) CPC). The referral of the case for retrial cannot be ordered even in light of the provisions of the European Convention on Human Rights. The right to defence is not regulated as such in the Convention, but as a component of the right to a fair trial provided for in Art. 6. (...) not every violation of the right to defence entails a violation of the right guaranteed by Art. 6 of the Convention. Only to the extent that that violation is likely to affect the fairness of the procedure as a whole, and the irregularity cannot be corrected by the appeal court, is the case required to be referred for retrial.

- Bucharest Court of Appeal - Criminal Decision no. 477/A of June 11, 2020 - Appointment of a public defender in violation of the term provided for in Art. 91 para. (2) CPC. The public defender was appointed by the trial court on the very day of the hearing in violation of the provisions of Art. 91 para. (2) final thesis CPC. Violation of the aforementioned term calls into question the institution of relative nullity, not being equivalent to the lack of legal assistance. However, in the case, before the trial court the defendant benefited from the successive postponement of the case for the exercise of the right to defence, the violation of the term provided for by Art. 91 para. (2) final thesis CPC not being attributable to the judicial body, but to the defence, which, although it was aware of the impossibility of appearing, not only did not notify the court in a timely manner, but also offered guarantees in the sense of appearing even on the day before the trial date.

Good practices

1. Good Practices

- Pro bono schemes: bar councils partner with legal clinics to provide aid beyond mandatory scope
- Court-bar collaboration: county courts flag cases for legal aid proactively
- Awareness campaigns: posters at police stations and courts explaining free lawyer roles
- Local bar councils maintain rotating rosters of available defence attorneys
- Some courts notify bar associations in advance to assign legal aid counsel promptly
- Partnerships with NGOs and law school clinics supplement legal assistance for vulnerable populations
- Posters and brochures in detention centres explain legal aid rights

2. Checklist for pratitioners

- Has the defendant been informed in writing about the right to legal aid?
- Has the financial status of the defendant been evaluated?
- Was legal aid counsel assigned promptly at detention or first hearing?
- Are there signs of vulnerability requiring additional legal support?
- Have cross-border procedures been initiated in case of EAW?

Spain

Infosheets on the Application of Three EU Procedural Rights Directives

Summary

By way of introduction, Spanish criminal proceedings are, broadly speaking, divided into two phases: the investigatory and the trial phase. Although the trial phase has, *mutatis mutandis*, the same characteristics and features as in any other European country, the investigatory phase is different from the majority of them, because Spain retains, with a few exceptions, the model of an investigating judge, who governs and directs the inquiry. The public prosecutor is just a party who interacts in the proceedings, but is not in charge of the investigation.

Respect for procedural safeguards in Spanish criminal proceedings is high. There is an old Criminal Procedural Act from 1882, amended many times, and inspired by liberal ideology, which encompasses a wide range of guarantees that have been increased through legislative reforms and by the 1978 Constitution and adherence to international instruments on human rights, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Of course, there is room for improvement in procedural safeguards issues in Spain and there are certain shortcomings that should be resolved. The three directives which are the subject of this infosheet have helped the Spanish system to improve and fix some of these shortcomings, despite the fact that, of the three of them, only the directive on the right of access to a lawyer has been formally implemented through legislative reform in 2015.

Principle sources of law

- Spanish Constitution (1979)
- Criminal Procedural Act (1882, amended several times)

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

Application of the Directive

— Criminal Procedural Act (1882), amended in 2015

— Organic Act 5/2024, 11th November

Directive 2013/48/EU was implemented in the Spanish procedural system by the Organic Act 13/2015, 5th October, which amended the Criminal Procedural Act (CPA), Royal Act 14 september 1882, in order to strengthen procedural guarantees.

The implementation improved the legal regime of the right of access to a lawyer, which is inextricably linked to the right of defence and the right to equality of arms – in other words, the right to a fair trial - as the Spanish Constitutional Court has stated in many rulings, for instance Ruling nº 5/2020, which states that the right to a defence is based on the need to ensure full equality of arms and the effective enforcement of the right to state the case for the defence, avoiding any risk of imbalance in the procedural position of the parties. This is a right that is recognised for the benefit of the defendant him- or herself, and is also a structural requirement of a criminal trial to guarantee its correct outcome. The receptiveness of the Spanish system towards access to a lawyer can be seen in the recently passed Organic Act 5/2024, 11th November, that expressly states the existence of an intrinsic connection between the right to defence and access to a lawyer, and therefore, the essential connection between the right to defence and legal professionals.

The improvements that the implementation of the directive has brought to Spanish criminal proceedings result in a clearer and more effective recognition of the rights of the suspect and accused in the scope of criminal proceedings, by means of codifying certain rights that were already applicable according to the case law of the Supreme and Constitutional Courts. This improvement in the right of defence cannot be fully understood without taking into account the implementation of other Directives, such as Directives 2010/64/EU, on the right to interpretation and translation, and 2012/13/EU, on the right to information, both implemented by Organic Act 5/2015, 27th April.

According to the reform introduced to implement the directive which is the subject of this infosheet, Art. 118(1) CPA sets out that the suspect and accused may exercise the right to a defence from the moment that they are notified of their condition as suspect or accused, whether they have been arrested or have been subject to another precautionary measure or if their prosecution has been agreed, and for this purpose, and without undue delay, they will be instructed of the following rights:

(i) the right to be informed about the acts ascribed to them and any relevant change in the subject of the investigation and the grounds on which the accusation was based - this information will be given with a sufficient amount of detail to enable effective exercise of the right to a defence;

(ii) the right to examine the proceedings sufficiently in advance to safeguard the right to a defence and, at any event, prior to their statement being taken;

(iii) the right to act in the criminal proceedings to exercise their right to a defence in accordance with the provisions of the law;

(iv) the right to appoint a lawyer freely, without prejudice to the provisions of paragraph 1 a) of Art. 527 CPA;

(v) the right to request free legal aid, the procedure for doing so and the conditions to obtain it;

(vi) the right to translation and interpretation, free of charge, in accordance with the provisions of Arts. 123 and 127 CPA;

(vii) the right to remain silent and not make a statement if they do not wish to do so and not to answer some or any of the questions put to them; and

(viii) the right not to make a statement against themselves and not to confess guilt.

Also, article 118 CPA states that the information referred to shall be provided in understandable, simple language.

For this purpose, the information will be adapted to the age of the recipient, their degree of maturity, disability and any other personal circumstance which may give rise to a modification to the capacity to understand the scope of the information being provided to them.

Article 118.2 CPA also sets out specifically the timeframe for the exercise of the right of defence: from the attribution of the investigated punishable act until the very termination of the judgment.

Article 118.4 CPA envisages the confidentiality of communication between the lawyer and the suspect or accused or detainee, with the only exception being that there are objective grounds for believing that the lawyer is participating in the crime alongside his or her client. The confidentiality of lawyer-client communication was already acknowledged by the Supreme Court in its ruling 79/2012, 9th February. Recently, confidentiality has been protected by article 16 Organic Act 5/2024, 11th November.

The amendments made to the CPA in 2015 set out new rights for the arrested person, namely:

(i) the right to communicate by phone or videoconference with the lawyer of their choice if the geographic distance makes in-person assistance impossible (Art. 520.2.c) CPA);

(ii) the right to communicate privately with their lawyer even before police questioning (Art. 118.2 CPA) - this solves an issue that arises many times in police stations when the lawyer seeks to interview their client before questioning;

(iii) the right to communicate by telephone with a third party of their choice (Art. 520.2.f) CPA); and

(iv) the right to communicate and be visited by consular authorities, in the case of foreign detainees or prisoners (Art. 520.2.g) CPA).

Other improvements were:

(i) to introduce the same rights mentioned above for those detained within the scope of a crime committed at sea (Art. 520 ter CPA);

(ii) to clarify the circumstances in which the judge may render the detainee incommunicado (Art. 527 CPA).

Currently, the right to legal assistance in the Spanish system includes the following rights:

(i) *Right to a defence* (Arts. 17.3 and 24.2 of the Spanish Constitution (SC). It cannot be waived. If the investigated or accused person does not appoint a lawyer, one shall be appointed *ex officio* (Arts. 118.3, 520.5, 767, 784.1 CPA). Exception: crime against traffic safety (but only at the time of arrest – Art. 520.8);

(ii) *Free choice of lawyer*, except in the cases listed in Art. 527 CPA (detainee incommunicado);

(iii) *The assistance of an ex officio lawyer* (Art. 119 SC, and Directive 2016/1919, of October 26, relating to free legal assistance for suspects and accused in criminal proceedings);

(iv) *The right to a confidential interview with a lawyer both before and after a statement* (Art. 520.6.d CPA) - the conversations between lawyer and client are confidential (Art. 118.4 and SCR 79/2012, of 9 February);

(v) *The right to submit a defence* - Articles 6.3.c) European Convention on Human Rights (ECHR) and 14.3.d) International Covenant on Civil and Political Rights (ICCPR) in two situations:

a) in the absence of lawyer, only if procedural law allows it - in our system in proceedings to try certain minor crimes;
b) in the presence of a lawyer – in other words, the right to the last word (Constitutional Court Ruling (CCR) 35/2021).

Good practices

There are no official lists or catalogues of good practice on this field. The Spanish system is not used to soft law or non-legislative actions created by the authorities.

Nevertheless, there are some good practices for lawyers regarding the right of access to a lawyer:

(a) a lawyer assisting a client in police detention centres should require the police to list the essential documents needed to challenge effectively the lawfulness of the arrest. If the police fail to comply with this requirement, the lawyer should mention this by state so in the minute of the suspect's first statement. If the police refuse to mention this in the minute, the lawyer should refuse to sign it.

(b) once a lawyer is called by the police, public prosecutor or the Court to assist an arrested person, the lawyer, if he/she take over the case, should appear as soon as possible, without any delay.

(c) training is eseential. Any lawyer should be concerned to improve their skills in knowing not only the legal national legislation and its jurisprudence, but also that at the European level (Directives and CJEU case law).

(d) in EAW cases, the lawyer in the executing State should informed his/her client about the possibility of double representation (a lawyer in the issuing State), who can be very helpful in order to challenge, if possible, the EAW.

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

Application of the Directive

Directive 2016/343 has not been implemented in our system.

There is no official explanation, but it is assumed that our law-makers consider that the presumption of innocence is already established in our system. This is true, but with some nuances.

The essential content of the presumption of innocence is fully recognised. The presumption of innocence is a fundamental right set out in Art. 24.2 of the Spanish Constitution, which has been defined by the Constitutional Court (CCR 18/2021, FJ 5) as one of the cardinal principles of contemporary criminal law (CCR 138/1992, FJ 1), considering it perhaps the main constitutional manifestation of the special need to protect a person against an unjustified State sanction (CCR 141/2006, FJ 3). As a *treatment rule*, the presumption of innocence prevents someone from being treated as guilty who has not been declared so after a previous fair trial (CCR 153/2009, FJ 5). And, as a *trial rule*, it appears as the right of the accused not to be convicted unless guilt has been established beyond any reasonable doubt (CCR 78/2013, FJ 2), with the burden of proof on the prosecution to prove all the elements of the charge (Art. 6.1 Directive 2016/343; CCR 105/1988, FJ 3). Our system recognises that the burden of the proof is on the prosecution (CCR 181/2020, FJ 2) and that the suspect or accused has the right not to incriminate themselves (Art. 118.1.g CPA, CCR 21/2021, FJ 4).

However, there are certain elements contained in the directive which are not currently recognised in Spanish law:

(a) The extra-procedural dimension of the presumption of innocence, set out in Arts. 4 and 5 of the directive. Essentially, those articles mean that the presumption of innocence must be respected also outside the proceedings in the sense that, at least, public authorities cannot treat a person as guilty until a guilty judgment has been delivered. Thanks to the directive, Constitutional Court case law now takes this aspect of the right into account (CCR 106/2021, FJ 8, 8.3), but implementation of the directive is absolutely necessary.

(b) The *in dubio pro reo* principle is not recognised in Spanish case law as a part of the presumption of innocence, and therefore does not possess the nature of a fundamental right. Following case law from the Supreme and Constitutional Courts - from the ruling 44/1989, FJ 2 - presumption of innocence and *in dubio pro reo* are different rights. The *in dubio pro reo* principle operates only at the time of sentencing as a merely subjective criterion for interpreting the applicable evidence when, even though there is substantiated evidence of the charge, doubt remains in the mind of the judge. According to this way of handling it, the presumption of innocence - expressly referred to in Art. 24.2 of the Spanish Constitution '78 - enjoys constitutional protection, acquired as a subjective right by the defendant both in the extraordinary appeal of cassation and in amparo, while the *in dubio pro reo* does not (CCR 16/2000, FJ 4).

However, Art. 6.2 of the directive sets out the *in dubio pro reo* principle as one of the attributes of the presumption of innocence, and so the implementation of the directive should trigger a re-examination of the doctrine within Spain's highest courts.

(c) The impossibility of using the right to remain silent against the suspect or accused, along with the right not to testify against oneself, as Art. 7.5 of the directive establishes. In Spain, the Constitutional and Supreme Courts' case law declares that the right to remain silent and not to testify against oneself comprise the following aspects (CCR 181/2020, FJ 2):

(i) that the suspect can freely exercise their right not to testify, that is, that they are not obliged to do so, including the prohibition of any form of violence, intimidation,

coercion, suggestion or deception to obtain the testimony of the suspect or accused; and

(ii) that no harm is derived from that conduct. The refusal to testify cannot be considered as an acknowledgment of guilt or of involvement in the facts, which would constitute a contravention of the right to the presumption of innocence derived from a reversal of the rules on the burden of proof which, in any case, belongs to the prosecution.

This last question is, however, controversial. Since ECtHR Murray v. UK, 1996 (approved by 7 judges against 5), silence can operate against the accused if two circumstances arise:

(i) that the evidence is evaluated by a judge, and not by a jury; and

(ii) that there is prima facie proof of what happened, which requires an explanation that the accused should be able to give. It is the so-called "explanation test" which has been assumed by the Spanish Supreme Court and Constitutional Court (CCR 155/2002; SCR 658/2018, 4th December). This jurisprudence must nevertheless be reviewed, in our opinion, as a result of the literal wording of Art. 7.5 of Directive 2016/343.

Good practices

There are no official list or catalogue of good practice in this field. The Spanish system is not used to soft law or non-legislative actions created by the authorities.

Nevertheless, some good practices for lawyers regarding the use of the presumption of innocence as a defence tool for suspects and accused persons have been put forward by the in academia (DE HOYOS SANCHO, M., y GUERRERO PALOMARES, S. (2020), "Directiva 2016/343, de 9 de marzo, por la que se refuerzan en el proceso penal determinados aspectos de la presunción de Inocencia", in *Garantías Procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España,* ARANGÜENA FANEGO, C. and DE HOYOS SANCHO, M. (Dirs.), Thomson Reuters Aranzadi, Cizur Menor, p. 95 and so on, as follows:

(a) it should be required that the evidence presented by the prosecution be disclosed to the defence sufficiently in advance to allow for its analysis and the preparation of an effective procedural and/or substantive challenge to it. When the admission of new evidence at the request of the prosecution occurs during the oral trial, the defence should demand that the prosecution justify that the evidence was neither known nor could reasonably have been known beforehand. In any case, the Judge or Court must grant any request for the suspension of the hearing made by the defence in light of the admission of such evidence, in order to safeguard the right to defence.

(b) when the defence presents an alternative factual hypothesis, it must have at its disposal the means to attempt to prove its thesis. Otherwise, the defence's position will be adversely affected.

(c) it is highly advisable to refer to the standard of proof "beyond a reasonable doubt," which is intrinsically linked to the presumption of innocence and to the *in dubio pro reo* principle. It should be required that this standard of proof always overcome any doubt that could arise objectively in the mind of a qualified legal operator, setting aside any personal conviction regarding guilt not supported by evidence obtained in full compliance with procedural safeguards, from which it may reasonably be inferred that the normative and subjective elements of the criminal offence leading to conviction are present. The prosecutorial hypothesis must: (i) be supported by a plurality of pieces of evidence that account for all available data and are apt to explain additional facts beyond those expressly stated in the prosecutorial narrative; and (ii) be capable of refuting all other plausible alternative hypotheses, whether or not they have been raised by the defence.

(d) for the defence, it is sufficient not to accept the factual ground put forward by the prosecution, and in theory, it should not be prejudiced by its failure to propose an alternative factual hypothesis or by remaining silent. Reliance should be placed on Article 7.5 of Directive 2016/343 of 9 March.

(e) it is advisable to request the recusal of members of a trial court who have had prior contact with the investigative phase of the case — not only when they have acted as investigating judges (in which case they will almost certainly recuse themselves), but also when they have participated in the adjudication of any appeal against decisions issued by the investigating judge.

Right to legal aid
Directive (EU) 2016/1919

Application of the Directive

- Criminal Procedural Act (1882, amended)
- Act nº 1/1996, 10 January, on legal aid

The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU, by making available the assistance of a lawyer funded by the Member State for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA (requested persons).

This directive has not yet been implemented in Spain. The reason is the same as regarding the directive on presumption of inocence: Spanish law makers assume that Spain already complies with the minimum standards that the directive establishes.

That assumption is correct. Indeed, Spanish regulation goes beyond the directive (for instance, recognising the need for legal aid in any criminal proceedings, even for minor traffic offences; granting the right not only to suspects and accused but also to some victims; and granting legal aid even prior to an evaluation of means).

The full coverage of legal aid in Spanish systems is due to its constitutional codification (Art. 119 SC): "*Justice shall remain free when thus provided by law, and shall in any case be so in respect of those who have insufficient means to litigate*". This right is developed in Act nº 1/1996, 10 January, on legal aid, and in Regulation nº 141/2021, 9th March.

The beneciaries of legal aid are (Art. 2 Act 1/1996):

(a) Spanish citizens, nationals of other Member States of the European Union and foreigners who are in Spain;

(b) The Management Entities and Common Services of Social Security;

(c) The following legal persons:

(i) public utility associations, provided for in Art. 32 of Organic Law 1/2002, of March 22, regulating the Right of Association;

(ii) foundations registered in the relevant public registry;

(iii) legal persons when they have been declared in bankruptcy or there is no activity in the last year if the company is in the process of dissolution.

The material requirement to access the legal aid system is a lack of sufficient assets or resources to litigate. The definition of when it is considered that there is a lack of assets or resources are established in Act 1/1996 (art. 3).

However, the law grants the right to legal aid to the following persons, regardless of their financial means or wealth (art. 2):

(i) victims of gender violence, terrorism and human trafficking in those proceedings that are linked to, derive from or are a consequence of their status as victims, as well as minors and people with disabilities;

(ii) those who, due to an accident, can prove permanent consequences that completely prevent them from carrying out the tasks of their usual work or professional occupation and require the help of other people to carry out the most essential activities of daily life, when the object of the dispute is the claim for compensation for personal and moral damages suffered;

(iii) associations whose purpose is to promote and defend the rights of victims of terrorism, indicated in Law 29/2011, of September 22, on the recognition and comprehensive protection of victims of terrorism.

In any case, a legal aid lawyer will be provided to any suspect or acussed who does not appoint a lawyer of their choice; however, if those persons have enough means and wealth, the lawyer shall invoice them afterwards.

The content of the right comprises the following (Art. 6 Act 1/1996):

(a) free advice and guidance prior to the proceedings for those who intend to claim judicial protection of their rights and interests, as well as information on the possibility of resorting to mediation or other extrajudicial means of conflict resolution, in cases not expressly prohibited by law, when they aim to avoid procedural conflict or analyse the viability of the claim;

(b) access to a lawyer for a detainee, prisoner or defendant who has not appointed one, in any police procedure that is not a consequence of a criminal proceeding in progress or in their first appearance before a judicial body, or when this is carried out by means of judicial assistance, and the detainee, prisoner or accused has not appointed a lawyer in the place where judicial assistance is provided. This legal assistance shall also apply to the person requested and detained as a result of a European arrest warrant who has not appointed a lawyer. It will not be necessary for the detainee, prisoner or defendant to prove in advance their lack of resources, without prejudice to the fact that if the right to free legal assistance is not recognised later, they must pay the lawyer the fees accrued for their intervention;

(c) free defence and representation by a lawyer and *procurador* in judicial proceedings when the intervention of these professionals is legally mandatory or when, not being so, any of the following circumstances arise:

(i) their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings; or

(ii) in the case of minor crimes, the person against whom the criminal proceedings are directed has claimed the right to be assisted by a lawyer, which is agreed by the court or tribunal, in consideration of the category of the offence in question and the personal circumstances of the applicant in relation to legal assistance.

(d) free insertion of announcements or edicts, in the course of the proceedings, which must be published in official newspapers;

(e) exemption from the payment of legal fees, as well as the payment of deposits necessary for filing appeals;

(f) free expert assistance in proceedings by technical personnel assigned to relevant authorities, or, failing that, by officials, agencies or technical services dependent on public administrations;

(g) obtaining free copies, evidence, instruments and notarial acts, in the terms provided in Art. 130 of the Notarial Regulations;

(h) reduction by 80% of the fees that arise from the granting of public deeds and for obtaining copies and notarial evidence not contemplated in the previous number, when they are directly related to the proceedings and are required by the judicial body in the course of the same, or serve to substantiate the claim of the beneficiary of legal aid;

(i) reduction by 80% of the fees that arise from obtaining notes, certifications, annotations, entries and registrations in the Property and Mercantile Registries, when they are directly related to the proceedings and are required by the judicial body in the course of the same, or serve to substantiate the claim of the beneficiary of legal aid.

Good practices

There are no official list or catalogue of good practice in this field. The Spanish system is not used to soft law or non-legislative actions created by the authorities.

Nevertheless, here are some good practices for lawyers regarding the right of access to a lawyer:

(a) legal aid lawyers should not forget that they are a key element in the proper conducting of due and fair process, despite their work not being reimbursed properly. Vocation is essential for the proper performance of work.

(b) due to the various types of cases that could be assigned to legal aid lawyers, they should be very concerned to improve and enhance their skills through a systematic use of training (each provincial Bar has its own training programmes during the year).

(c) fluent and good communication with the client is crucial. On the first possible occasion, the lawyer should obtain as much information as available to try to keep contact with the client, including cell phone number, email or address of relatives (in some cases, it can be difficult to get in touch with the client after first assistance, especially when dealing with people on very low incomes who may change their place of residence or who may even be homeless).