

**THE RIGHT TO SILENCE IN THE EU DIRECTIVE 2016/343
ON THE STRENGTHENING OF CERTAIN ASPECTS
OF THE PRESUMPTION OF INNOCENCE FROM
THE PERSPECTIVE OF POLISH CRIMINAL PROCEEDINGS¹**

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ABSTRACT

The right to remain silent is one of the most fundamental principles of domestic and international criminal law. It is also closely related to the presumption of innocence. As the responsibility is placed on the prosecution to prove the guilt of a person it follows that the accused should not be forced to assist the prosecution by being forced to speak. The right to remain silent expresses the individual's right not to be compelled to say anything even if it would not be incriminating or confesses guilt. Its core component is the freedom to choose whether or not to give answers to individual questions or to provide explanations. The consequence of the right to silence proposes that one cannot be required to give information or answer questions as well as this right includes protection of an accused against compulsion. Such freedom of choice is effectively undermined in a case in which the suspect has elected to remain silent during questioning and the authorities use subterfuge to elicit confessions or other statements of an incriminatory nature from the suspect which they were unable to obtain during such questioning. This

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article has two objectives. Firstly, to interpret the right to remain silent in light of the Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. Secondly, the Directive 2016/343 can be used as reference to evaluate the degree to which Polish legal solutions conform to the Directive in question, giving rise to several postulates in this matter. The analysis will also include shortages and problems resulting from imperfect Polish criminal process in that field.

Key words: The right to remain silent; criminal proceeding; human rights, the Polish Code of Criminal Procedure, the European Court of Human Rights

1. INTRODUCTION

The right to silence and the guarantee of its exercise have been the subject of numerous analyses and critical statements of representatives of the doctrine of criminal procedural law in Polish and European *literature*. They usually refer to national laws, while ignoring the standard of protection of the right to silence under international law. This situation is surprising, since the rules of international law set a minimum standard for individual rights in criminal proceedings in national systems. The system of international guarantees of the rights of individuals, including the right to silence appear in different forms of which the most important are the international (universal and regional) law and European law. Depending on their status, they play a special role in the development of national laws governing human rights and sometimes provide a basis for implementation of measures aimed to protect the rights of individuals at the national level. The level of this protection depends on the status of the act of international law and the legal instruments provided for in the various laws.

While recognizing the differences in the status of different acts of international law, some of them expressly define the right to silence (e.g. Article 14(4)(g) of the International Covenant on Civil and Political Rights). In the case of other legislation, there is no explicit reference to this right, e.g. in the European Convention on Human Rights (ECHR)². This

² The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in

did not prevent the European Court of Human Rights (ECtHR) from stating that “although not specifically mentioned in Article 6, the right to remain silent and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. By providing the accused with protection against improper compulsion by the authorities, these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6”³. It should only be stated that the right to silence constitutes a guarantee that exists independently from the privilege against self-incrimination (*nemo se ipsum accusare tenetur*). The ECtHR is not clear on the substance of this right. On the one hand, the ECtHR states that the right to silence is a component of the privilege against self-incrimination, and on the other hand, it is indicated that the right to silence is one of the components of the principle of presumption of innocence or is a form of the right of defense. However, there is no doubt that the right to silence is a key component of the fair trial standard, as it protects the defendant from compulsion exerted by law enforcement and judicial authorities⁴.

Rome on 4 November 1950 and came into force in 1953, ETS.

³ Judgment of the ECtHR delivered on 25 February 1993, Application no 10828/84, Case of Funke v. France, § 44, Series A no. 256-A, 22; Judgment of the ECtHR delivered on 17 December 1996, Application no 19187/91, Case of Saunders v. the United Kingdom, § 68, January 20, 2020 <http://hudoc.echr.coe.int/eng?i=001-58009>; Judgment of the ECtHR delivered on 8 February 1996, Application no 18731/91, Case of John Murray v. the United Kingdom, § 47, Reports of Judgments and Decisions 1996-I, pp.49-50; Judgment of the ECtHR (Grand Chamber) delivered on 10 March 2009, Application no 4378/02, Case of Bykov v. Russia, § 92, January 20, 2020, <http://hudoc.echr.coe.int/eng?i=001-91704>; William A. Schabas, *The European Convention on Human Rights. A commentary*, Oxford: Oxford University Press, 2017, 319; Ben Emmerson, Andrew Ashworth, Alison Macdonald, Andrew L-T Choo, Mark Summers, *Human Rights and Criminal Justice*, London: Sweet & Maxwell, 2012, 615; Ryan Goss, *Criminal Fair Trial Rights. Article 6 of the European Convention on Human Rights*, Oxford, Portland, Oregon: Hart Publishing, 2016, 191–193; Mark Berger, “Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence”, *European Human Rights Law Review* 5(2007), 515; Andrzej Sakowicz, “The right to remain silent on the Court’s case-law - European Court of Human Rights”, *Ius Novum* 2(2018), 122, DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz.

⁴ In *Allan v the United Kingdom*, the ECtHR established that “[while the right to silence and the privilege against self-incrimination are primarily designed to protect against

Any discussions about the right to silence must make reference to laws of the European Union. This right has been regulated in two legal acts, i.e. Directive 2012/13 on the right to information in criminal proceedings and Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings. Article 3 of Directive 2012/13 on the right to information in criminal proceedings states that suspects or accused persons should be provided with information on the right to remain silent. This information must be provided orally or in writing and in a simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons. When providing suspects or accused persons with information in accordance with this Directive 2012/13, competent authorities should pay particular attention to persons who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition (Recital 26)⁵. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing or invoking it.

A more detailed regulation of the right to silence is provided in Article 7 of Directive 2016/343 of the European Parliament and of the

improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way.” The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial”, Judgment of the ECtHR delivered on 5 November 2002, Application no 48539/99, Case of Allan v the United Kingdom, § 50, 20 January 2020, [http://hudoc.echr.coe.int/eng?i=001-60713.Allan v the United Kingdom, no. 48539/99, para 50, ECHR 2002-IX](http://hudoc.echr.coe.int/eng?i=001-60713.Allan%20v%20the%20United%20Kingdom,%20no.%2048539/99,%20para%2050,%20ECHR%202002-IX).

⁵ Article 6 of the ECHR does not provide for the right to be informed of one’s rights. However, the ECtHR has ruled that the minimum information, which must be provided to defendants, is that they have the right to remain silent and the right to not incriminate themselves.

Council 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 proceedings⁶. It has not been critically analyzed in the Polish literature. This article has two objectives. First, to present the standard of protection of the right to silence in light of Directive 2016/34 and the Polish Code of Criminal Procedure. Second, to answer the question of whether the provisions of the Polish Code of Criminal Procedure on the protection of the right to silence implement the minimum standard resulting from the provisions of Directive 2016/34. The analysis of this issue should be preceded by a few words on the right to silence.

2. THE ESSENCE OF THE RIGHT TO SILENCE

A defendant (as well accused or suspect) treated as a subject retains the full, unrestricted possibility of making statements in accordance with his or her will and may refuse to make statements at any time during the proceedings. This means that the defendant's procedural behavior can come down to two options: either active participation in the taking of evidence or remaining passive and exercising the right to silence. The latter option involves inactivity of the defendant with regard to provision of evidence against himself or herself and evidence demonstrating his or her innocence, in particular his or her failure to provide information or make statements⁷. It can therefore be assumed that the right to silence is an expression of the autonomy and freedom of the individual subject to criminal proceedings. The lack of the defendant's duty to prove his or her innocence, which results from the principle of presumption of innocence, allows for a wider range of possibilities to create his or her own defense. With this assumption, the defendant is completely free to decide whether to provide explanations and on the content of such explanations.

⁶ Directive 2016/343 of the European Parliament and of the Council 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, O.J.L. 65, 11.3.2016, 1.

⁷ Paweł Wiliński, *Zasada prawa do obrony w polskim procesie karnym* [The principle of the right of defense in the Polish criminal process], Warsaw: WoltersKluwer 2006, 197.

The right to silence can be reduced to a conscious and autonomous choice between speaking or remaining silent⁸. This means that the defendant may exercise this right without giving any reasons, and the procedural authorities can neither require him or her to give reasons for refusing to provide explanations nor state that he or she is exercising the right to refuse to provide them. The freedom to decide on the provision of explanations and on the answers to questions shows that the defendant is recognized as a subject and a party to the proceedings who can take actions in the proceedings in accordance with his or her will, awareness of his or her own situation, and his or her own procedural rights. However, in order for that to be possible, investigating or judicial authorities conducting the procedure may neither enquire into the motives for exercising the right to refuse to provide explanations nor treat a refusal to provide explanations as a “silent” confession or an aggravating circumstance. Use of deception and taking advantage of the mental state of the defendant and of the defendant’s lack of awareness to break the silence are also prohibited. The *ratio legis* of the right to silence prevents such situations by depriving the defendant of an informed and autonomous choice between providing explanations and remaining silent. In this context, a significant protection is ensured by providing the individual with access to a lawyer before the first interrogation.

With reference to the essence of the right to silence, the values on which this guarantee is based cannot be ignored. The right to silence appears as an expression of empowerment of the human being and of respect for his or her personality, the autonomy of the individual, freedom of expression⁹, freedom of thought, the right to private life, the accused’s

⁸ Por. Fenella M.W. Billing, *The Right to Silence in Transnational Criminal Proceedings Comparative Law Perspectives*, Springer, 2016, 7. Similarly S. Trechsel, which wrote in *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) that “The right to silence is narrower in that it refers to acoustic communication alone, the right not to speak. The privilege clearly goes further in that it is not limited to verbal expression” (342); Andrzej Sakowicz, *Prawo do milczenia w polskim procesie karnym* [The right to silence in the Polish criminal proces], Białystok: Temida 2, 2019, p. 33-35.

⁹ Judgment of the ECtHR delivered on 2 June 1993, Application no 16002/90, Case of *K v Austria*, §11, January 20, 2020 <http://hudoc.echr.coe.int/eng?i=001-57830>.

right to passivity¹⁰, and serves to protect human dignity¹¹. Only the defendant's voluntary activity in ongoing proceedings can be reconciled with the dignity of the individual. In protecting it, the legislator should seek to shape the criminal procedure in such a way as to keep intact the freedom of the defendant in finding the truth, regardless of whether he or she is ultimately found innocent or guilty¹². It is also beyond dispute that the right to silence is also closely linked to the principle of presumption of innocence¹³. The lack of the defendant's duty to prove his or her innocence, which results from the principle of presumption of innocence, allows for a wider range of possibilities to create his or her own defense. As a result, the defendant is completely free to decide whether to provide explanations and on the content of such explanations.

3. THE RIGHT TO SILENCE IN LIGHT OF DIRECTIVE 2016/343

The purpose of Directive 2016/343 is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence, the right to be present at the trial as well as the right to remain silent and the right to not incriminate oneself (recital 9). The EU legislator shows that, by establishing common minimum rules on the protection of procedural rights of suspects and accused persons, this Directive aims to strengthen the trust of Member States

¹⁰ The accuser has to provide the evidence and this burden cannot be relegated to the accused.

¹¹ Such an interpretation of the right to silence appears in the case law of the BVerfG, e.g. decision of the BVerfG of 8 October 1974, 2 BvR 747/73, BVerfGE 38, 105 (113-115).

¹² See Albin Eser, „Der Schulz vor Selbstbezeichnung im deutschen Strafprozessrecht“, In: Deutsche strafrechtliche Landesreferate zum IX. Internationalem Kongreß für Rechtsvergleichung Teheran 1974, ed. Hans-Heinrich Jescheck, Berlin: De Gruyter, 1974, 144-146; Rolf Nickl, Das Schweigen des Beschuldigten und seine Bedeutung für die Beweiswürdigung, München: *Universität Dissertation*, 1978, 32-34; Andrzej Sakowicz, Prawo do milczenia w polskim procesie karnym [The right to silence in the Polish criminal proces], Białystok: Temida 2, 2019, 38-39.

¹³ This aspect of the right to silence is addressed in recital 24 of Directive 2016/343, which indicates that “the right to remain silent is an important aspect of the presumption of innocence and should serve as protection from self-incrimination.”

in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. It is clear too that such common minimum rules may also remove obstacles to the free movement of citizens throughout the territory of the Member States. First of all, it should be stated that Directive 2016/343/EU has restricted its scope of protection only to "criminal proceedings." It applies at all stages of criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive. In addition, this Directive applies only to natural persons who are suspects or accused persons in criminal proceedings. Although, the European Parliament tried to broaden the scope of application of the Directive to cover legal persons¹⁴, Article 2 of Directive 2016/343 clearly entails the exclusion of legal persons from its scope. Finally, the EU legislator adopted that at the current stage of development of (case) law at the national and Union levels, it is premature to legislate at the Union level on the presumption of innocence or the right to silence with regard to legal persons.

The rights that are covered by Directive 2016/343 include the right to silence. This right, alongside the right to not incriminate oneself is expressed in Article 7 of Directive 2016/343. As regards the right to silence, Directive 2016/343 sets out the obligation for Member States to ensure that "suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed." In particular, this right "should apply to questions relating to the criminal offence that a person is suspected or accused of having committed and not, for example, to questions relating to the identification of a suspect or accused person" (recital 26). It is unacceptable that the last element (i.e. to questions relating to the identification of a suspect or accused person) will be excluded from the right to silence. Its approval would mean, for example, that a wanted man may not hide his or her identity and should give a true answer to questions posed by law enforce-

¹⁴ EP Document of 20.04.2015, A8-0133/2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0133+0+DOC+PD-F+V0//EN>, amendments 9 and 39.

ment officers. Given that Directive 2016/343 sets a minimum standard, individual member states may set a higher level of protection of rights of individuals in their internal systems.

Directive 2016/343/EU provides that competent authorities should not compel suspected or accused persons to provide information against their will. The second sentence of recital 25 stipulates that: “Suspects and accused persons should not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information which may lead to self-incrimination.” Moreover, Article 7 (5) of the Directive 2016/343/EU states that “the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.” The adoption of such a solution indicates that the EU legislator has provided for a higher standard of protection of the right to remain silent than that resulting from the ECtHR verdict¹⁵. In the Strasbourg case-law, there have been statements allowing for drawing adverse inferences from the defendant’s silence, which “in situations which clearly call for an explanation from him, [may] be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.” The fact that it is not possible to draw adverse inferences from the right to silence under Article 7 of Directive 2016/343 indicates that such a possibility is already excluded at the level of the minimum standard¹⁶.

¹⁵ See Steven Cras, Anže Erbežnik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, *Eucrim* 1 (2016): 31.

¹⁶ In case *Condrón v. the UK*, the ECtHR clearly stressed that “it proceeded on the basis that the question whether the right to silence is an absolute right must be answered in the negative. It noted in that case that whether the drawing of adverse inferences from an accused’s silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. The Court stressed in the same judgment that since the right to silence, like the privilege against self-incrimination, lay at the heart of the notion of a fair procedure under Article 6, particular caution was required before a domestic court could invoke an accused’s silence against him. Thus, it observed that it would be incompatible with the right to silence to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself. Nev-

An analysis of the aforementioned Article 7 (1 and 5) of Directive 2016/343 suggests that the right to silence is a “quite strong” or almost an absolute right¹⁷. Any inferences drawn from the fact that suspects or accused persons make use of these rights should be excluded. Without this, the right would be merely illusory if the suspects or accused had to fear that their non-cooperation or their silence would be used against them later in the criminal proceedings. Therefore, Directive 2016/343 clearly states that the silence of the accused and suspects cannot be taken into account in any case when sentencing¹⁸.

Moreover, the fact that no inferences should be drawn from the exercise of these rights and that the exercise of these rights should not be used against suspects or accused persons at a later stage of criminal proceedings should not prevent Member States from taking into account cooperative behavior when deciding the concrete sanction to impose. In Article 7 (4) of Directive 2016/343, the phrase “cooperative behavior of suspects and accused persons” is not clarified. However, in view of *ratio legis* of this

ertheless, the Court found that it is obvious that the right cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution (ibid.), Judgment of the ECtHR delivered on 2 May 2000, Application no 35718/97, Case of *Condrón v the United Kingdom*, § 56, January 20, 2020 <http://hudoc.echr.coe.int/eng?i=001-58798>; Judgment of the ECtHR delivered on 8 February 1996, Application no 18731/91, Case of *John Murray v. the United Kingdom*, § 47, Reports of Judgments and Decisions 1996-I, pp.49-50; See David J. Harris, Michael O’Boyle, Ed P. Bates, Carla Buckley (ed.), *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2014, p. 423; Fenella M. W. Billing, *The Right to Silence in Transnational Criminal Proceedings Comparative Law Perspectives*, Springer, 2016, p. 79-80.

¹⁷ This nature of the right to remain silent is clearly emphasized in the Proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM/2013/0821 final. The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, meaning that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights. According to the Commission proposal, “Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of fact” (Art. 7 (3)).

¹⁸ Stijn Lamberigts, “The Directive on the Presumption of Innocence A Missed opportunity for Legal Persons?”, *Eucrium* 1 (2016): 37.

Directive and the fact that the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a suspect or accused person and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned, it can be argued that Article 7 (4) of Directive 2016/343 concerns the inclusion of statements made by suspects or accused persons, including confessions, in the calculation of penalties.

Some weakening of the right to silence can be found in Article 7(3) and recital 29 of the Directive 2016/343, which states that “The exercise of the right not to incriminate oneself should not prevent the competent authorities from gathering evidence which may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and which has an existence independent of the will of the suspect or accused person.”¹⁹ The use of a category of evidence which have an existence independent of the will of the person does not explain much, especially when the person is compelled to provide documents which can then be used against him or her in criminal proceedings²⁰. In this respect,

¹⁹ Stijn Lamberigts, “The Directive on the Presumption of Innocence A Missed opportunity for Legal Persons?”, *Eucri* 1(2016): 37-38.

²⁰ In *Saunders v. United Kingdom* the ECtHR held that “The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily samples for the purpose of DNA testing”, judgment of the ECtHR delivered on 17 December 1996, Application no 19187/91, Case of Saunders v. the United Kingdom, § 68-69, January 20, 2020 <http://hudoc.echr.coe.int/eng?i=001-58009>. In the context of documents, this phrase only refers to the obligation to tolerate compulsion but in *Funke v. France*, in which the applicant was required himself to produce documents, the Court notes that “the customs secured Mr Funke’s conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the appli-

doubts will be resolved case by case using ECtHR case law. This is encouraged by the EU legislator itself, as indicated in recital 27 of the Directive 2016/343 which provides that “in order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR should be taken into account”.

The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have had their rights not been disregarded²¹. In implementing this assumption, the EU legislator provided in Article 10 of Directive 2016/343 for certain remedies. They are to serve the protection of procedural rights of suspects and accused persons cov-

cant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (...) cannot justify such an infringement of the right of anyone “charged with a criminal offence”, within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself”, judgment of the ECtHR delivered on 25 February 1993, Application no 10828/84, Case of *Funke v. France*, § 44, Series A no. 256-A, 22; Ben Emmerson, Andrew Ashworth, Alison Macdonald, Andrew L-T Choo, Mark Summers, *Human Rights and Criminal Justice*, London: Sweet & Maxwell, 2012, 613-617; David J. Harris, Michael O’Boyle, Ed P. Bates, Carla Buckley (ed.), *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2014, 422; Andrzej Sakowicz, “The right to remain silent on the Court’s case-law - European Court of Human Rights”, *Ius Novum* 2(2018), 122, DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz. According to M. O’Boyle that there are undoubtedly situations in which the compulsion to produce some documents is, in effect, identical to a confession by testimony, see Michael O’Boyle, “Freedom from Self-Incrimination and the Right to Silence: a Pandora’s Box?”, In: *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal/Protection des droits de l’homme: la perspective européenne: mélanges à la mémoire de Rolv Ryssdal*, eds. Paul Mahoney, Franz Matscher, Herbert Petzold, Luzius Wildhaber, Köln-Berlin-Bonn-München: Carl Heymanns Verlag KG, 2000, 1028.

²¹ Judgment of the ECtHR delivered on 20 June 2005, Application no 11931/03, Case of *Teteriny v. Russia*, § 56, January 21, 2020, <http://hudoc.echr.coe.int/fre?i=001-69579>; <http://hudoc.echr.coe.int/fre?i=001-69579>; Judgment of the ECtHR delivered on 31 October 2006, Application no 41183/02, Case of *Jeličić v. Bosnia and Herzegovina*, § 53, January 22, 2020, <http://hudoc.echr.coe.int/fre?i=001-71523>; Judgment of the ECtHR delivered on 17 July 2007, Application no 52658/99, Case of *Mehmet and Suna Yiğit v. Turkey*, § 47, January 22, 2020, <http://hudoc.echr.coe.int/eng?i=001-81734>.

ered by the Directive. For this purpose, the Directive imposes two requirements on Member States. Firstly, according to Article 10 (1) of Directive 2016/343, Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached. Secondly, without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defense and the fairness of the proceedings are respected (Article 10(2) of Directive 2016/343)²². The inclusion of a reference to national law suggests that this provision is not an exclusionary rule and does not amount to a departure from the rule of non-inquiry; it does not clearly impose on Member States the obligation to exclude evidence obtained in violation of the right to remain silent or the right not to incriminate oneself. An analysis of the aforementioned article of Directive 2016/343 leads to the conclusion that the Directive does not contain any clause that excludes admissibility of evidence obtained in breach of the right to remain silent and the privilege against self-incrimination²³. Directive 2016/343 leaves it to the national legislator to define the way to remedy the consequences of a breach of the right to silence. Consequently, compliance with

²² In Article 7 (4) of the Proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, the exclusionary rule was more pronounced. It was noted during the negotiations that MSs with a system of free assessment of evidence should be able to continue to use it. As provided for in Article 7 (4) of the Proposal, “any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.”

²³ S. Cras and A. Erbežnik noted that “While Art. 7 of the Directive seems to provide a clear prohibition on deriving any adverse inference from the right to remain silent, the words “in itself” and the last sentence of Recital 28, read together with Art. 10(2) on remedies, appear to indicate that John Murray is still hanging (a bit) around”, See Steven Cras, Anže Erbežnik, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, *Eucrim* 1 (2016): 32; Thomas Weigend, “Defense Rights in European Legal Systems under the Influence of the European Court of Human Right”, In: *The Oxford Handbook of Criminal Process*, eds. Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisse, Oxford: Oxford Press, 2019, 180, DOI: 10.1093/oxfordhb/9780190659837.013.35.

the requirement of Article 10 of Directive 2016/343 does not have to be limited to verification at the stage where admissibility of the evidence is tested, but may consist in a careful assessment, taking into account the fact that evidence has been obtained in breach of the right to silence²⁴.

4. THE RIGHTS OF SILENCE IN THE POLISH CRIMINAL PROCESS

When assessing the Polish legislation on the right to silence from the perspective of Directive 2016/343, it should be stated that the right of defense is a fundamental civil right that is guaranteed in the Constitution of the Republic of Poland and in provisions of international conventions signed and ratified by Poland, which have become a part of Poland's internal law. The provision of Art. 42 (2) of Poland's Constitution guarantees to every defendant in a criminal proceeding the right of defense, at all the stages of the proceeding. The Polish literature emphasizes the importance of this right, which in its essence is "the right of defense of an individual against any interference in the sphere of his or her freedom and rights threatened by or, due to its nature, caused by the criminal process. Thus, it is the right of defense of a human being, as opposed to defense of his or her role or status in the criminal process"²⁵.

The right of defense in the Polish criminal process is regulated mostly in Art. 6 of the Code of Criminal Procedure. One of the guarantees of the right of defense defined is the right of the defendant, provided for in Art. 175 (1) of the Code of Criminal Procedure, to remain silent, namely to refuse to give answers to individual questions. Defendants must be advised of this right. There is no doubt that defendants have the right to choose a completely passive defense; thus, their refusal to testify or answer specific

²⁴ Critical comments in relation to Article 10 of Directive 2016/343 are also formulated by: Stijn Lamberigts, "The Directive on the Presumption of Innocence A Missed opportunity for Legal Persons?", *Eucrim* 1 (2016): 38; María Luisa Villamarín López, "The presumption of innocence in Directive 2016/343/EU of 9 March 2016", *ERA Forum* 18(2017), 350.

²⁵ Dariusz Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie* [Constitutional freedom of individuals and temporary detention], Lublin: Lubelskie Wydawnictwo Prawnicze, 1999, 202.

questions is one of the ways to implement such defense²⁶. Consequently, exercise of this right may not be considered to be an aggravating circumstance, i.e. it must not be considered either as a circumstance resulting in a negative evaluation of the defendants' attitude or as an aggravating circumstance with regard to the evidence or the measure of the penalty²⁷. Thus, one cannot conclude *a contrario* that lack of active participation of defendants in the process may constitute an aggravating circumstance as such a conclusion would violate their right to remain silent and, consequently, the presumption of innocence principle from which this right is derived. Consequently, while admission of guilt may constitute when deciding on the penalty mitigating circumstance, the lack of it may not lead to the conclusion that the defendant's attitude could lead to negative consequences because it is a manifestation of the exercise of his or her right of defense, which the freedom to testify, limited only by the prohibition to commit a crime by providing the testimony, certainly is²⁸.

The right to remain silent is enjoyed by defendants at every stage of the criminal procedure and they can waive it at any stage, even though they have declared their refusal to answer questions or provide explanations. The above opinion is reflected in case law. Nevertheless, any statement made by a defendant in both pre-trial and court proceedings will constitute evidence which will be assessed by the court. As the verdicts of the Supreme Court rightly emphasize, testimony provided by defendants

²⁶ Unless such behavior of the defendant is a consequence of illnesses that he or she is suffering from; see: verdict of the Supreme Court of 27 July 1984, I KZ 107/84, OSNKW, 1985, no. 3-4, item 26; Andrzej Sakowicz, "The right to remain silent in the Polish criminal process", In: Current Problems of the Penal Law and the Criminology. Aktuelle Probleme des Strafrechts und der Kriminologie, ed./Hrsg. Emil W. Pływaczewski, Warszawa: C.H. Beck, 2014, Vol. 6, 200.

²⁷ See: verdict of the Supreme Court of 4 November 1977, V KR 176/77, OSNKW, 1978, no. 1, item 7; verdict of the Supreme Court of 6 September 1979, III KR 169/79, LEX, no. 21822; verdict of the Supreme Court of 5 February 1981, II KR 10/81, OSNKW, 1981, no. 7-8, item 38; Fenella M.W. Billing, *The Right to Silence in Transnational Criminal Proceedings Comparative Law Perspectives*, Springer, 2016, 7-8.

²⁸ Andrzej Sakowicz, "The right to remain silent in the Polish criminal process", In: Current Problems of the Penal Law and the Criminology. Aktuelle Probleme des Strafrechts und der Kriminologie, ed./Hrsg. Emil W. Pływaczewski, Warszawa: C. H. Beck, 2014, Vol. 6, 200.

in preparatory proceedings and then withdrawn or changed, regardless of whether the withdrawal or change took place in the course of the preparatory proceedings or during the court hearings, constitute evidence in the case which, in the same manner as any other evidence, is subject to free, but not discretionary, evaluation of the adjudicating court.²⁹ Of note is the fact that withdrawal of testimony by defendants does not, by itself, eliminate the evidence provided in such testimony. The adjudicating court must thoroughly consider the reasons why the defendants withdrew their testimony, analyze the contents of the testimony provided in the preparatory proceedings and during the hearing, compare them with other evidence, and only then indicate the reasons why the court believes that specific testimony of the defendants is true³⁰.

Based on the provisions of the Polish Code of Criminal Procedure, there is no doubt that the personal scope of the right to remain silent covers the suspect³¹, the accused³², and the detained person in light of Article 244 (1) of the Code of Criminal Procedure. The problem is with the suspected person³³: it is not clear whether this person gains this right at the time he or she becomes a suspect or a defendant or whether he or

²⁹ See: verdict of the Supreme Court of 14 February 1998, I KR 10/80, OSP, 1981, no. 1, item 10.

³⁰ See: verdict of the Supreme Court of 17 February 1969, III KR 179/68, OSP, 1971, no. 6, item 121, together with the note of J. Nelken, OSP, 1971, no. 6, item 121; Andrzej Sakowicz, "The right to remain silent in the Polish criminal process", In: *Current Problems of the Penal Law and the Criminology. Aktuelle Probleme des Strafrechts und der Kriminologie*, ed./Hrsg. Emil W. Pływaczewski, Warszawa: C. H. Beck, 2014, Vol. 6, 200.

³¹ According to Article 71 § 1 of the Polish Code of Criminal Procedure, a person shall be considered a suspect if an order has been made about charging them or if they have been charged without such an order in relation to questioning them as a suspect.

³² Article 71 § 1 of the Polish Code of Criminal Procedure provides that an accused is a person against whom an indictment has been submitted to a court, a person with regard to whom a public prosecutor has filed to the court, a motion for a conviction to be issued in a session as well as for adjudicating penalties agreed upon with the accused or other measures envisaged in relation to their act, and also a person with regard to whom a prosecutor has filed a request for a conditional discontinuation of proceedings,

³³ Before a person becomes a formal suspect in Polish criminal proceedings, he or she can be treated in preliminary proceedings as a suspect person. This person is identified as someone on whom the attention of investigating authorities is focused, but there is not enough evidence to substantiate a decision to charge with an offence.

she can exercise it earlier, i.e. when such a person is in fact a suspect with sufficient evidence justifying a suspicion that he or she has committed a forbidden act but the body conducting the process, contrary to the provisions of Art. 313 (1) of the Code of Criminal Procedure, takes its time before issuing the decision to present the charges.

Article 313 (1) of the Code of Criminal Procedure contains an injunction to transform a proceeding conducted in a case into a proceeding against a specific person if the conditions stipulated therein have been fulfilled. It is the transformation of the proceeding that leads to introduction of a suspect into the process (art. 71 of the Code of Criminal Procedure) and from that moment on the suspect has the right of defense, to include the right to remain silent consisting in exemption from the duty to provide information concerning the perpetration of an offense and the circumstances that may have a negative impact on his or her situation in the process. Such a position is supported by the provision in Art. 42 (2) of the Polish Constitution. It does not make the exercise of the rights of defense dependent on the formal acquisition of the status of a suspect or an accused person³⁴, since the phrase “*against whom the criminal proceedings are conducted*” refers to the conduct of proceedings against the offender, without the specific status of that person. It follows from that provision that the right of defense applies at any stage of the proceedings, named in the light of the constitutional provision, criminal proceedings *sensu largo*. It is correctly recognized in the literature that “the right to the protection of an individual against any interference with the sphere of freedoms and rights which is threatened or, by its nature, caused by a criminal process. It is therefore the right to defend a person and not his or her role or status in a criminal process³⁵. Conse-

³⁴ Cf.: Włodzimierz Wróbel, Konstytucyjne prawo do obrony w perspektywie prawa karnego materialnego [Constitutional right of defense from the perspective of substantive criminal law], In: Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi [Key problems of criminal law, criminology, and criminal policy. A commemorative book offered to Professor Andrzej Marek], eds. Violetta Konarska-Wrzosek, Jerzy Lachowski, Józef Wójcikiewicz, Warszawa: WoltersKluwer, 2010, 225.

³⁵ Dariusz Dudek, Konstytucyjna wolność człowieka a tymczasowe aresztowanie [Constitutional freedom of a man and pre-trial detention], Lublin: Lubelskie Wydawnictwo Prawnicze, 1999, 202.

quently, it appears that the scope of the right of defense, including the right to silence, is broader than the procedural guarantees enjoyed by the accused person (the suspect). It also protects any participant in criminal proceedings who is required to make procedural statements (a witness, an expert, a party to the proceedings) and who could be exposed to criminal liability if the offence is revealed. It therefore protects a potential suspect even before he is charged with any offence. The above statements lead to the conclusion that the alleged perpetrator of a prohibited act acquires the right of defense in the material sense at the time of its perpetration, and the full possibility of exercising this right is possible when criminal proceedings are initiated. Only such an interpretation of the provisions of the Polish Code of Criminal Procedure will make it possible to maintain their compliance with art. 42 sec. 2 of the Constitution and Article 2 of the Directive 2016/343, which states that the right to silence applies “at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive”.

This position is also confirmed in ECtHR case law. For example, in the case *Serves v. France*, the ECtHR considered it illegal to try to interview as a witness a person who, based on the actions of the authorities so far, may conclude that his or her testimony will be used in the future against him or her³⁶. In subsequent judgements, it was stated that, in addition to the requirement to formally inform a person of the charges, the possibility of becoming a suspect in a criminal case starts “not at the time when he or she is formally granted the status of a suspect in a criminal case, but when the domestic authorities have plausible reasons for suspecting that person’s involvement in a criminal offence”³⁷.

³⁶ Judgment of the ECtHR delivered on 20 September 1997, Application no 20225/92, Case of *Serves v. France*, § 45-47, January 20, 2020, <http://hudoc.echr.coe.int/eng?i=001-58103>; see Andrzej Sakowicz, “The right to remain silent on the Court’s case-law - European Court of Human Rights”, *Ius Novum* 2(2018), 130-131, DOI: 10.26399/iusnovum.v12.2.2018.19/a.sakowicz.

³⁷ In addition, the concept of a “criminal charge” has an “autonomous” meaning, independent of the categorisations employed by the national legal systems of the member States. This is true both for the determination of the “criminal” nature of the charge and

When assessing the material scope of the right to silence in light of the provisions of Directive 2016/343 and the Polish Code of Criminal Procedure, it must be concluded that the Polish regulations go beyond the minimum standard resulting from EU regulations. In the light of both Directive 2016/343 and the Polish Code of Criminal Procedure, there is no doubt that the scope of the right to silence applies to the subject matter of criminal proceedings. The defendant is exempted of the obligation to provide explanations concerning the alleged offence. The defendant's passive attitude must not result e.g. in pre-trial arrest "in retaliation" for refusing to provide an explanation³⁸, and may not be used to put pressure on the defendant to admit to committing the offence or to provide an explanation³⁹.

An analysis of the content of Directive 2016/343 shows that the right to silence does not apply to questions relating to the identification of a suspect or accused person (recital 26). This issue is no longer so obvious in the light of the provisions of the Polish Code of Criminal Procedure. On the one hand, it is claimed that the right to remain silent does not include information that enables identification of the person, since "no one has the right to remain anonymous in the course of a criminal process"⁴⁰. It is added that the right to remain silent can only be exercised "within the scope

for the moment from which such a "charge" exists, see Judgment of the ECtHR delivered on 14 October 2010, Application no 14666/07, Case of Brusco v France, § 47, January 21, 2020, <http://hudoc.echr.coe.int/eng?i=001-100969>; Judgment of the ECtHR delivered on 31 October 2013, Application no 23180/06, Case of Bandaletov v. Ukraine, § 56, January 21, 2020, <http://hudoc.echr.coe.int/eng?i=001-127401>; Judgment of the ECtHR (GC) delivered on 23 March 2016, Application no 47152/00, Case of Blokhin v Russia, § 179, <http://hudoc.echr.coe.int/eng?i=001-161822>.

³⁸ Cf.: decision of the Administrative Court in Wrocław of 19 October 2005, II AKz 453/05, OSA 2006, no. 3, item 15.

³⁹ Decision of the Administrative Court in Katowice of 28 December 2005, II AKz 777/05, KZS 2006, no. 4, item 84.

⁴⁰ Piotr Hofmański, Andrzej Wróbel, In: *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz* [Convention for the Protection of Human Rights and Fundamental Freedoms. A commentary], ed. Leszek Garlicki, Warszawa: C. H. Beck, 2010, 405.

of the explanations and their subject matter⁴¹.” As a consequence, “an accused person may refuse to answer questions about the subject matter of the proceedings and about his or her own criminal liability⁴².” However, as P. Wiliński claims, he or she cannot conceal such information as personal data, because “this right does not allow for concealing such information as personal data, property relations, occupation, and amount of earnings”⁴³. On the other hand, it is emphasized that the right to silence covers not only the subject matter of the proceedings, but also information on identity, nationality, profession, place of employment, and residence⁴⁴. Those who support this position take the view that the request for information is made at the time of the questioning and, therefore, since the defendant has the right to refuse to answer questions or to provide explanations throughout the process, he or she may also refuse to provide information in relation to the above data.

It is the latter position that should be supported. Firstly, the provisions of the Polish Code of Criminal Procedure do not limit the scope of a suspect’s right to refuse to provide explanations solely to issues directly related to the alleged act; the Code does not treat statements on the suspect’s identity, property, criminal record, place of residence, employment, etc., as a separate type of statement which does not fall within the scope of the explanations provided by him or her. On the contrary, questions from the authority conducting the process relating to this issue and to the alleged act are a part of an interrogation in which the suspect (defendant) may or may not provide explanations regardless of the subject-matter of the questions asked. After all, this takes place as part of an interrogation, which is also evidenced by the headline on the record. The same is true

⁴¹ Paweł Wiliński, *Zasada prawa do obrony...* [The principle of the right of defense...], 352, 527.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See: Michał Błoński, *Wyjaśnienia oskarżonego w polskim procesie karnym* [Explanations of a defendant in the Polish criminal process], Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2011, 262; Kazimierz Marszał, In: Kazimierz Marszał, Stanisław Stachowiak, Kazimierz Zgryzek, *Proces karny* [Criminal process], Katowice: Volumen, 2003, 258; Jolanta Chankowska, „O prawie oskarżonego do milczenia słów kilka [A few words on the right of the defendant to remain silent]”, *Palestra* 2005, no. 5–6, 133ff.

during the main hearing, when the defendant is informed again about his or her right to remain silent under Article 386 (1) of the Code of Criminal Procedure before proceeding to question the defendant. Secondly, none of the provisions of the Polish Code of Criminal Procedure lays down a legal norm imposing an obligation on the suspect (defendant) to make available his or her assets, criminal record, place of residence, employment, etc., as regards the identity of the suspect (defendant). Adoption of an obligation to cooperate in this respect would impose an obligation on the suspect to provide answers⁴⁵. Not only the confirmation of the name of the defendant (suspect) may be an aggravating circumstance, for example, by the person sought. It may also be work in a specific profession, living in a specific locality, or having the status of a guarantor. This information may have a dual meaning, i.e. it may be relevant for the determination of identity and may affect, for example, the imputability of criminal responsibility, the attribution of the type of qualified criminal act, or the imposition of a specific criminal measure.

The Polish Code of Criminal Procedure and Directive 2016/343 prohibit the negative consequences of passivity of the defendant. The defendants' silence must not constitute an aggravating circumstance affecting the measure of the penalty but also, which is very important, this right must not result in any negative consequences in the course of determination of their guilt or reinforce the suspicion that the specific persons have committed crimes. Therefore, if a defendant does not admit his or her guilt, this fact must not negatively affect the defendant's situation or be considered as a situation that results in a negative evaluation of his or her attitude or an aggravating circumstance with regard to the evidence or the measure of penalty. In the Polish legal literature, assuming that a sentence covers the

⁴⁵ See: Maike Aselmann, *Die Selbstbelastungs- und Verteidigungsfreiheit*, Frankfurt am Main, Peter Lang, 2004, 51-52; Johannes Wessels, „Schweigen und Lügen in Strafverfahren“, *Juristische Schulung* 1966, Heft 5, 176; Klaus Rogall, *Der Beschuldigte als Beweismittel gegen sich selbst*, Berlin, Duncker & Humboldt, 1977, 178; Hinrich Rüping, „Zur Mitwirkungspflicht des Beschuldigten und Angeklagten“, *Juristische Rundschau* 1974, Heft 4, 137; Manfred Seebode, „Schweigen des Beschuldigten zur Person“, *Monatsschrift für Deutsches Recht* 190, Heft 3, 185-186; Andrzej Sakowicz, *Prawo do milczenia w polskim procesie karnym* [The right to silence in the Polish criminal proces], Białystok: Temida 2, 2019, 141.

type and measure of the penalty, for example a trial which the offender is to be subjected to in the case of a conditional suspension of a prison sentence, it must be said that a defendant's silence may not negatively affect the type of the adjudicated penalty and its measure, or lead to a stricter treatment of the defendant with regards to the adjudicated penal measures⁴⁶.

The provisions of the Polish Code of Criminal Procedure and Directive 2016/343 are compatible with regard to the exercise of the right to information. At the stages of pre-trial proceedings (Article 300 (1) of the Code of Criminal Procedure) and court proceedings (Article 386 (1) of the Code of Criminal Procedure), a suspect (defendant) is orally advised about the right to remain silent. It is only after having been informed of the existence of such a right and of the unconditional possibility of exercising it that the defendant may consciously make a decision to provide explanations and may freely shape the content of his or her explanations. By informing the defendant about the possibility of remaining silent during criminal proceedings, a guarantee is given to the passive party to the procedure that the exercise of the right to silence will not have a negative impact on the defendant's procedural situation. On the other hand, in the absence of information, erroneous information, and incomplete information on the right to remain silent, the explanations provided by the defendant cannot be used in the criminal process. In such a situation, not only is there a violation of the Polish Code of Criminal Procedure in respect of the duty to advise, but there is also a restriction on the defendant's freedom of expression. There is hardly any freedom of expression when the defendant (suspect) decides to provide an explanation in the mistaken belief that such an obligation exists. Therefore, a necessary condition of the existence of freedom of expression is also creation of appropriate conditions for making a decision on the object of the explanations, which includes the obligation of the authority conducting the process to advise the defendant (suspect) about the right to refuse to be heard or to answer individual questions without giving the reasons for such a decision.

⁴⁶ Andrzej Sakowicz, *Prawo do milczenia w polskim procesie karnym* [The right to silence in the Polish criminal process], Białystok: Temida 2, 2019, 363-367.

5. CONCLUSION

The analysis that has been carried out makes it possible to claim that the right to remain silent is a manifestation of the autonomy of the defendant's will and a form of exercise of the right of defense. The defendant decides for himself or herself on his or her activity in the criminal process and on the possible provision of information. He or she may provide explanations, which at a later stage will form the basis of the factual findings, and may refuse to provide explanations and answers to specific questions. The defendant can also choose the form of defense he or she considers most effective. Leaving the method of the defense in the hands of the defendant is a manifestation of the subjective treatment of the defendant and of respect for his or her dignity. Consequently, it must be assumed that the right to remain silent is a key component of a fair trial standard. This right is a form of the right of defense. Since the defendant has the right to choose his or her behavior in the course of the trial, he or she can also choose silence as a form of defense. It is up to the defendant to choose the time during the process and the material scope of his or her exercise of the right to silence. Furthermore, Directive 2016/343, like the ECtHR, connects the presumption of innocence with the right to remain silent.

The adoption of Directive 2016/343 should be considered to be a positive fact. It is undisputed that this is an important step towards the approximation of the rules on the right to remain silent or the right not to incriminate oneself. It also seems to provide a higher degree of protection than ECHR case law. This is because the exercise by suspects and accused persons of the right to remain silent must not be used against them and shall not be considered to be evidence that they have committed the criminal offence. Despite this, the effectiveness of Directive 2016/343 is undermined by two legal solutions it contains. First, Directive 2016/343 has not established clear and effective exclusionary rules regarding evidence improperly obtained, e.g. in violation of the right to silence. The second issue focuses on the lack of clarity as to the scope of the right to a legal remedy afforded to individuals under Art 10 of Directive 2016/343. In case of infringement to the right to remain silent, the assessment of these breaches by the competent authorities should respect the rights of the defense and the fairness of the proceedings. However, this assessment should

be “without prejudice to national rules and systems on the admissibility of evidence.” This may, however, lead to asymmetries in standards of protection of the right to silence between EU Member States.

The assessment of Polish legal solutions concerning the protection of the right to silence from the standpoint of the provisions of Directive 2016/343 is satisfactory. In general, one could say, that the scope of the right to silence under the Polish Code of Criminal Procedure provides for a higher standard of protection than that resulting from the guarantees provided for by Directive 2016/343. However there are doubts whether this is enjoyed by the suspected person. Only pro-constitutional interpretation and interpretation in conformity with the ECHR makes it possible to achieve the state of conformity of the Polish Code of Criminal Procedure” with Directive 2016/343. There is also compatibility as regards the form of the prohibition to draw negative consequences from the right to silence and the impossibility to treat the defendant’s explanations as evidence when the defendant has not been informed about the right to silence. Unfortunately, there is also consensus with respect to the fact that, in the light of Article 10 of Directive 2016/343 and the provisions of the Code of Criminal Procedure, it is not possible to determine the form of remedies to be applied when the right to remain silent is infringed.

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