

ACCESS TO A LAWYER FOR A SUSPECT AT EARLY STAGE OF CRIMINAL PROCEEDINGS AND ITS PARTICIPATION IN INVESTIGATIVE ACTS

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ABSTRACT

This elaboration is dedicated to analysis of access to a lawyer for a suspect at the early stage of criminal proceedings in Polish criminal law in light of directive 2013/48/EU. In particular, it emphasises the suspect's right of access to a lawyer during the identity parade, confrontation and the reconstruction of the scene of a crime. It considers whether the applicable legal provisions of the Polish Code of Criminal Procedure ensure, above all, appropriate scope of the right of defence for the suspected person in view of the indicated evidentiary activities and whether this scope corresponds to the standards designated by European Union directive 2013/48/EU.

Key words: access to defence counsel, participation of defence counsel in evidentiary activities, European Union directive, preparatory proceedings.

1. INTRODUCTION

Safeguarding access to a lawyer¹ for the person suspected of committing a criminal offence at early stage of preparatory proceedings is undoubted-

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¹ Considering the content of art. 82 of the Code of Criminal Procedure (the Act of 6.06.1997 – the Code of Criminal Procedure, Dz. U. (Journal of Laws) of 2018, item 1987

ly one of the fundamental rights in criminal proceedings, leading to full implementation of the right of defence indicated in art. 42, section 2 of the Constitution of the Republic of Poland². Obtaining professional legal assistance and communication with a lawyer prevents undertaking wrong decisions in the proceedings and minimises the risk of subjecting the suspected person to inhuman or degrading treatment. Effective defence during criminal proceedings allows for explanation of occurring inaccuracies or doubts, while observing reactions for asked questions and behaviours of persons participating in evidentiary activities of preparatory proceedings allows the defence counsel for own assessment of credibility of the interviewed persons (also persons being confronted) and possible opportunity of undermining their statements in judicial proceedings³.

Apart from national law, minimal standards of protection of rights of suspects and accused persons have also been determined by directive of the European Parliament and Council 2013/48/EU dated 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings pertaining to the European arrest warrant and on the right to have a third party informed upon deprivation of liberty and to communicate with third parties and consular authorities while deprived of liberty⁴. The purpose of this elaboration is an analysis of the scope of safeguards designated by the directive during evidentiary activities indicated in art. 3, section 3, letter c. This provision gives rise to a right for the suspect and accused person to have defence counsel present during identity parade, confrontation and reconstruction of the scene of a crime. In particular, considerations included applicable legal provisions of the Polish Code of

with further amendments - hereinafter referred to as the Code of Criminal Procedure), the term "lawyer" shall also include solicitor.

² The Constitution of the Republic of Poland . The Act of 2.04.1997, Dz. U. (Journal of Laws) No. 78, item 483 with further amendments.

³ Jarosław Zagrodnik, *Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych*, Warszawa: Wolters Kluwer, 2016, 135; Włodzimierz Posnow, "Udział obrońcy w przygotowawczym stadium procesu – aspekty realizacji niektórych uprawnień", In: *Rzetelny proces karny. Księga jubileuszowa Profesor Zofii Świdy*, ed. Jerzy Skorupka, 2009, LEX/el.

⁴ Dz. Urz. UE (Official Gazette of the EU) L 294, 6.11.2013, page 1 and ff. – hereinafter referred to as the directive.

Criminal Procedure pertaining to providing the suspected person with appropriate scope of rights of defence in view of the indicated evidentiary activities and whether this scope corresponds to the standards designated by European Union directive 2013/48/EU. Due to the scope of the undertaken considerations, this elaboration shall not pertain to the access to a lawyer in relation to questioning.

2. ACCESS TO A LAWYER IN RELATION TO EVIDENTIARY ACTIVITIES – THE SCOPE OF SAFEGUARDS DETERMINED BY DIRECTIVE 2013/48/EU

The scope of application of the directive is established in art. 2 thereto, according to which the rights to access to a lawyer shall be referred to the suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise⁵, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. Furthermore, the directive expands the scope of its application to persons who become suspects or accused persons in the course of questioning by the police or by another law enforcement authority (art. 2, section 3 of the directive). Considering point 21 of the recitals it must be emphasised that the status of the suspect and the right of access to a lawyer appertain to a witness who in the course of questioning provides self-incriminating information. In accordance with the directive, questioning must be immediately suspended to allow for implementation of rights stipulated by the directive.

Art. 3, section 2 of the directive clarifies the initial moment upon which the rights safeguarded therein start to apply. It was assumed that access to a lawyer should be provided without undue delay, depending on the occurrence of the following circumstances: a) before the initia-

⁵ Making a person aware “otherwise” that he or she is suspected shall be understood at least as undertaking activities towards the person which are directed at his or her prosecution, for instance arresting or identity parade (Małgorzata Wąsek-Wiaderek, “Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej”. *Europejski Przegląd Sądowy* 1(2019): 18.

tion of the questioning by the police or by another law enforcement or judicial authority, b) upon the carrying out by investigating or other competent authorities of an investigative or other evidentiary activities indicated in art. 3, section 3, letter c of the directive, c) without undue delay after deprivation of liberty, d) prior to appearing before the court. Therefore, it should be noted that indication of the aforementioned situations constitutes clarification of art. 2 and at the same time it expands its scope to circumstances with no formal notification of a person that he or she is suspected, but situations indicated in art. 3 of the directive⁶ occurred.

The model of guaranteeing access to a lawyer adopted by the directive corresponds to the case law of the European Court of Human Rights (hereinafter referred to as ECtHR), according to which the protection arising from art. 6 ECHR⁷ justifies the existence of substantive circumstance (the existence of a suspicion that a person has committed a prohibited act)⁸ and formal circumstance (undertaking an activity directed to prosecute this person)⁹. As a result, ECHR indicates that the person acquires the status of a suspect not from the moment when it is formally given by the national authorities but from the moment when these authorities have reasonable grounds to suspect this person of committing a prohibited act

⁶ Kazimierz Ujazdowski, „Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka”. *Forum Prawnicze* 4(2015): 52.

⁷ The Convention for the Protection of Human Rights and Fundamental Freedoms prepared in Rome 4.11.1950, *Dz. U. (Journal of Laws)* of 1993, No. 61, item 284 with further amendments) – hereinafter ECHR.

⁸ Similarly: point 12 of the recitals to the directive of the European Parliament and Council (EU) 2016/343 dated 9 March 2016 on strengthening some aspects of the presumption of innocence and the right to be present during hearings in criminal proceedings, *Dz. Urz. UE (Official Gazette of the EU)* L 65 dated 11 March 2016, page 1 and ff.

⁹ In more detail: Sławomir Steinborn, Małgorzata Wąsek-Wiaderek, “Moment uzyskania statusu biernej strony postępowania karnego z perspektywy konstytucyjnej i międzynarodowej”, In: *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa profesora Piotra Kruszyńskiego*, ed. Beata T. Bienkowska, Hanna Gajewska-Kraczkowska, Maria Rogacka-Rzewnicka. Warszawa: Wolters Kluwer, 2015, LEX/el.

or if his or her legal situation is determined by actions of the authorities undertaken towards him or her as a result of such suspicion¹⁰.

Art. 3, section 3, letter c of the directive determines the minimum standard as providing the suspect or accused person with access to a lawyer during identity parades, confrontation and reconstruction of the scene of a crime, if these activities are stipulated in the national law and if a given activity requires or permits the presence of the suspect or accused person. It seems that this indication shall be understood as an open catalogue, indicating at a minimum the procedural acts determined by the directive¹¹.

Due to the fact that in Polish criminal trials, confrontation constitutes a type of questioning, the instructions of the directive determined for questioning shall refer also to this evidentiary activity¹². As a consequence, the right to a lawyer in connection with questioning (also confrontation) includes: the right to consult a lawyer in private before such activity (art. 3, section 3, letter a of the directive) and the right to have a lawyer attending during questioning (also confrontation) and the lawyer's effective participation in the action (art. 3, section 3, letter b of the directive). Point 22 of the recitals adds that consultation should take place in private, and it is up to the national legislator to introduce practical solutions pertaining to duration and frequency of such meetings to ensure also safety and protection of the lawyer and the suspect. It is important that national regulations

¹⁰ Małgorzata Wąsek-Wiaderek, "Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej", *Europejski Przegląd Sądowy* 1(2019): 18. See also on the standard of Strasbourg right of defence: Arkadiusz Lach, *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warszawa: Wolters Kluwer, 2018, 112 and ff.; Cezary Kulesza, "Udział obrońcy w postępowaniu przygotowawczym", In: *System Prawa Karnego Procesowego. Postępowanie przygotowawcze*. Tom X, ed. Ryszard A. Stefański, Warszawa: Wolters Kluwer, 2016, 940-946; Wojciech Jasiński, "Dostęp osoby oskarżonej o popełnienie czynu zagrożonego karą do adwokata na wstępnym etapie ścigania karnego – standard strasburski", *Europejski Przegląd Sądowy* 1(2019): 24-30.

¹¹ Jacek Barcik, Tomasz Srogosz, "Prawo dostępu do adwokata w Polsce w świetle dyrektywy 2013/48/UE", *Palestra* 7-8(2015): 247. Similarly: Piotr Starzyński, "Ochrona praw oskarżonego na podstawie przepisów prawa unijnego", In: *System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego*. T. VI, ed. Cezary Kulesza, Warszawa: Wolters Kluwer, 2016, 647.

¹² Małgorzata Wąsek-Wiaderek, „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej”, *Europejski Przegląd Sądowy* 1(2019): 19.

would not lead to prejudice to effective performance of the indicated right. In accordance with the national procedure, a lawyer can ask questions, request clarification and make statements. These activities should be recorded in a protocol in accordance with the national law.

The directive states that access to a lawyer does not have to be absolute and introduces temporary exclusions. Safeguards including the right to meet prior to questioning (also prior to confrontation), the right for the lawyer to participate during identity parades, confrontation as well as reconstruction of the scene of a crime can be limited. In accordance with art. 3, section 6 of the directive, temporary exclusions can occur only at the stage of preparatory proceedings, in exceptional circumstances and to the extent that it is justified (in the light of specific circumstances of the case) for one of the following reasons: 1) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, 2) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings¹³.

Temporarily derogation from a possibility to exercise the right of access to a lawyer may also occur in relation to depriving a person of liberty and is possible due to geographical remoteness of a suspect. Such derogation is permitted only in preparatory proceedings and in exceptional circumstances (art. 3, section 5 of the directive). The recitals indicate that in such circumstances judicial bodies should not carry out questioning and other evidentiary activities¹⁴ and in the absence of direct access to

¹³ At the same time, the recitals of the directive (point 31 and 32) specify that questioning of a suspect in the absence of a lawyer is possible if the suspect has been informed of the right to silence. Questioning can be conducted only for the purpose and to the extent necessary in order to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person or prevent substantial jeopardy to criminal proceedings (destruction or alteration of essential evidence or to prevent interference with witnesses).

¹⁴ Literature indicates that this prohibition results only from the recitals and not from the content of the directive which does not exclude the possibility of questioning (also confrontation) of a person arrested in the conditions of geographical remoteness. Consequently, in such situation the authorities could accede to questioning or other evidentiary activity indicated in the directive without enabling access to a lawyer only if at least one of the circumstances stipulated in art. 3, section 6 shall occur next to circumstances stipulated in art. 3, section 5 (Małgorzata Wąsek-Wiaderek, „Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej”, *Europejski Przegląd Sądowy* 1(2019): 21).

a lawyer, they should arrange for communication via telephone or video conference (point 30).

Application of temporary derogations in respect of granting access to a lawyer must be proportionate and not go beyond what is necessary, be strictly limited in time, not be based exclusively on the type or the seriousness of the alleged criminal offence and not prejudice the overall fairness of the proceedings (art. 8, section 1 of the directive).

3. ACCESS TO A LAWYER IN RELATION TO EVIDENTIARY ACTIVITIES FROM THE PERSPECTIVE OF THE POLISH CODE OF CRIMINAL PROCEDURE – AREAS THAT RAISES DOUBTS IN RESPECT OF COMPLIANCE WITH THE PROVISIONS OF DIRECTIVE 2013/48/EU

A necessity of transposition of the directive of the European Parliament and Council 2013/48/EU was frequently signalled in literature, opinions and pronouncements¹⁵. It was pointed out numerous areas which

¹⁵ Wojciech Hermeliński, Barbara Nita-Światłowska, “Kilka uwag o prawie do obrony w związku z nowelizacją Kodeksu postępowania karnego z 2016 roku”, *Palestra* 9(2016): 15; Tomasz Tadeusz Koncewicz, Anna Podolska, “Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim”, *Palestra* 9(2017): 9-23; 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): 4-10; Pierwszy Prezes Sądu Najwyższego, “Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie”, 2017: 85-88, [date of access: 10.02.2020] http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2017.pdf; Pierwszy Prezes Sądu Najwyższego, “Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie za rok 2018”, 2019: 99-100, (access: 10.02.2020) www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki%20w%20prawie-2019.pdf; Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014, z 5.06.2017, [date of access: 10.02.2020] <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Ministra%20Sprawiedliwosci%20w%20sprawie%20prawa%20osoby%20zatrzymanej%20do%20pomocy%20prawnej.pdf>; Pronouncement of the Ombudsman to the Minister of Justice, II.5150.9.2014.MM, z 4.07.2018, [date of access: 10.02.2020] <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20ws.%20wprowadzenia%20dyrektywy%20gwarantuj%C4%85cej%20m.in.%20prawo%20zatrzymanego%20do%20adwokata.pdf>; Sławomir Steinborn, “Opinia w sprawie implementacji w prawie polskim dyrektywy Parla-

require normative changes indispensable in order to adjust criminal and procedural provisions to requirements of the directive. Amending the Code of Criminal Procedure¹⁶ in 2019, the Polish legislator added to its title the following reference: “In the scope of its regulation, this Act implements provisions of the directive of the European Parliament and Council 2013/48/EU dated 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings pertaining to European arrest warrant 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 (Official Gazette of the EU L 294 dated 6 November 2013, page 1)”. Justification of the indicated amendment emphasised that directive 2013/48/EU did not require to be implemented because the applicable provisions of the Code of Criminal Procedure implement provisions of the directive¹⁷. However, when it comes to the issues analysed in this elaboration, objections regarding the following areas can still be indicated.

Considering the scope of application of the directive indicated in this elaboration and autonomous meaning of the term suspect adopted therein, it must be concluded that in accordance with the Polish Code of Criminal Procedure, the right of access to a lawyer should also refer to a suspected person and limiting this right in preparatory proceedings solely to a suspect would be unreasonable¹⁸. The directive indicates that arrest, identity

mentu 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 konsularnymi w czasie pozbawienia wolności”, 2014, [date of access: 10.02.2020] <https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego>.

¹⁶ The Act dated 10 January 2018 on amendment of the Act – the Code of Criminal Procedure and some other acts (Dz. U. (Journal of Laws) of 2018, item 201.

¹⁷ Justification - Sejm paper No. 1931: 17, [date of access: 10.02.2020] <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1931>.

¹⁸ 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

parade, confrontation and reconstruction of the scene of a crime belong to activities which are directed at prosecution of a person and therefore, they determine the acquisition of the right of access to a lawyer¹⁹. Consequently, the implementation of the directive requires providing the suspected person with the possibility to consult with a lawyer who would have a status of a defence counsel²⁰.

konsularnymi w czasie pozbawienia wolności”, 2014, [date of access: 10.02.2020] <https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego>; 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): 4-10. See also comments pertaining to a reference of constitutional standard of the right of defence to the suspected person: Sławomir Steinborn, “Status osoby podejrzanego w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de lege ferenda)”, In: Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla, tom II, ed. Piotr Kardas, Tomasz Sroka, Włodzimierz Wróbel. Warszawa: Wolters Kluwer, 2012, LEX/el.; Sławomir Steinborn, “Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda”, *Europejski Przegląd Sądowy* 1(2019): 39.

¹⁹ Therefore, it is rightly indicated that the rights stipulated by the directive shall be referred in the criminal proceedings to: 1) the accused person (art. 71, § 2 of the Code of Criminal Procedure), 2) the suspect in relation to questioning in this capacity (art. 71, § 1, art. 301 and 313 of the Code of Criminal Procedure), its identity parade (art. 74, § 2, point 1 of the Code of Criminal Procedure), participation in confrontation and reconstructions of the scene of a crime (art. 316, § 1 and 2 of the Code of Criminal Procedure, art. 317 of the Code of Criminal Procedure), 3) the suspect deprived of liberty in relation to a charge of committing a criminal offence (art. 247, § 1 of the Code of Criminal Procedure, art. 249, § 5 of the Code of Criminal Procedure), 4) the suspected person in relation to his or her arresting (art. 244 of the Code of Criminal Procedure, art. 247 of the Code of Criminal Procedure), 5) the suspected person in relation to his or her identity parade (art. 74, § 3 in conjunction with § 2, point 1 of the Code of Criminal Procedure) and participation in other procedural acts (Pierwszy Prezes Sądu Najwyższego, “Uwagi o stwierdzonych nieprawidłowościach i lukach w prawie”, 2017: 85-88, [date of access: 10.02.2020] http://www.sn.pl/osadzienajwyzszym/Uwagi_PPSN_luki_w_prawie/luki-w-prawie-2017.pdf).

²⁰ Małgorzata Wąsek-Wiaderek, „Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka”, In: System Prawa Karnego Procesowego. Strony i inni uczestnicy postępowania karnego. T. VI, ed. Cezary Kulesza, Warszawa: Wolters Kluwer, 2016, 535; Kulesza, Cezary. 2016. “Udział obrońcy w postępowaniu przygotowawczym”. In: System Prawa Karnego Procesowego. Postępowanie przygotowawcze. Tom X, ed. Ryszard A. Stefański, 926-1011. Warszawa: Wolters Kluwer.

Pursuant to Polish provisions, a suspected person has a right to seek assistance of a lawyer or solicitor only in case of their arrest (art. 245, § 1 of the Code of Criminal Procedure), and a suspect is informed about the possibility to have defence counsel prior to first questioning (art. 300 of the Code of Criminal Procedure). In practice, the indicated right of the arrested person is limited only to contacting and consulting a lawyer. Unfortunately, the Code does not provide a lawyer with a right to participate in activities which can be conducted towards the suspected person in accordance with art. 74, § 3 of the Code of Criminal Procedure. In practice, apart from collecting evidence from the arrested person, law enforcement authorities might perform a number of evidentiary activities with the participation of the arrested person (for instance search, inspection) prior to formal presentation of charges. In view of the scope of rights indicated in the directive, the absence of regulating access to a lawyer in relation to an identity parade (art. 74, § 3 in conjunction with § 2, point 1 of the Code of Criminal Procedure) raises particular concerns. The applicable Code of Criminal Procedure imposes *expressis verbis* on the suspected person an obligation to participate in identity parade for the purpose of recognising. The suspected person finds himself or herself in a specific procedural situation because the suspected person is not a party to the trial (he or she has not been presented with charges but remains of interest to law enforcement authorities)²¹. Polish regulations pertaining to trial do not stipulate solutions safeguarding the right of access to a lawyer in this respect. Identity parade of the suspected person requires him or her to participate in such activity, which consequently should update the right to have a lawyer present during this evidentiary activity (art. 3, section 3, letter c of the directive). It should be noted that in case of a suspected person who is not arrested, there are no regulations pertaining to the analysed aspects. Reasonably, literature indicates that in this situation a person not being a party can only seek the assistance of an attorney (art. 87, § 2 and 3 of the Code of Criminal Procedure) if a body of the criminal procedures

²¹ Włodzimierz Posnow, „Komentarz do art. 74 k.p.k.”, In: Kodeks postępowania karnego. Komentarz, ed. Jerzy Skorupka, Warszawa: Wydawnictwo C.H. Beck, 2020, 235.

recognises that the person's interest requires this in pending proceedings²². However, the provisions of the Code of Criminal Procedure (art. 315-318 of the Code of Criminal Procedure) do not stipulate a right for the suspected party's attorney to participate in evidentiary activities because they pertain to the parties to the trial and representatives thereof. In the scope indicated above, it is correct to state that the Code of Criminal Procedure does not fulfil the standard of the suspected person's access to a lawyer required under the directive²³.

The defence counsel's joining preparatory proceedings is only possible on the *ad personam* stage, that is from the moment of presenting a person with charges, which provides the person with the rights as a party to the trial, thus a right to participate in non-recurring activities (art. 316, § 1 of the Code of Criminal Procedure)²⁴ and in other actions of preparatory proceedings (art. 317, § 1 of the Code of Criminal Procedure). Due to this fact, the right of access to a lawyer in case of confrontation and reconstruction of the scene of a crime no longer raises as many doubts as the indicated identity parade. Considering the nature and purpose of these evidentiary activities, it must be indicated that they are conducted towards the suspects, thus following the presentation of charges. This obliges the body of the criminal procedures to allow the suspect and the suspect's defence counsel to participate in action (art. 316, § 1 and art. 317, § 1 of the Code of Criminal Procedure). It is necessary to remember that during

²² Sławomir Steinborn, "Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", *Europejski Przegląd Sądowy* 1(2019): 39.

²³ Similarly: Barbara Grabowska-Moroz, "Unijna dyrektywa o prawie dostępu do obrońcy – zadanie dla ustawodawcy, wyzwanie dla sądów". *Przegląd Sądowy* 3(2019): 45-59; Barbara Grabowska-Moroz (ed.), "Prawo dostępu do obrońcy w świetle prawa europejskiego", 2018 (access: 10.02.2020) [http:// www:hfhr.pl](http://www.hfhr.pl) Sławomir Steinborn, "Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda", *Europejski Przegląd Sądowy* 1(2019): 39.

²⁴ Non-recurring actions (that is actions as to which there is a reasonable concern that to carry them out in proceedings before the court would be impossible or would serve no purpose) include: inspection of a scene, person and items, inspection and autopsy of a corpse, disinterment of a corpse, search, identity parade, confrontation, reconstructions of the scene of a crime, taking blood and bodily excretions, testimony of witnesses (Jarosław Zagrodnik, *Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych*, Warszawa: Wolters Kluwer, 2016, 136.).

reconstruction of the scene of a crime, the participation of the suspect is voluntary. Consequently, it must be indicated that the minimal standard stipulated in art. 3, section 3, letter c of the directive is fulfilled in reference to these regulations.

There is no doubt that evidence conducted in preparatory proceedings have a significant impact on resolution of the case by the Criminal Court and that the nature of the indicated activities points to a need to have defence counsel participate in them²⁵. Literature recognises that this participation should not be reduced only to the role of a person controlling the activity of law enforcement authorities but should also be understood as being included in the undertaken activities and influencing their shape, of course within the rights designated by the inquisitorial principle²⁶.

In accordance with the Polish standards, evidentiary activities indicated in the directive are classified as non-recurring actions; therefore, not providing the parties with a possibility to participate in them on the stage of preparatory proceedings would lead to deprivation of the right to control the correctness of implementation of evidentiary activity constituting the basis of the given decision. Thus, the basic task of a defence counsel should be ensuring proper preparation and conducting of the activities.

From a tactical point of view and in view of its non-recurring nature, it seems that an identity parade has particular importance among the activities of preparatory proceedings (art. 173 of the Code of Criminal Procedure). It is worth emphasising that in practice the participation of defence counsel in this evidentiary activity is not frequent, which may be surprising due to the high level of wrong questioning of cases which may

²⁵ Cezary Kulesza, "Rola obrońcy w gromadzeniu dowodów i wprowadzaniu ich do podstawy dowodowej orzeczenia sądowego w znowelizowanym kodeksie postępowania karnego", In: *Wokół gwarancji współczesnego procesu karnego*. Księga jubileuszowa profesora Piotra Kruszyńskiego, ed. Beata T. Bieńkowska, Hanna Gajewska-Kraczkowska, Maria Rogacka-Rzewnicka, Warszawa: Wolters Kluwer, 2015, LEX/el.

²⁶ Piotr Girdwoyń, *Zarys kryminalistycznej taktyki obrony*, Kraków: Zakamycze, 2004, 18; Ewa Gruza, „Zostałem rozpoznany, bo byłem przystojny – czyli o okazaniu osoby”, *Edukacja Prawnicza* 5(2011): 34 and ff.

lead even to a judgment of conviction²⁷. The basic sources of errors during identity parade include among others²⁸: suggestive impact exercised by a person conducting the activity on an eyewitness (exerting pressure by the officers of law enforcement authorities but also non-verbal impact), inappropriate selection of persons to identity parade, not enough appointed persons (the more people, the greater diagnostic value of recognising the suspect²⁹), carrying out the identity parade to several witnesses at the same time, errors on the part of eyewitnesses (permanency of remembering an object and possible distortions connected therewith). Choosing a form of conducting the identity parade (simultaneous, sequential) has also a huge practical meaning³⁰.

Decisions pertaining to the activity of identity parade performed without participation of a defence counsel can also be found in the case law of the European Court of Human Rights. In the case of *Laska and Lika vs. Albania*³¹, the Court found that an infringement of the right to fair criminal trial took place because during the identity parade the applicants wore white and blue balaclavas, similar to those worn by the perpetrators and other persons participating in the identity parade wore black balaclavas despite the fact that the national law imposes an obligation to ensure similar appearance of the presented persons. At the same time,

²⁷ See more details on the subject of court errors: Józef Wójcikiewicz, *Temida nad mikroskopem*, Toruń: Wydawnictwo „Dom Organizatora”, 2009, 251 and ff.; Laura Spineey, „Eyewitness identification: Line-ups on trial”. *Nature* 453(2008): 442-444.

²⁸ Piotr Girdwoyń, *Zarys kryminalistycznej taktyki obrony*, Kraków: Zakamycze, 2004, 42-46.

²⁹ Avraham M. Levi, “An analysis of multiple choices in MSL lineups, and a comparison with simultaneous and sequential ones”, *Psychology, Crime & Law* 12(2006): 273-285. In the assessment of K. Juszka in identity parades analysed by her, the number of the presented persons have been correctly constructed only in 52.9% of them (Kazimiera Juszka, *Jakość czynności kryminalistycznych*, Lublin: Oficyna Wydawnicza Verba, 2007, 350.

³⁰ Józef Wójcikiewicz, *Temida nad mikroskopem*, Toruń: Wydawnictwo „Dom Organizatora”, 2009, 196 and ff.; Julia Meisters, Birk Diedenhofen, Jochen Musch, “Eyewitness identification in simultaneous and sequential lineups: an investigation of position effects using receiver operating characteristics”, *Memory* 26(9) (2018): 1297-1309.

³¹ Judgment of the European Court of Human Rights dated 20 April 2010 12315/04 i 17605/04, LEX nr 576495.

participation of defence counsels was not provided during this activity and the court adjudicating in the case failed to explain irregularities in the conducted identity parade³². In the case of *Dzhulay vs Ukraine*³³ despite the fact that the identity parade was conducted without participation of the designated defence counsel, the Court did not identify infringement of art. 6 of the European Convention on Human Rights. The Court emphasised that the accused person did not apply for conducting the identity parade in the presence of a defence counsel and evidence from the identity parade was not the only one or decisive evidence leading to conviction. However, in the case of *Mehmet Şerif Öner*³⁴, an infringement of art. 6 of ECHR was ascertained. The applicant did not plead guilty in preparatory proceedings but participated in the identity parade. The court stated that the impossibility to seek assistance of defence counsel had a lasting impact on the proceedings, in particular because the result of the identity parade was significant evidence in the case³⁵.

In view of the above, it must be noted that directive 2013/48/EU corresponds in the discussed scope to the case law of the Court. Literature also highlights that the content of art. 3 of the directive shall be associated with a standard designated by the ECHR³⁶. Participation of defence counsel during identity parade plays a significant and important role. The effective presence of a defence counsel allows the defence to influence the course and scope of activities, thereby safeguarding criminal proceedings against possible omission of circumstances that are relevant

³² Wojciech Jasiński, “Prawo dowodowe w orzecznictwie Europejskiego Trybunału Praw Człowieka”, In: *System Prawa Karnego Procesowego. Dowody*. Tom VIII cz. 2, ed. Jerzy Skorupka, Warszawa: Wolters Kluwer, 2019, 1795.

³³ Judgment of the European Court of Human Rights dated 3 April 2014, 24439/04 i 17605/06, LEX nr 1442795.

³⁴ Judgment of the European Court of Human Rights dated 13 September 2011, 50356/08.

³⁵ Arkadiusz Lach, *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego*, Warszawa: Wolters Kluwer, 2018, 112 and ff.

³⁶ Jacek Barcik, Tomasz Srogosz, “Prawo dostępu do adwokata w Polsce w świetle dyrektywy 2013/48/UE”, *Palestra* 7-8(2015): 245. Similarly: 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): 4-10.

to the case. Not only personal control over the correctness of conducting identity parade is important, but also a possibility of immediate indication of the source of made mistakes to a body of the criminal procedures and appropriate reaction to them. Thanks to participation in the discussed procedural act, a defence counsel has a possibility of earlier recognition of information that is significant to the case, allowing for preparation of appropriate line of defence in the course of further criminal proceedings. There is no doubt that presence of a defence counsel during conducting non-recurring activity that is encumbered with high risk of making a mistake safeguards the exercise of due diligence during its conduction. The role of a defence counsel is to prevent the occurrence of the most significant mistake, that is incorrect recognition of an innocent suspect.

4. SUMMARY

In conclusion of this elaboration, it must be emphasised one more time that current regulation of the access to a lawyer or solicitor on early stage of preparatory proceedings does not ensure full transposition of the directive to national law. Omission of safeguarding the right of access to a lawyer for the suspected person during the implementation of the directive can lead to situations in which judicial bodies will not present charges to a person and thereby, postpone a possibility of acquiring rights stipulated in the directive by the suspected person. Also, one cannot rule out calling into question the evidentiary activities during trial which have been conducted during preparatory proceedings and during which the suspect could not implement rights stipulated in directive 2013/48/EU. It is therefore necessary to introduce changes in the Code of Criminal Procedure and in particular, in art. 71 of the Code of Criminal Procedure which will allow for granting a right to establish a defence counsel for a suspected person. As rightly noted in the opinion of the Criminal Law Codification Commission, the required legislation changes should pertain to reorganisation of the status of a suspect and suspected person by changing the moment of obtaining the status of a suspect from a moment of presentation of charges to a moment of the first procedural act directed at

prosecution of a person³⁷. As a consequence, eliminating a division into a suspect and a suspected person will allow for realisation of the right of access to defence counsel's assistance regardless of whether a given person has been presented with charges. It seems that introduction of the proposed changes is indispensable for realisation of safeguards arising from directive 2013/48/EU.

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³⁷ 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 konsularnymi w czasie pozbawienia wolności", 2014, [date of access: 10.02.2020] <https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego>.

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