

**THE RIGHT TO DEFENCE IN POLAND.
REMARKS ON THE LATEST AMENDMENTS OF THE CODE
OF CRIMINAL PROCEDURE FROM THE EUROPEAN
PERSPECTIVE**

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ABSTRACT

The article discusses the issue of standards of the right to *defence* and takes into account the recent amendments of the Code of Criminal Procedure. The analysis is conducted against the background of minimum standards of the right to defence set out under European law. A reference introduced to the title of the Code includes the assertion that the legislator has implemented the provisions of Directive of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty as well as Directive of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. However, it seems that as a result of changes made in the discussed scope in the years 2016-2019, the legislator not only failed to fully implement the aforementioned Directives, but even introduced modifications that led to lowering the standards of the right to defence and guarantees of its implementation, both in material as well as formal terms.

Key words: Right to defence; accused person; suspected person; defence lawyer; European law

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1. INTRODUCTION

In general, the right to defence, which covers the individual rights of the accused ensuring its global implementation, is one of the foundations of a fair criminal trial. Therefore, in a fair and honest trial, the passive party should have, first of all, a position, guaranteed *in abstracto* and defined by the granted rights including available legal instruments, which should enable substantive defence against the charge (right to defence in substantive terms). In addition, given that the defence of the accused is realized in formalized proceedings, and therefore in complex and often incomprehensible procedural circumstances, an important element of the right to defence also focuses in its formal aspect, including not only the right to be represented by defence counsel, but also their procedural activities¹.

Such a complementary approach allows the full picture of the right to defence; however, it should be emphasized that, with reference to the linguistic interpretation of the concept referred to, it remains the general right of the accused. It includes a number of legal means which can be used. In a situation where the accused is represented by a professional lawyer, there should be a conviction that the rights necessary for effective defence are exercised in the best interests of the accused. It should be noted, however, that the right to defence is determined by legal regulations that should guarantee its potential effectiveness.

2. RIGHT TO DEFENCE AGAINST THE BACKGROUND OF EUROPEAN LAW AND THE LATEST AMENDMENT TO THE CODE OF CRIMINAL PROCEDURE - GENERAL COMMENTS

Under European law, the assumption is that there is a need for a certain universal framework guaranteeing the exercise of the right to defence in terms of an objective concept of a fair criminal trial. The effectiveness of the right to defence is, however, one of the key conditions for a fair trial,

¹ Cf. Paweł Wiliński, „Zasada prawa do obrony”, In: System Prawa Karnego Procesowego, vol. III, p. 2: Zasady procesu karnego, ed. Paweł Wiliński, Warsaw: LexisNexis, 2014, 1490.

which has been recognized in the European forum². The manifestation of this was the adoption of the Council of the European Union Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings³. The indicated document highlights, among others the importance of the right to defence in maintaining mutual trust among Member States and public confidence in the European Union. In the following years, steps were taken to strengthen the procedural rights of suspects and accused persons. The effect of the implementation of the roadmap was the adoption of the following directives, shaping the minimum standards and aimed at ensuring, *in genere*, the effectiveness of exercising the rights of the passive party during criminal proceedings⁴:

- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings⁵;
- Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings⁶;
- Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in

² Cf. Stefano Ruggeri, „Harmonisation of Criminal Justice and Participatory Rights in Criminal Proceedings. New Developments in EU Law After the Lisbon Treaty”, In: Stefano Ruggeri, *Audi Alteram Partem in Criminal Proceedings. Towards a Participatory Understanding of Criminal Justice in Europe and Latin America*, Cham: Springer, 2017, 368.

³ OJ C 2009 No. 295, 1.

⁴ See Kai Ambos, „The Protection of Fundamental Rights by the EU”, In: Kai Ambos, *European Criminal Law*, Cambridge: Cambridge University Press, 2018, 136-140; Anna Demenko, „Prawo oskarżonego do korzystania z pomocy obrońcy w świetle dyrektywy nr 2013/48/UE – wybrane zagadnienia”, *Paestra* 12(2018): 14; Maciej Fingas, „O konieczności poszerzenia zakresu kontroli zażaleniowej nad niektórymi decyzjami dotyczącymi praw oskarżonego – wybrane problemy implementacji unijnych dyrektyw w polskim procesie karnym”, *Białostockie Studia Prawnicze* vol. 23, 1(2018): 49-50. DOI: 10.15290/bsp.2018.23.01.03; Alicja Klamczyńska, Tomasz Ostropolski, „Prawo do adwokata w dyrektywie 2013/48/UE – to europejskie I implikacje dla polskiego ustawodawcy”, *Białostockie Studia Prawnicze* 15(2014): 146.

⁵ OJ L 2010 No. 280, p. 1.

⁶ OJ L 2012 No. 142, p. 1.

criminal proceedings and in European warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty⁷;

- Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings⁸;
- Directive 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings⁹;
- Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings¹⁰.

As part of these considerations, the point of reference are Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013, and in this context also Directive 2016/1919 /EU of 26 October 2016 and Directive of the European Parliament and of the Council 2016/343/EU of 9 March 2016 to the extent that they contain regulations that affect the implementation of the right of the accused to defence in a criminal trial.

Already in this context it should be pointed out abstractly that, in particular against the background of changes made to Polish criminal procedural law in 2016-2019, a gradual decrease in the procedural status of the accused can be observed, including the standard of the right to defence in both material and formal terms, rather than striving to consolidate it at the minimum level postulated in EU directives. It is significant, therefore, that the legislator by the Act of 10 January 2018 amending the Act - Code of Criminal Procedure and some other acts¹¹ introduced reference No. 1 to

⁷ OJ L 2013 No. 294, p. 1.

⁸ OJ L 2016 No. 65, p. 1.

⁹ OJ L 2016 No. 132, p. 1.

¹⁰ OJ L 2016 No. 297, p. 1.

¹¹ Journal of Laws of 2018, item 201.

the title of the Act, recognizing that the provisions of the Code of Criminal Procedure implement the provisions of Directive 2013/48/EU of 22 October 2013. Then, pursuant to the amendment of 19 July 2019¹² the legislator changed the content of the specific reference, emphasizing the alleged standardization in the provisions of the Act of the norms stipulated in Directive 2016/343/EU of 9 March 2016. However, the changes introduced by the cited legal acts did not carry such elements that would allow for the declaration about strengthening the position of the accused, among others also in the *spectrum* of their right to defence.

Within the justifications of both acts, the former introducing the reference with the mention of implementation, and the latter extending its content to include a reference to another Directive, it is impossible to find any arguments, especially in the absence of any amendments, supporting the claim that the Code of Criminal Procedure implements the provisions of the aforementioned directives. In both cases, the legislator merely stated that the directives in question did not require implementation, as the provisions in force implemented their stipulations¹³. Unfortunately, such a *de lege lata* claim cannot be considered fully truthful. In fact, it is not holistically reflected in the current normative state, if one analyses the applicable regulations from the perspective of the provisions of EU directives and the basic assumptions of the above-mentioned directives¹⁴. However, before proceeding to the analysis of recent amendments to criminal procedural law in the light of the cited European acts, it is first necessary to discuss the main assumptions underlying their adoption. Finally, they also need to be considered against the concept of the right to defence.

¹² Act amending the Act - Code of Criminal Procedure and some other acts of 19 July 2019 (Journal of Laws of 2019, item 1694).

¹³ Cf. Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, Sejm print no. 1931: 17, orka.sejm.gov.pl/Druki8ka.nsf/0/A9ED16CA28149400C12581BD00426457/%24File/1931-uzasadnienie.docx, [date of access: 2.02.2020]; Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, Sejm print no. 3251: 4, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/A617BC771FDAE095C12583AC004875E9/%24File/3251-uzas.docx>, [date of access: 20.02.2020].

¹⁴ As a side note, it is worth adding that Directive 2013/48/EU was to be implemented by 27 November 2016, while Directive 2016/343/EU by 1 April 2018.

The main purpose of Directive 2013/48/EU, as can be read from recital 19 in its preamble, was to ensure that the Member States guarantee the accused persons' right of access to a lawyer without undue delay. Very significant in this context are the provisions of Article 3 (1) and (2) of the aforementioned Directive, which literally imply the need to guarantee access to a lawyer at an early stage of criminal proceedings. It should be emphasized that under the provisions of the Directive, the right to defence in formal terms defined by the Act refers not only to the passive party who already has a defined procedural status, i.e. suspect or accused person, but also to other persons, regardless of whether they are actually suspected of committing a given prohibited act (Article 2 (3) of the Directive)¹⁵.

This approach is undoubtedly dictated by the need to guarantee also to those persons who do not yet have the status of a party the effective exercise of their right to defence. As follows from recital 21 in the preamble to the Directive, such a person should be protected above all from self-accusation and has the right not to testify. At the same time, this person should be allowed to obtain legal assistance from a lawyer during questioning¹⁶. In this context – as underlined in recitals 22, 28 and 33 of the preamble, as well as in Article 4 of the Directive – attention should be paid to the significance of free communication with a lawyer, including ensuring the confidentiality of meetings, correspondence, telephone conversations and other forms of communication between the accused and their professional legal representative. Similarly, the right of access to a lawyer in a state executing the European arrest warrant has been standardized by the Directive in relation to the persons subject to the warrant, emphasizing the confi-

¹⁵ Cf. Antonio Balsamo, „The Content of Fundamental Rights”, In: *Handbook of European Criminal Procedure*, ed. Roberto E. Kostorsis, Cham: Springer, 2018, 126; Zlata Đurđević, „The Directive on the Right of Access to a Lawyer in Criminal Proceedings: Filling a Human Rights Gap in the European Union Legal Order”, In: *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*, ed. Zlata Đurđević, Elizabeta Karas Ivičević, Zagreb: Croatian Association of European Criminal Law, 2016, 22.

¹⁶ Cf. Piotr Kardas, „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego – kilka uwag w świetle doktryny Salduz, doktryny Miranda oraz dyrektywy w sprawie dostępu do adwokata”, *Europejski Przegląd Sądowy* 1(2019): 5-6.

dentiality principle (recitals 42 to 45 of the preamble to the Directive and Article 10 of the Directive).

When referring to Directive 2013/48/EU, it is impossible not to refer to the provisions of Directive 2016/1919/EU. According to recital 1 of the preamble, the purpose of that Directive is to ensure access to a lawyer in accordance with Directive 2013/48/EU. Therefore, it is justified to claim that Directive 2016/1919/EU is of a subordinate character in relation to the aforementioned Directive 2013/48/EU. It also guarantees the right of the suspected or accused person to obtain legal assistance from an ex officio defence lawyer, leaving Member States free to make the appointment of such a lawyer conditional upon finding that the person in question has insufficient funds to cover the costs of a lawyer of choice, when the interests of justice so require (Article 4 (1) of Directive 2016/1919/EU). However, it seems that the criterion of assessing the financial situation is not relevant when the suspect or accused person is deprived of liberty (Article 4 (4) of Directive 2016/1919/EU)¹⁷. This directive also obliges Member States to provide legal aid ex officio in the State executing the European arrest warrant to the persons concerned, from the time of their arrest under the EAW, until their surrender or until the decision not to surrender becomes final (Article 5 (1) of Directive 2016/1919/EU). Furthermore, the provisions of Article 4 (5) and Article 6 (1) of the Directive stress the fact that decisions on the appointment of an ex officio lawyer should be taken without undue delay.

There is no doubt that the participation of a lawyer in legal proceedings from their beginning may be of key importance for the outcome of the whole trial. It is important not only for planning and implementing a certain tactic of defence, but above all allows the accused to properly understand their procedural situation and to make them aware of their rights and obligations. The defence lawyer is often above all a guaran-

¹⁷ See Dominika Czerniak, „Prawo dostępu do adwokata w postępowaniu przygotowawczym. Uwagi na tle postanowienia Sądu Najwyższego z 27.06.2017 r., II KK 82/17”, *Przegląd Sądowy* 11-12(2018): 124. In this context, it is worth contrasting the recital 25 in the preamble to Directive 2016/800/EU, according to which Member States should provide ex officio legal assistance to suspected or accused children if the child or the holder of parental responsibility have not provided such assistance on their own.

tee of the actual recognition of the defendant's right to defence and its effective implementation.

From the point of view of the right to defence, Directive 2016/343/EU is also crucial. There can be no doubt about the importance of the principle of the presumption of innocence and the need to comply with it from the moment a person becomes suspected or accused of a prohibited act or an alleged prohibited act. Its strict observance from the beginning of the proceedings involving a specific person is, after all, an important condition for a fair trial and in the light of *in dubio pro reo* should influence the assessment of all doubts, not only those that cannot be removed, in favour of the accused (Article 6 (2) of the Directive). The directive emphasizes the material aspect of the right to defence and points to the right to remain silent, which serves as an important factor related to the presumption of innocence and protects one against self-accusation. Against this background, the importance of the right not to incriminate oneself, defined by the prism of the *nemo se ipsum accusare tenetur* principle, is underlined. Attention is drawn to the inadmissibility of the situation in which the legal authorities would force the accused to provide explanations or answer questions or provide evidence, documents or information that may lead to self-accusation. Finally, the directive also raises the issue of the right to participate in the hearing, which is crucial in considering the fairness of the proceedings (recitals 33 to 34 of the preamble to the Directive and Articles 8 to 9 of the Directive). There is no doubt that the active participation of the accused, and possibly also his lawyer in its course is of key importance for the realization of the defence. Therefore, while such participation lies, in principle, in the sphere of rights and not obligations, it is necessary for the Member States to create such legal instruments that will provide the accused and their legal representatives with a real basis for exercising their rights in this respect.

3. THE RIGHT TO DEFENCE AGAINST THE BACKGROUND OF DIRECTIVE 2013/48/EU OF 22 OCTOBER 2013 AND DIRECTIVE 2016/1919/EU OF 26 OCTOBER 2016 IN THE CONTEXT OF RECENT AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE

As it was already pointed out when presenting the general assumptions of Directive 2013/48/EU, it was to shape certain minimum standards to which the regulations functioning in the analysed scope in individual Member States of the European Union should be adapted. It should be noted that the stipulations of the said directive have already been implemented to some extent in the provisions of the Polish criminal procedure law in the legal system in force from 1 July 2015 to 14 April 2016¹⁸. It was related to the amendments introduced with the Act of 27 September 2013 amending the Act - Code of Criminal Procedure and some other acts, which was issued earlier than Directive 2013/48/EU¹⁹.

Prima facie, it seems legitimate to argue that, under the said amendment, a model of ex officio defence was established to a certain extent, which allowed the accused to appoint a defence lawyer at the stage of court proceedings. In preparatory proceedings, however, the rule made it possible for a suspect to use the assistance of a lawyer ex officio, if the person proved the inability to bear the costs of appointment of a lawyer of choice without prejudice to the necessary support for themselves and the family. It should be emphasized that the legislator implemented the indicated solutions, at the same time entering them into the mode established by the provisions of Article 81a of the Code of Criminal Procedure and the Regulation of the Minister of Justice of 21 May 2015 on the manner of ensuring access to an ex officio lawyer by the accused²⁰. This allowed not only for a broader, but also faster provision of access of the accused to the

¹⁸ Similarly, Barbara Grabowska-Moroz, „Wzmocnienie praw procesowych w postępowaniu karnym: skuteczne wdrożenie prawa do obrony i pomocy prawnej na podstawie Programu Sztokholmskiego. Raport krajowy: Polska”, <http://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Wzmocnienie-praw-procesowych-w-postepowaniu-karnym-29-03.pdf>: 9, [date of access: 11.02.2020].

¹⁹ Journal of Laws of 2013, item 1247.

²⁰ Journal of Laws of 2017, item 53 – consolidated text.

assistance of a lawyer in the trial, in a situation where they are unable to bear the cost of defence of their choice.

A systemic analysis of the discussed issues makes it legitimate to say that the aforementioned amendments meant that the Polish criminal procedure law was not far from complying with the standards set out in Directive 2013/48/EU in terms of regulations on access to a defence lawyer. Appointment of a defence lawyer pursuant to Article 80a § 1 of the Code of Criminal Procedure proceeded with the exclusion of verification as to whether the accused was able to bear the costs of appointing a lawyer without prejudice to the necessary maintenance of themselves and the family²¹. The determination of facts in this regard was to be made only as part of the decision on the costs of the trial, in the context of determining whether the person will bear the unpaid costs of legal aid granted ex officio according to prescribed standards. The legislator also provided for the possibility of appointing, on specific terms, a defence lawyer of choice to participate in a given act, pursuant to Article 80a § 2 of the Code of Criminal Procedure²².

It seems that the later-established European standard was met within the analysed scope. The procedure for appointing a lawyer was essentially configured in such a way that it justified the claim that swift access to legal aid was guaranteed. However, access to a lawyer at the pre-trial stage still remained a drawback, if this matter were to be considered in light of Article 3 (2) in conjunction with Article 3 (3) of Directive 2013/48/EU. However, suspects or accused persons should be granted access to a lawyer in all cases, starting from the dates mentioned therein, namely:

²¹ This solution justified exclusion from the obligatory defence of a situation where the accused was deprived of liberty in proceedings before a regional court as a court of first instance. The provision of Article 80a § 1 of the Code of Criminal Procedure, however, constituted the possibility of appointing a defence lawyer for such a person at their request. In the case of a defence lawyer being appointed, in accordance with Article 80a § 1 sentence 2 of the Code of Criminal Procedure, his participation in the trial was obligatory. This provided the accused with a real right to formal defence in court proceedings, the exercise of which resulted in their mandatory representation at the main hearing.

²² In relation to the issue of the right to use the assistance of a lawyer against the background of the September 2013 amendment, see Marek Smarzewski, „Granice efektywności prawa do korzystania z pomocy obrońcy w kontekście ostatnich nowelizacji KPK”, *Monitor Prawniczy* 21(2016): 1154-1157.

- before questioning by the Police or other law enforcement or judicial authority, in order to guarantee passive parties the right to presence and effective participation of their defence lawyer during the questioning;
- when investigative or other evidence-related acts are carried out by law enforcement or other competent authorities, including, in this context, ensuring for suspects or accused persons at least the right to the presence of a defence lawyer during investigative or evidence-related acts;
- immediately after deprivation of liberty;
- if they were summoned to appear before a competent court, at the right moment before they appeared before that court²³.

Hence, while the institution of an *ex officio* lawyer at a request in court proceedings could be considered to be in line with the provisions of the analysed Directive regarding access to a lawyer in court proceedings, in preparatory proceedings no analogous procedure was introduced, which would in principle allow the appointment of *ad hoc* defence lawyers, for example in relation to participation in the above mentioned procedural acts for which the Directive provides for the need to ensure the right to the assistance of an *ex officio* lawyer at an early stage of criminal proceedings.

In the analysed scope, significant amendments, constituting largely a return to solutions functioning before 1 July 2015, were made by the Act of 11 March 2016 amending the Act - Code of Criminal Procedure and some other acts²⁴. Pursuant to the amendment in relation to the right to defence in formal terms, attention should be paid above all to the repeal of Article 80a of the Code of Criminal Procedure and related modifications made in the content of Article 78 of the Code of Criminal Procedure. First of all, the assumption was restored that recognition of the legitimacy of ap-

²³ As a side note, it should be added that in the same way the importance of access to a defence lawyer at an early stage of criminal proceedings is underlined by Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (Article 6 (3) of Directive 2016/800/EU).

²⁴ Cf. Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, Sejm print no. 207: 5, <http://orka.sejm.gov.pl/Druki8ka.nsf/0/0DCDFBC92E81FB4CC1257F47004B0C7D/%24File/207-uzasadnienie.docx>, [date of access: 9.02.2020].

pointing a defence lawyer *ex officio* for the accused remains conditional on verification whether this person is not able to bear the costs of defence of their choice without prejudice to the necessary maintenance of themselves and the family. The legislator decided to remove defence upon request in court proceedings. Using the template stipulated in the repealed provision of Article 80a § 2 of the Code of Criminal Procedure, in the event of poverty, optional appointment of a defence lawyer to perform a specific procedural act was provided for in Article 78 § 1a of the Code of Criminal Procedure. However, it should be noted that, unlike Article 80a § 2 of the Code of Criminal Procedure, pursuant to Article 78 § 1a of the Code of Criminal Procedure a defence lawyer may be appointed not only for acts at the stage of court proceedings, but also in preparatory proceedings.

Referring to the indicated changes, it should be noted that they manifested a reduction in the standard of access to *ex officio* legal aid in criminal proceedings due to the need to always examine whether a given person is able to bear the costs of defence. In general, this factor extends the procedure for appointing a defence lawyer. In the light of Article 3 (1) in conjunction with Article 3 (2) of Directive 2013/48/EU, the reality and effectiveness of the realization of the formal right to defence is closely related to ensuring access to a lawyer without undue delay. On the other hand, the change enabling the appointment of an *ex officio* defence lawyer for particular procedural acts should be assessed as favourable, also, what is important, at the stage of preparatory proceedings. Formally, it is therefore possible to claim that there are regulations under national law that allow the appointment of a lawyer to participate in acts referred to in Article 3 (2) point a and b of Directive 2013/48/EU, also in cases where suspects do not have sufficient resources to cover the costs of legal aid.

The main problem under applicable Polish law, in the context of European law, is the lack of immediate access to a lawyer for a person actually suspected of a prohibited act who does not yet have the status of a party to the proceedings, e.g. a detained person. In fact, the current regulation of Article 245 § 1 of the Code of Criminal Procedure is insufficient, in particular in a situation where the detained person is not able to secure initial legal assistance of a lawyer. In this case, Wąsek-Wiaderek rightly argues that a solution to this problem that would be at the same time an effective implementation of Directive 2016/1919/EU would be to ensure the

possibility of immediate access to a lawyer under the free legal aid system. As the aforementioned author aptly claims in this context, such a model would be appropriate, as often it will be necessary in practice to swiftly appoint a defence lawyer *ex officio* for a suspect deprived of liberty²⁵.

Another important issue is ensuring the possibility of seeking the assistance of a lawyer on being questioned as a suspect in connection with the presentation of charges to a given person. Therefore, in the event that a given person wants to seek the assistance of a defence lawyer, it is necessary to set out statutory grounds for suspending the indicated act and setting the date in order to ensure the participation of a lawyer or legal adviser, be it one of choice or appointed *ex officio*. Of course, Article 300 § 1 of the Code of Criminal Procedure provides for informing the suspect before the first interrogation about the right to assistance of a defence lawyer, including the right to apply for appointment of an *ex officio* lawyer in the event referred to in Article 78 of the Code of Criminal Procedure. In turn, Article 301 of the Code of Criminal Procedure states that at the request of the suspect, the questioning should, as a rule, proceed with the participation of an appointed lawyer²⁶. However, access to lawyers and the right to confidential contact with them is undoubtedly important even before the act in question occurs; sometimes the promptness of making such contact is crucial at an early stage of the proceedings and before the accusation of a given person, for example in connection with a potential earlier questioning as a witness. In such a case, the effectiveness of the realization of the right to defence may be strictly conditional on confidential consultation and undertaking key actions for defence with the help of a professional entity even before the focus of proceedings formally shifts towards a given person.

In this context, the assistance of a lawyer should be understood more broadly than just seeking legal assistance by a party but rather as a possibil-

²⁵ Małgorzata Wąsek-Wiaderek, „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej”, *Europejski Przegląd Sądowy* 1(2019): 20. Cf. Right to a Lawyer and to Legal Aid in Criminal Proceedings in Five European Jurisdictions. Comparative Report, Sofia 2018, <https://www.hfhr.pl/wp-content/uploads/2018/05/RIGHT-TO-A-LAWYER-final.pdf>, 51 [date of access: 15.02.2020].

²⁶ It should be noted that the provision of article 301 c.c.p. applies only if the defender has already been appointed, what significantly limits the scope of the invoked regulation.

ity of carrying out a defence involving a professional factor from the very first moments of proceedings and taking specific procedural acts against a given person, e.g. detention. Sufficient security for the person who is actually suspected cannot be provided by the optional appointment of a representative for a person who is not a party pursuant to Article 87 § 2 of the Code of Criminal Procedure, the more so because the prosecutor may refuse to allow such an entity to participate in the preparatory proceedings. In addition, it should be noted that if a given person does not have sufficient resources to appoint a representative of choice, in practice the possibility of appointing such a representative *ex officio* seems illusory.

Against this background, it can be observed that pursuant to the latest amendment to the Code of Criminal Procedure of 19 July 2019, certain simplifications were introduced, aimed at accelerating the procedure regarding the appointment of an *ex officio* defence lawyer at the stage of preparatory proceedings. The commented change should be assessed definitely *in plus*, since, pursuant to Article 81a § 3 item 1 of the Code of Criminal Procedure, when circumstances thus far indicate the necessity of taking up defence, the motion for the appointment of a defence lawyer and other documents necessary to examine the request may be submitted by the body conducting the preparatory proceedings to the competent court via facsimile or e-mail. This regulation may contribute to shortening the procedure related to the appointment of an *ex officio* lawyer in preparatory proceedings and faster issuing of decisions in this matter, and thus affect the assessment of ensuring prompt access to a lawyer from the perspective of EU directives. Given the proper application of Article 81a § 3 of the Code of Criminal Procedure, pursuant to Article 88 § 2 of the Code and with respect to *ex officio* representatives, it remains justified to argue that a similar practice may theoretically be applied to *ex officio* lawyers of persons who are not yet parties to proceedings, including e.g. persons actually suspected of committing a given act .

When referring briefly to the topic of implementation by the Polish criminal procedure law of the principles of confidentiality of communication between suspects or accused persons and their lawyers when exercising the right of access to professional legal assistance, guaranteed by Article 4 of Directive 2013/48/EU, it should be noted that also in this respect national law has not been adapted to the minimum standards developed in Euro-

pean law. Individual regulations, e.g., Article 73 § 2 and Article 245 § 1 of the Code of Criminal Procedure confirm this impression.

The possibility of limiting the confidentiality of contacts with a lawyer exists primarily at the pre-trial stage and, significantly, it follows already from the provisions of a general nature. While the rule is that persons remanded in custody may communicate with their defence lawyer in the absence of other persons and by correspondence, a prosecutor, when granting permission for communication between a suspect and a lawyer, may decide, in particularly justified cases and if it is in the interest of preparatory proceedings, that contacts should occur in his presence or a person authorized by him (Article 73 § 2 of the Code of Criminal Procedure). Moreover, in accordance with Article 73 § 3 of the Code of Criminal Procedure, the prosecutor may also decide, when it is in the interest of preparatory proceedings and in particularly justified cases, to control the correspondence of the suspect with the defence lawyer. It is significant at the same time that the indicated reservations may remain in force, pursuant to Article 73 § 4 of the Code of Criminal Procedure, for up to 14 days from the date the suspect was remanded²⁷. Hence, even if one considers the possibility of limiting the principle of confidentiality in the suspect's contacts with their lawyer, it should be emphasized after Steinborn that the limitation should meet the requirements set out in Article 8 (2) of Directive 2013/48/EU. This means that in order to establish the legitimacy of such a limitation of the suspect's right which is essential for the effective implementation of the right to defence, it would be necessary for the legislator to provide a possibility of appealing against the prosecutor's decision regarding the reservation of his presence or the person authorized by him during the meeting of the suspect with a lawyer²⁸.

²⁷ Cf. Piotr Kardas, „Gwarancje prawa do obrony oraz dostępu do obrońcy na wstępnym etapie postępowania karnego. Kilka uwag w świetle Dyrektywy w sprawie prawa dostępu do adwokata, doktryny Salduz oraz doktryny Miranda”, *Pałestra Świątokrzyska* 43-44(2018): 19.

²⁸ Sławomir Steinborn, „Opinia w sprawie implementacji w prawie polskim dyrektywy Parlamentu Europejskiego i Rady 2013/48/UE z dnia 22 października 2013 r. w sprawie dostępu do adwokata w postępowaniu karnym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami

4. RIGHT TO DEFENCE UNDER DIRECTIVE 2016/343/EU OF 9 MARCH 2016 IN THE CONTEXT OF RECENT AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE

Using retrospective assessment in the analysed context, one can risk the claim that, like the Directive on access to a lawyer, also Directive 2016/343/EU was implemented to some extent in the legislative system created by the Act of 27 September 2013. However, when one refers to the state of the law between 1 July 2015 and 14 April 2016, one can primarily observe that, against the background of Article 6 (2) of the Directive, the September amendment was compatible with the established EU standard.

Undoubtedly, it reinforced the principle of the presumption of innocence in the aspect of *in dubio pro reo*. According to the content of Article 5 § 2 of the Code of Criminal Procedure, doubts which were not eliminated in evidence proceedings had to be resolved in favour of the accused. In an adversarial criminal trial, in which the burden of proof rested with the parties, this meant in practice that any doubts not eliminated in the course of the trial by the prosecution, generally in accordance with the intention of the complaint, had to be examined in favour of the accused. From the point of view of the Directive, objections could therefore only be caused by the fact that under the Polish criminal procedure law, in subjective terms, both the presumption of innocence principle and its significant expression in the form of the *in dubio pro reo* rule referred literally to the accused.

The situation changed due to the modification of Article 5 § 2 of the Code of Criminal Procedure and restoring its prior version applicable before 1 July 2015. The Act requires that not all doubts be resolved, but only those that cannot be removed in favour of the accused. Against this background, one should mention the position presented by the Commissioner for Human Rights, according to which the Polish criminal procedure act shows incompatibility on two levels in relation to Directive 2016/343/EU. The Commissioner observed, against the background of the current content of Article 5 § 2 of the Code of Criminal Procedure, that the Directive

konsularnymi w czasie pozbawienia wolności”, <https://www.gov.pl/attachment/ba665e2a-9ea6-4c45-98d0-cbdfdf034bbe>: 11, [date of access: 11.02.2020].

was not limited to unresolvable doubts, but to all doubts. Furthermore, it was argued that the directive provided for the need to apply the *in dubio pro reo* rule not only to the accused, but also to the suspect²⁹. It should be noted, however, that applying the interpretation of Article 5 § 2 of the Code of Criminal Procedure, set out by the provision of Article 71 § 3 of the Code of Criminal Procedure, the *in dubio pro reo* rule can also be applied to the suspect.

Another issue particularly important for the implementation of the right to defence in material terms is the right not to incriminate oneself, defined by the lack of an obligation to prove innocence or the obligation for the accused to provide evidence to his disadvantage, stemming from the principle *nemo se ipsum accusare tenetur*, which is expressed in Article 74 § 1 of the Code of Criminal Procedure. In Article 7 (1) of Directive 2016/343/EU, a requirement was introduced to provide suspects and accused persons with the right to remain silent in relation to the prohibited act that they are suspected or accused of having committed. It should be specified that the Directive in Article 2 determines the scope of its application at all stages of criminal proceedings from the moment when a given person becomes a suspect or is accused of having committed a prohibited act or an alleged prohibited act, until the decision on the final determination of whether that person has committed the prohibited act concerned has become definitive. When clarifying the personal scope in preparatory proceedings, reference should be made to recital 12 in the preamble to the Directive, which clearly indicates that it should also apply to a suspected person, since, as explained therein, it applies not only to the person who has the formal status of a suspect, but also before that person is informed by official notification or otherwise, i.e. in the case of the Polish legal system, essentially before presenting charges³⁰.

²⁹ See Wystąpienie do Ministra Sprawiedliwości w sprawie wdrożenia dyrektywy niewinnościowej, znak: II.510.619.2018II.510.619.MM: 3-4, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwo%C5%9Bci%20w%20sprawie%20wdro%C5%BCenia%20dyrektywy%20niewinno%C5%9Bciowej.pdf>, [date of access: 12.02.2020].

³⁰ See for example: Anita Nagy, „The Presumption of Innocence and of the Right to Be Present at Trial in Criminal Proceedings in Directive (EU) 2016/343”, *European Integration Studies*, 1(2016): 6. Cf. María Luisa Villamarín López, „The presumption of

Article 7 (2) of Directive 2016/343/EU goes further and stipulates the need to ensure that the aforementioned persons have the right not to incriminate themselves. Against this background, it is necessary to emphasize the observable differentiation in the current normative environment of the procedural situation of the person actually suspected, or the actual perpetrator of the prohibited act who is not yet suspected of committing it and is being interrogated as a witness in relation to the passive party who already has a procedural status allowing them to fully exercise their rights defining the right to defence. In particular, attention should be paid to the type of crime introduced by the already mentioned Act of 11 March 2016 in Article 233 § 1a of the Penal Code, which applies whenever testimonies are given and are to be used as evidence in court proceedings or other proceedings conducted pursuant to a law, in which a witness gives false testimony or conceals the truth for fear of criminal liability threatening themselves or their immediate family.

The provision of Article 233 § 1a of the Penal Code in its normative sense should be analysed in conjunction with Article 233 § 3 of the Penal Code, since only then can the real *spectrum* of the existing problem be defined. The regulation in question provides that this person is not liable to the penalty for the act described in art. 233 § 1a of the Penal Code, if the person gives a false testimony while being unaware of the right to refuse testimony or answer to questions. This regulation therefore challenges the correct assumption that the right to defence covers not only all the explanations but also the testimonies given by the accused in criminal proceedings, in the latter case, in particular in situations where the person is often purposefully interrogated as a witness under pain of criminal liability before being charged. If the current criminal procedure law in Article 183 § 1 of the Code of Criminal Procedure allows the suspect only to evade answers to individual questions, this results in a fictitious guarantee of the right to defence. In such a case, the suspected person does not have the right to remain silent, which is within the scope of the principle of *nemo se ipsum accusare*, but only the possibility of refusing

innocence in Directive 2016/343/EU of 9 March 2016”, ERA Forum 18(2017): 340. DOI: 10.1007/s12027-017-0480-5.

to answer individual questions during the phase of questions, after prior spontaneous testimony³¹.

In this light, it seems legitimate to put forward the thesis that the indicated state of the law is *in contradiction* to Article 7 (1) and (2) in conjunction with Article 2 of Directive 2016/343/EU. Suspects questioned as witnesses are not guaranteed the right to remain silent in its entirety, in analogy to the possibility of refusing to provide explanations *in genere*. Providing such a solution, at least with regard to persons actually suspected, seems to remain necessary not only from the point of view of European law, but also from the perspective of Article 42 clause 2 of the Constitution³² and Article 6 clause 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950³³. Limitation of the right to defence that can be observed against the background of the type of prohibited act under Article 233 § 1a of the Penal Code not only contradicts Directive 2016/343/EU, but also fails to meet the standard set out in Article 6 clause 1 of the ECHR. Finally, in a manner inconsistent with Article 42 clause 1 of the Constitution, it narrows the subjective scope of the right to defence designated in the indicated provision.

In the context of the changes introduced to Polish criminal procedure law in the years 2015-2019, and against the background of Directive 2016/343/EU, an important problem to be addressed is the issue of the right of the accused to participate in the trial. Recital 33 in the preamble to the Directive underlines the importance of the right to be present at the hearing and derives it from the right to a fair trial. According to recital 34, it is considered, in turn, that if, for reasons beyond their control, suspects or accused persons are unable to appear at the trial, they should have the

³¹ Arkadiusz Lach, „Glosa do uchwały SN z dnia 20 września 2007 r., I KZP 26/07”, LEX no. 83583. See the decision of the Supreme Court of 15 January 2020, I KZP 10/19, Legalis no. 2272428, in which the Supreme Court approved a literal interpretation of the provision of Article 233 § 1a of the Penal Code in conjunction with Article 233 § 3 of the Penal Code, and in the context of Article 183 of the Code of Criminal Procedure, the Court recognised the legitimacy of reducing the principle of *nemo se ipsum accusare tenetur*, in relation to the suspected person, only to the right to refuse to answer individual questions.

³² The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997 No. 78, item 483, as amended.

³³ Journal of Laws of 1993 No. 61, item 284, as amended; hereinafter: ECHR.

possibility to request a new date for the trial within a time frame provided for in national law. However, recital 35 provides for the possibility to waive this right, which should however be made expressly, or tacitly, but unequivocally. Similarly, in recital 37, the Directive indicates the possibility of holding a trial which may result in a decision on criminal liability in the absence of the accused, when the accused has been informed of it and has given a mandate to a defence lawyer who was appointed by that person or by the State, and that defence lawyer represented the person at the trial.

The described assumptions are developed in Articles 8-9 of the Directive. Hence, as stipulated in Article 8 (1) of the Directive, Member States are to ensure that accused persons have the right to be present at their trial. Arguing against the background of Article 8 (2) of the Directive, it should be noted that it applies not only to trials but also to sentencing hearings. Both forms may constitute a forum for a decision on criminal liability. A trial or a hearing may take place in the absence of the accused only if the person has previously been notified in due time about the trial or hearing and the consequences of their absence or was represented at the trial or hearing by an appointed defence lawyer.

Against this background, the new regulation of Article 117 § 3a of the Code of Criminal Procedure seems particularly important; according to this provision, the accused person's failure to appear, having been duly notified of the procedural act, regardless of the reason for this failure, does not preclude the conduct of this action if the person's defence lawyer appeared, unless the accused person's participation was deemed mandatory. The rule, however, according to Article 374 § 1 of the Code of Criminal Procedure is the right of the accused to participate in the hearing. The presence of the accused can be deemed mandatory only by the presiding judge or the court.

In this context, Article 378a of the Code of Criminal Procedure, introduced by the Act of 19 July 2019 appears to be particularly controversial. It provides, in particularly justified cases, for admissibility by the court to take evidence in the absence of the accused or their defence counsel, including in particular the hearing of witnesses, even in a situation where the accused person has not yet offered explanations, if the accused person or the defence lawyer did not appear at the trial, having been notified of its date. It does not matter for the applicability of the said regulation that the

accused has duly justified their failure to appear. Importantly, the decision on the taking of evidence in the absence of the accused may be taken by the court, as Chojniak rightfully notes, regardless of the importance of the case or its complexity. The ability of the accused to carry out the defence independently and on their own, when the defence lawyer did not appear at the trial for justified reasons, is also of no importance³⁴.

In Article 378a § 3 of the Code of Criminal Procedure, the Act provides for the right to submit, by the accused or their lawyer and at the latest at the next hearing, a motion for supplementary taking of evidence having been taken in their absence. The supplementary taking of evidence depends on whether the absence was justified. It should be emphasized that – as follows from Article 378 § 5 of the Code of Criminal Procedure – the motion for supplementary taking of evidence should prove that the manner of taking evidence in the absence of the accused or their defence counsel violated procedural guarantees, including, in particular, the right to defence. If the motion is granted, the evidence is taken on a supplementary basis, and only to the extent that violations of procedural guarantees have been demonstrated (Article 378 § 6 of the Code of Criminal Procedure). It is significant that in the event of failure to submit a motion for supplementary taking of evidence at the next hearing, of which the accused or their defender was notified, pursuant to Article 378a § 4 of the Code of Criminal Procedure the right to submit the motion expires. In such a case, in the further course of the proceedings the possibility of alleging violation of procedural guarantees, including the right to defence, as a result of taking evidence in the absence of the accused or their defence counsel is excluded.

It does not require any special argument to claim that the regulation in question remains in essence contrary to Article 8 of Directive 2016/343/EU, in particular with the main assumption that the right to be present at the trial is the right of the accused, hence, if the person has an appointed lawyer, also of their defender. Active participation in evidence-related acts carried out during the trial remains crucial for the effective implementation of the right to defence. Therefore, in a situation where the absence of

³⁴ See: Łukasz Chojniak, „Postulat nowelizacji Kodeksu postępowania karnego – krytycznie o niektórych proponowanych zmianach”, *Palestra* 1-2(2019): 59.

the accused or their defender remains justified, the rule should be to order a break or adjournment of the hearing and to set its next date in order to ensure the possibility of their appearance.

An assessment against the background of Article 8 (2) of the Directive should not raise doubts that the contradiction of Article 378a of the Code of Criminal Procedure with the Directive occurs when the appointed defence lawyer does not appear at the trial date while duly justifying their failure to appear. Similarly, in the case of simultaneous and justified failure to appear of the accused person and their defence lawyer, it seems that the literal interpretation of the provision of Article 378a § 1 of the Code of Criminal Procedure leads to the conclusion that it is impossible to proceed in their absence. Therefore, the only doubt relates to the situation when the accused does not appear at the hearing while the person's defence lawyer does, and a motion for a break or adjournment has been submitted³⁵. It should be borne in mind that the right to a personal participation in the hearing under European law is rather a fundamental right of the individual than an obligation imposed to ensure that the trial proceeds only in the interests of the judiciary, and not the accused³⁶.

To sum up this part of the discussion, it is finally necessary to raise doubts as to the content of Article 343b of the Code of Criminal Procedure with reference to Article 8 (1) of the Directive. The aforementioned regulation of the Polish criminal procedure law provides for the possibility of issuing a decision on the refusal to consider a motion for conviction without conducting a trial (Article 335 § 1 and 2 of the Code of Criminal Procedure), a motion for issuing a judgement without conducting evidence proceedings (Article 338a of the Code of Criminal Procedure) or a motion for conditional discontinuance of criminal proceedings (Article 336 of the Code of Criminal Procedure) —at a session the date of which the participants generally entitled to appear, e.g., the accused and their lawyer

³⁵ Cf. Libor Klimek, „Strengthening Procedural Rights in Criminal Proceedings as a Consequence of Mutual Recognition”, In: Libor Klimek, *Mutual Recognition of Judicial Decisions on European Criminal Law*, Cham: Springer, 2017, 645-647.

³⁶ Cf. Oreste Pollicino, Marco Bassini, „Personal Participation and Trials In Absentia. A Comparative Constitutional Law Perspective”, In: *Personal Participation in Criminal Proceedings: A Comparative Study on Participatory Safeguards and In Absentia Trials in Europe*, eds. Serena Quattrococo, Stefano Ruggeri, Cham: Springer, 2017, 539.

were not notified. It seems right to say that this solution remains controversial due to the fact that the issues that may result in the motion being rejected may result from a substantive assessment by the court of the circumstances of the case in terms of premises for issuing a specific decision. In such a case, the position of the accused or the defence lawyer may be of key importance. The provision of Article 343b of the Code of Criminal Procedure can therefore, in principle, be considered compliant with Directive 2016/343/EU only to the extent that it provides for the possibility of issuing a decision not to consider the recalled motions at a session without the participation of the parties due to the withdrawal of one of the parties from the consensus³⁷.

5. CONCLUSIONS

To sum up, it should be emphasized that the indicated incompatibilities or discrepancies actually do occur between the Polish criminal procedure law and the European law not having been implemented within the set deadlines³⁸. Nevertheless, it seems that often meeting the standard set out in the content of the Directives remains dependent on the correct application of the provisions (Article 87 § 2 of the Code of Criminal Procedure, providing for the institution of a representative for a non-party, and Article 88 § 1 of the Code of Criminal Procedure in conjunction with Article 78 of the Code of Criminal Procedure or with Article 78 § 1a of the Code of Criminal Procedure, enabling the appointment of such a representative for a suspected person for specific acts, e.g. for a witness or at an early stage of proceedings, even prior to obtaining the status of a party). Legislative deficiencies can be identified, including primarily those related to the continuous lack of a swift procedure for appointing an *ex officio* defence lawyer at an early stage of the proceedings or the lack of even

³⁷ Cf. Piotr Karlik, „Komentarz do art. 343b Kodeksu postępowania karnego”, In: Katarzyna Gajowniczek-Pruszyńska, Piotr Karlik, Kodeks postępowania karnego. Komentarz do ustawy z 19.7.2019 r., Warsaw 2020: C.H. Beck, Legalis.

³⁸ Cf. Cornelia Riehle, Allison Clozel, „10 years after the roadmap: procedural rights in criminal proceedings in the EU today”, ERA Forum 20(2020): 323. DOI: <https://doi.org/10.1007/s12027-019-00579-5>.

a controlling tool in the form of a complaint on the decision resulting in limiting the confidentiality of contacts between the suspected person and the lawyer.

In some cases, it may be necessary to change the applicable law or even consider directly applying the provisions of the Directives in the Polish legal order. In other cases, proper interpretation of the provisions through the prism of functioning procedural rules and in the light of the approach developed in the jurisprudence (the principle of *nemo se ipsum accusare tenetur* and the right of the suspect to defence in the context of Article 233 § 1a of the Penal Code) will be sufficient. The last striking example is Article 378a of the Code of Criminal Procedure, which, due to the prevailing normative contradiction with the provisions of Directive 2016/343/EU, should not apply, also due to the fact that based on too general and imprecise premises it may lead to an arbitrary limitation of the right to defence.

From the perspective of the current state of the law and assessment of the degree of implementation of the analysed EU Directives, in the light of important issues shaping the right to defence in Polish criminal proceedings, it is fully justified to claim that the constitution of strong normative foundations for the realization of defence is key to achieving procedural justice. The provision of appropriate legal instruments for the realization of defence is, in fact, one of the important elements allowing the suspected or accused person and their defence lawyer to build effective counter-argumentation in relation to arguments asserted by the prosecution. Hence, it is a factor conditioning the appropriate institutional balance in criminal proceedings³⁹.

³⁹ Cf. Anna Pivaty, „The role of a defence lawyer at the investigative stage”, In: Anna Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study*, Abingdon: Routledge, 2019, <https://books.google.pl/books?id=6dS8DwAAQBAJ&printsec=frontcover&dq=Criminal+Defence+at+Police+Stations:+A+Comparative+and+Empirical+Study&hl=pl&sa=X&ved=0ahUKEwj75cvVqsrnAhVNi1wKHZ1aDqMQ6A-EIKDAA#v=onepage&q=Criminal%20Defence%20at%20Police%20Stations%3A%20A%20Comparative%20and%20Empirical%20Study&f=false> [date of access: 11.02.2020].

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nym i w postępowaniu dotyczącym europejskiego nakazu aresztowania oraz w sprawie prawa do poinformowania osoby trzeciej o pozbawieniu wolności i prawa do porozumiewania się z osobami trzecimi i organami konsularnymi w czasie pozbawienia wolności”, <https://www.gov.pl/attachment/ba665e2a-9ea6-4c45-98d0-cbddd034bbe>.

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