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ACCESS TO A LAWYER FOR SUSPECTS AT THE POLICE STATION AND DURING DETENTION PROCEEDINGS

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ABSTRACT

Directive 2013/48/EU of the European Parliament and of the Council of 2 October 2013 on the right of access to a lawyer lays down minimum standards concerning access to a lawyer for suspects and the accused in criminal proceedings, as well as persons subject to the European arrest warrant proceedings. The present article focuses on the subject of access to a lawyer at the earliest stage of criminal proceedings – in connection with arrest as well as during proceedings concerning the use of pre-trial detention. The author analyzes in sequence: subjective scope of the right to a lawyer, the right to a lawyer for the person deprived of liberty, confidentiality of communications between the person deprived of liberty and their lawyer. The main statement is that Poland does not meet these standards.

Key words: directive, right to a lawyer, arrest, detention

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1. INTRODUCTION

Directive 2013/48/EU of the European Parliament and of the Council of 2 October 2013 on the right of access to a lawyer[1] lays down minimum standards concerning access to a lawyer for suspects and the accused in criminal proceedings, as well as persons subject to the European arrest warrant proceedings. The present article will focus on the subject of access to a lawyer at the earliest stage of criminal proceedings – in connection with arrest as well as during proceedings concerning the use of pre-trial detention as a preventive measure in the form of confinement, and therefore in connection with deprivation of liberty. The main statement of this paper is that Poland does not meet the standard resulting from the directive.

Although the directive uses the concept of a "lawyer", it should be interpreted as access to defence counsel (attorney) and the possibility of exercising the formal aspect of one's right to defence. Accordingly, on the basis of national law, whenever a lawyer is being mentioned, they must be understood as any legal profession which may serve as counsel for the defence, i.e. attorney (advocate) as well as solicitor (legal counsel)[2].

[1] Directive 2013/48/EU of the European Parliament and of the Council of 2 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, [2013] OJ L 294/1 ("the directive on the right of access to a lawyer" or "Directive 2013/48/EU").

[2] See: Article 2 of the Polish Criminal Procedure Code (Criminal Procedure Code of 6 June 1997, i.e. Polish Journal of Laws 2020, item 30 ("CPC")); see: M. Wąsek-Wiaderek, Dostęp do adwokata na wczesnym etapie postępowania karnego w prawie Unii Europejskiej, EPS 2019, no. 1, 17-18.

2. MINIMUM LEGAL STANDARD OF THE RIGHT TO DEFENCE IN ACCORDANCE WITH THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER

2.1. General

By way of introduction, since recital (1) of Directive 2013/48/EU makes reference to international law, the judgment of the Grand Chamber of the European Court of Human Rights of 7 November 2008 creating the so-called Salduz doctrine, should be seen as a ruling of great importance. The judgment clearly states that practical effective access to a lawyer throughout the proceedings as from the first questioning of a suspect[3] is a basic prerequisite of a fair trial according to Article 6(1) of ECHR[4].

The directive quite clearly sets minimum standards for access to a lawyer. Sentence 1 of Article 3 indicates that the suspect and the accused have the right to access a lawyer without undue delay. The phrase "without undue delay" appears synonymous with "promptly". By semantic interpretation, we may arrive at the meaning: "as soon as possible"[5]. Undoubtedly, the wording of the first sentence in Article 3 of the said directive suggests that the right to defence could be exercised at the earliest possible stage of criminal proceedings. However, the provision on the prompt exercise of such right alone is insufficient to be considered a binding standard due to the vagueness and ambiguity of the phrase. For this reason, the legislator clarifies how the phrase "without undue delay" should be construed under Article 3 of the directive on the right of access to a lawyer by providing a catalogue of specific litigation. The list also includes that access to a lawyer should be made possible promptly after the person has been deprived of liberty.

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[3] Judgment of the Grand Chamber of the European Court of Human Rights of 7 November 2008, complaint 36391/02, Salduz v. Turkey, HUDOC.

[4] European Convention on Human Rights and Fundamental Freedoms of 4 November 1950, Polish Journal of Laws 1993, no. 61, item 284, as amended ("ECHR").

[5] Entry: *promptly*, Longman Dictionary of Contemporary English Online, https://www.ldoceonline.com/dictionary/promptly, date of access: 3 December 2019.

2.2. Subjective scope of the directive on the right of access to a lawyer

An analysis of the provisions of the directive on the right of access to a lawyer must result in identifying a key issue in terms of meeting the minimum standard laid down in the directive, i.e. its subjective scope of application, since a fundamental problem is to determine whether the directive is applicable only to persons with the status of a suspect, i.e. formally charged, or the range of subjects of its application is broader. It should be noted that the problem was indeed one of the main causes of disagreement during the negotiations over the final wording of the directive[6].

According to Article 2(1) of the directive, it is applicable to suspects "from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty". Obviously, it is indisputable that it should apply to persons who have been formally presented with charges. However, the formal treatment of the issue is insufficient. Bearing in mind recital (53), special attention should be paid to consistent interpretation of the provisions of the directive on the right to access a lawyer with ECHR regulations and the Strasbourg case law. The standpoints formulated in those authorities leave no doubt that the right to defence is also conferred on the suspected person, an entity with respect to whom there are reasonable grounds to suspect that they may have committed a criminal offence[7], and whose situation is determined by action taken by judicial administration[8].

Considering the above, it should be noted that the minimum standard arising from the directive on the right of access to a lawyer also concerns an entity with respect to whom action has been taken to prosecute due to an offence having been committed, including without limitation

[6] With regard to negotiation problems see: A. Klamczyńska, T. Ostropolski, Prawo do adwokata w dyrektywie 2013/48/UE – tło europejskie i implikacje dla polskiego ustawodawcy, BSP 2015, Vol. 14, 147-149.

[7] See e.g. ECHR judgment of 1 October 2013, 23180/06, Bandeletov v. Ukraine, HUDOC, paragraph 56.

[8] See e.g. ECHR judgment of 2 May 2017, 21980/04, Simeonovi v. Bulgaria, HUDOC, paragraph 110.

acts listed in Article 3 of Directive 2013/48/EU, i.e. can be exercised e.g. before the first questioning, in relation to the identity parades, and arrest (deprivation of liberty)[9].

2.3. Right to a lawyer due to deprivation of liberty

The directive clearly states that the right of access to a lawyer can be exercised "promptly after deprivation of liberty"[10]. The use of the vague term "promptly" may raise doubts as to its interpretation; see the above remarks concerning the construction of the phrase. The literature of the subject emphasizes that the phrase used in the directive may leave an excessive margin of discretion to law enforcement authorities[11]. Only the functional interpretation of the directive, especially its consideration of its *ratio legis*, hence ensuring the right to a lawyer at the earliest possible stage of the criminal proceedings, may lead to the conclusion that such right is conferred immediately upon arrest[12].

It must be emphasized that the directive merely stipulates the suspect's right to a lawyer without creating any obligation in this respect[13]. By putting special emphasis on the status of a person deprived of liberty, Directive 2013/48/EU very firmly specifies the need to provide the arrested person with a defence counsel. At this point we should focus on the reservation

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[9] In this manner e.g. M. Wąsek-Wiaderek, Dostęp do adwokata…, 18; T.T. Koncewicz, A. Podolska, Dostęp do adwokata w postępowaniu karnym. O standardach i kontekście europejskim, Palestra 2017, no. 9, 13-14; A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 150; K.W. Ujazdowski, Dyrektywa o dostępie do pomocy adwokackiej i prawie do poinformowania osoby trzeciej o zatrzymaniu – w świetle art. 6 Europejskiej Konwencji Praw Człowieka, FP 2015, no. 4, 52; A. Baj, Czy osoba podejrzana jest stroną postępowania przygotowawczego, Prok. i Pr. 2016, no. 10, 90; P. 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, EPS 2019, no. 1, 6.

[10] See more A. Pivaty, Criminal Defence at Police Stations: A Comparative and Empirical Study, Routledge 2020.

[11] See T. Wahl, Die EU-Richtlinien zur Stärkung der Strafverfahrensrechte im Spiegel der EMRK, ERA Forum 2017, no. 3, 321.

[12] See M. Wąsek-Wiaderek, Dostęp do adwokata…, 20.

[13] See e.g. A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 151.

concerning making arrangements for a lawyer for a person deprived of liberty who will not use the lawyer's assistance[14]. However, the absence of the obligation is finally determined by the stipulation that the suspect may waive his or her right to a lawyer. The waiver is possible and effective only if the suspect is advised of the possibility and consequences of the waiver, waives his or her right voluntarily and expressly, and the information of the waiver is recorded in a report. It should be noted that the premises are based on the possibility of such waiver prescribed in Strasbourg case law[15].

Another important point is that, despite quite forceful statements on access to a lawyer for the arrested person (and in general the person deprived of liberty), including the notion that such person must be provided with access to a lawyer, Directive 2013/48/EU does not regulate the question of access to ex officio defence counsel. The issue was provided for independently in the directive on legal aid[16].

A conclusion which can be drawn from an analysis of the provisions of the directive on access to a lawyer for persons deprived of liberty is that it is considered a special situation. It can also be seen due to the existence of a provision which is exceptional in relation to general regulations, and which concerns the possible derogation from the right to a lawyer. It should be stressed that it may happen only during pre-trial proceedings and only in exceptional circumstances. Temporary derogations from the right of access to a lawyer are possible if geographical remoteness of the suspect makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty. For example, this concerns arrest in overseas territories. A temporary derogation from the right of access to a lawyer should mean that law enforcement authorities refrain from any further acts with regard to the person deprived of liberty. If immediate access to a lawyer is impossible, the suspect must be provided with a possibility of communicating with a lawyer on the phone or via video-conference.

[14] Recital (28) as well as Article 3(4) of Directive 2013/48/EU.

[15] See e.g. K.W. Ujazdowski, Dyrektywa o dostępie…, 55; M. Wąsek-Wiaderek, In: System Prawa Karnego Procesowego, Vol. 6, Strony i inni uczestnicy postępowania karnego, ed. C. Kulesza, Warsaw 2016, 537-539.

[16] Directive 2016/9 of the European Parliament and of the Council of 6 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L.297/1.

It appears that in practice such derogation will be applied in extremely rare cases. First, it is subject to general restraints on derogations, i.e. it must be proportional, time-constrained, independent of the type and gravity of the offence, and the right to a fair trial should remain unaffected[17]. Secondly, note that the wording of Article 3(5) of the directive may be construed in such a manner that it applies only in a situation where geographical remoteness "makes it impossible" to access a lawyer. The provision does not apply when the exercise of the right was hindered, even to a considerable extent.

2.4. Confidentiality of communications between the person deprived of liberty and their lawyer

The directive on the right of access to a lawyer holds that the confidentiality of communication with the lawyer is an essential part of such right. The literature of the subject consistently emphasizes the absolute character of the confidentiality of communication between the suspect and their lawyer[18]. The normative content of the directive on the right of access to a lawyer defines a higher standard in the matter than the one developed by Strasbourg case law[19]. It covers communication with the defence counsel when using the right to access to a lawyer prescribed in the directive, including meetings, correspondence, telephone conversations and other means of communication permitted under national law (Article 4).

Although the directive's preamble mentions the need to respect the confidentiality of communications "without derogation", there are situations in which interference with such confidentiality is permitted. However, they do not have the status of a normative exception from the absolute confidentiality principle[20]. At this point it is worth mentioning that there is no detriment to the principle of the confidentiality of communications between the suspect and their lawyer if there is any reasonable suspicion

[17] See: A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 152.

[18] See e.g. A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 153; T.T. Koncewicz, A. Podolska, Dostęp do adwokata…, 15.

[19] See e.g. ECHR judgment of 1 January 2002, 24430/94, Lenz v. Austria, HUDOC.

[20] See: A. Klamczyńska, T. Ostropolski, Prawo do adwokata…, 153.

that the lawyer is involved in the criminal offence which the suspect is charged with, and also in cases of work carried out by authorities responsible for national security and the maintenance of law and order.

The directive once again puts emphasis on the situation of persons deprived of liberty, i.e. an arrested and detained person. In such a case, suitable measures should be taken so that communication solutions respect and protect confidentiality. Admittedly, this is without prejudice to existing precautions in detention facilities aimed at preventing illegal items being sent to persons deprived of liberty. Thus, the directive permits the inspection of correspondence, but only on condition that such precautions do not allow competent authorities to read the content of messages exchanged between the suspect and the lawyer.

3. THE POLISH LAW AND PROVISIONS OF THE DIRECTIVE ON THE RIGHT OF ACCESS TO A LAWYER

3.1. General

When making an attempt at a comparison between the standard of minimum right of access to a lawyer and the normative reality of the Polish legal system, one must begin by stating that Poland does not meet the standard[21].

Still, in the light of the above statement we should note that a number of publications acknowledge the fact that the right to use pre-trial aid of a defence counsel is a requirement arising from Poland's international obligations[22]. Obviously, the directive on the right of access to a lawyer is not an international obligation but forms part of the law of the European Union, a separate and specific legal system. However, the view presented

[21] See e.g. A. Soo, How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?, NJECL 2017, vol. 8, 64-78; E. Symeonidou – Kastanidou, The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 2 October 2013 on national legislation, EuCLR 2015, vol. 5, 68-85.

[22] W. Hermeliński, B. Nita-Światłowska, Kilka uwag o prawie do obrony w związku z nowelizacją Kodeksu postępowania karnego z 2016 roku, Palestra 2016, no. 9, 12-25.

above should be relied upon to the extent to which it accentuates the necessity to include not only national but also international legal standards in the Polish legal system, particularly as Directive 2013/48/EU makes an indirect reference to international obligations in the strict sense, including the ECHR. At this point let us consider K. W. Ujazdowski's opinion that the example of the directive on the right of access to a lawyer shows that although the European Commission (as the body proposing legislation) operates in a space to which it is authorized under the treaty, it may still force member states to make more profound changes, sometimes even affecting the commonly accepted model of the legal system[23].

It should be mentioned that two types of deprivation of liberty will be discussed – arrest and detention – and all the arguments will be divided between and into these two types.

3.2. Subjective scope of the right to a lawyer

According to Article 6 of CPC the accused person has the right to defence, including the right to use the assistance of a defence counsel, which he or she should be instructed about.

The decisions of the Supreme Court have developed the opinion that it is not the formal presentation of charges but the first act of the procedural authorities aimed at prosecuting a specific person that confers the right to defence on the person[24]. The opinion seems consistent with assumptions arising from the directive.

Similar views can be attributed to some of the representatives of the doctrine. According to A. Jezusek, the right to defence is conferred not only on the offender but also on any other person potentially facing criminal liability, which also includes persons innocent of the wrongful act. Such right is enforceable from the moment the person is objectively at risk of criminal liability, irrespective of his or her current status in the proceed-

[23] K.W. Ujazdowski, Dyrektywa o dostępie…, 57.

[24] See e.g. judgment of the Supreme Court of 9 February 2004, V KK 194/03, LEX no. 102907; resolution of the Supreme Court of 6 April 2007, I KZP 4/07, OSNKW 2007, no. 6, item 45; resolution of the Supreme Court of 20 September 2007, I KZP 26/07, OSNKW 2007, no. 10, item 71.

ings. As for the offender, such risk appears as early as the offence is being committed, although the perpetration of an offence as such is not a circumstance which entitles the offender to exercise their right to defence; instead, the right to defence is conditional on the objective risk of criminal liability for perpetrating the offence[25].

In the Constitutional Tribunal case law there are views accentuating the formal aspect of the right to defence, according to which a person is not entitled to the assistance of a lawyer until he or she is presented with charges, i.e. when criminal proceedings enter the *in personam* phase. Admittedly, it is emphasized that the right exists at every stage of the proceedings[26], sometimes with a proviso that the right can practically be exercised from the moment the criminal proceedings are instituted, that is from presentation of charges[27].

Those apparently competing views are not mutually exclusive, as they may refer to different aspects of the right to defence. It is commonly accepted that the suspected person is not liable for the untruthfulness of their depositions, which is consistent with the admissible content of testimony given by the suspect or the accused. Nevertheless, the same practice allows, as well the law declares, the use of a legal counsel's assistance only after the charges are presented, hence from the moment the person acquires the status of the suspect.

The Polish Criminal Procedure Code does not deprive the suspected person from the possibility of professional legal representation, even though an attorney or a solicitor has the status of an attorney-in-fact (plenipotentiary) instead of an attorney-at-law (defence counsel). According to Article 7 § 2 of the CPC, he or she may be appointed by a non-party,

[25] A. Jezusek, Możliwość dezinformowania przez świadka organów postępowania w świetle prawa do obrony, zasady równości wobec prawa i zasady praworządności a realizacja znamion występku z art. 3 § 1a k.k., CPKiNP 2018, no. 4, 115-156; see also e.g. S. Steinborn, Dostęp do obrońcy na wczesnym etapie postępowania karnego. Uwagi de lege lata i de lege ferenda, EPS 2019, no. 1, 38-46; M. Wąsek-Wiaderek, Dostęp do adwokata…, 18-23.

[26] Karlik, Sroka, Wiliński, Art. 2 [Zasada nieuchronności odpowiedzialności karnej; prawo do obrony; domniemanie niewinności], In: Konstytucja RP. Tom I. Komentarz do art. 1-86, eds. M. Safjan, L. Bosek, Legalis 2016, nb. 225.

[27] See judgment of the Constitutional Tribunal of 3 June 2014, K 19/11, OTK-A 2014, no. 6, item 60.

if it proves necessary for securing such non-party's interest in pending proceedings. The provision refers to any person who is not a party to the proceedings. Note that the so-called suspected person, the actual suspect, i.e. a person who has not been presented with charges, but who has been subject to procedural activities indicating that they he or she is treated as a suspect[28], is not a party to the proceedings under applicable law[29]. Consequently, this does not prevent the subject from using their right to appoint an attorney without the status of a defence counsel in order to defend their interest in judicial proceedings, which in fact means that defence may be attempted[30]. It should be mentioned that decision to participate in the proceedings of plenipotentiary for non-party belongs to the procedural authority – to the court or prosecutor. According to Article 7 § 3 CPC, this procedural authority may refuse to allow the plenipotentiary to participate in the proceedings, if he or she considers that it is not required to defend the interests of a non-party.

However, any possibility of using the assistance of a professional entity before acquiring the status of a suspect must be seen as beneficial, although it does not in any way alter the lack of conformity with the standard outlined in Directive 2013/48/EU, as Article 8 § 2 of the CPC in fact does not concern the right to defence. As stated above, performance of actions for the benefit of the suspected person may only constitute an attempt at providing defence. In reality, such entity remains an attorney-in-fact throughout, so they do not possess many attributes of the defence counsel such as the statutory obligation to act only for the good of the client. However, it is important to notice that the arrested person's attorney-in-fact is entitled to the lawyer-client privilege[31].

[28] S. Waltoś, P. Hofmański, Proces karny. Zarys systemu, Warsaw 2016, 194.

[29] See A. Baj, Czy osoba podejrzana jest stroną…, 87.

[30] See: J. Lisińska, Podmioty uprawnione do ustanowienia pełnomocnika w procesie karnym, Palestra 2014, no. 7-8, 72-81.

[31] See e.g. M. Smarzewski, M. Banach, Ochrona tajemnicy adwokackiej w procesie karnym w związku z czynnościami przesłuchania i przeszukania, Palestra 2017, no. 3, 78; P. Krzyżanowski, Zakres ochrony tajemnicy adwokackiej w postępowaniu karnym – zagadnienia wybrane, Roczniki Nauk Prawnych KUL 2018, no. 2, 36.

3.3. The right to a lawyer for the person deprived of liberty

If no charges are presented, the arrested person has no possibility of appointing a defence counsel. Article 5 § 1 of the CPC only provides the arrested person with an opportunity to contact an attorney or a solicitor, as well as to speak with them directly. It is worth noting that the act on criminal court proceedings does not use the concept of a defence counsel, but instead refers to an attorney or a solicitor (Polish: *pełnomocnik*). Making contact with an attorney or a solicitor does not necessarily mean making contact with a defence counsel[32]. An attorney or a solicitor acts as a legal adviser to the arrested person; he or she may be granted power of attorney by an arrested person who does not have the status of a suspect, and in such situation he or she may function as an attorney-in-fact of a non-party[33].

If we do not accept the present situation, we must agree that arrest itself, regardless of whether it is combined with charges presented at a later stage, is of a self-contained nature, i.e. arrest is an expression of will, purpose and nature of the actions performed by procedural authorities. For these reasons, it meets the criteria, indicated by the Supreme Court as well as in the directive, which deem the arrested person an entity with the right to defence[34].

In reference to the availability of the arrested person's contact with an attorney or a solicitor, one should partly reject the view expressed by K. Gajowniczek-Pruszyńska and M. Zwierz, according to which law enforcement authorities do not have any legal obligation to provide help in this respect[35]. Note that Article 5 § 2 of the CPC makes reference to Article 517j § 1 and 2 of the CPC, including secondary legislation enacted under Article 517j § 2 of the CPC.

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[32] J. Skorupka, Art. 5 [Contact with the defence counsel at the request of the arrested], In: Kodeks postępowania karnego. Komentarz, ed. J. Skorupka, Legalis 2020, Vol. 2.

[33] R.A. Stefański, S. Zabłocki, Art. 245. Prawa osoby zatrzymanej, In: Kodeks postępowania karnego. Volume II. Komentarz do art. 167-296, LEX/el 2019, Vol. 4.

[34] P. Kadas, Gwarancje prawa do obrony…, 9.

[35] See: K. Gajowniczek-Pruszyńska, M. Zwierz, Gwarancje sprawiedliwości proceduralnej wobec zatrzymanych a elementarne standardy demokratycznego państwa prawa, Palestra 2017, no. 10, 35.

Article 517j § 1 of the CPC provides for duty attorneys and duty solicitors, and it is meant to address the arrested person's need to access a lawyer. Arrangements for such lawyers on duty are specified in the Ordinance of the Minister of Justice on the manner of providing the accused with the aid of a defence counsel in fast-track proceedings[36].

The manner in which such duty is arranged may raise some doubts. First of all, the service is performed in district courts instead of locations where actions with arrested persons are performed. Moreover, at the consent of the president of a competent district court, duty service may be provided outside the seat of the circuit court, which in practice means that the lawyer is available "on call".

If the arrested person needs to contact an attorney or a solicitor, he or she must be provided with a list of lawyers on duty. Such arrangements for legal aid are to a certain extent questioned by K. Eichstaedt, who casts some doubts on the conformity of the solution with provisions of Article 42.2 of the Constitution of the Republic of Poland[37], guaranteeing free choice of a defence counsel[38]. Without doubt, narrowing the choice merely to persons who are on duty at a given moment radically limits such freedom, especially if we consider the fact that attorney's and solicitor's duties are voluntary, which may significantly affect the number of persons who the arrested may contact to obtain help.

Consequently, it appears that the opinion expressed by the Supreme Court in the 1970s, according to which it is admissible to appoint a non-duty lawyer selected by the arrested person, as long as he or she is able to perform his or her obligation to arrive immediately and offer legal aid, still holds true[39].

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[36] Ordinance of the Minister of Justice of 3 June 2015 on the manner of providing the accused with the aid of a defence counsel in fast-track proceedings, Polish Journal of Laws 2015, item 920.

[37] The Constitution of the Republic of Poland of 2 April 1997, Polish Journal of Laws 1997, no. 78, item 483, as amended ("The Constitution of Poland").

[38] K. Eichstaedt, Art. 517j. Dyżury adwokacko-radcowskie. Delegacja ustawowa, In: Kodeks postępowania karnego. Volume II. Komentarz aktualizowany, ed. D. Świecki, LEX/el 2019, vol. 7.

[39] See judgment of the Supreme Court of 6 February 1970, VI KR 2/70, OSNKW 1970, no. 6, item 68.

One must also take into account duration of the arrest (8 hours) in which the arrested person remains at the disposal of the public prosecutor. The shortness of the period implies the need to perform actions without delay. Publications on the subject suggest that in this particular situation the broadly-defined right to defence is prejudiced due to the need to examine the case quickly, restricting not only the choice of the counsel but also preparations for defence[40]. Concerning the aspect of preparation for defence, we must note that the opinion cited above is not entirely up-to-date. The aforementioned regulation guarantees that the arrested person and their attorney or solicitor may contact each other, also on the phone, without the presence of third parties, in a closed room and review the material concerning the proceedings. Accordingly, there exists a normative basis giving at least partial opportunity to prepare legal aid in the matter. At this point it should be emphasized that the provisions of the ordinance do not extend to the right to review the files of the proceedings directly upon arrest, e.g. in the event of making a complaint about the arrest. Such right exists only under Article 6 § 5 of the CPC; due to the absence of the function of the defence counsel in the proceedings, it mentions making files available "to a third party", hence only as an exception[41].

Because duty attorneys or duty solicitors are not available at police stations or in public prosecutor's offices, it is also difficult to comprehend the legislator's failure to provide for the possibility of taking procedural actions from the moment of arrest to the moment of the defence counsel's arrival at the location. The absence of provisions in this matter leaves the issue of taking action while waiting for the defence counsel at the sole discretion of the officer effecting the arrest, who may respect (or fail to respect) the principle of procedural loyalty.

An analysis of existing research reveals that the provisions for arrested persons' right of access to a lawyer, including the provisions of the Ordinance of the Minister of Justice, have not been implemented. It is pointed out that police stations are not in possession of lists of duty lawyers, hence

[40] C. Kulesza, Refleksje na temat obrony formalnej w postępowaniu przyspieszonym, In: Problemy stosowania prawa sądowego. Księga ofiarowana Profesorowi Edwardowi Skrętowiczowi, ed. I. Nowikowski, Lublin 2007, 356-366.

[41] See: S. Steinborn, Dostęp do obrońcy…, p 39.

the discrepancy between the situation of those arrested persons who may contact their lawyer on their own and those who do not have such possibility, which in fact deprives the latter of the right to use legal aid. In addition, it is reported that police stations do not have adequate infrastructure to enable the arrested person to contact their lawyer. As a result, conversations take place in the corridor, contrary to the confidentiality principle[42]. In connection with the services of duty lawyers, the literature of the subject reveals that the most urgently needed changes concern remuneration for services, the physical location in which the services are rendered, notices of the right of access to a lawyer, infrastructure to enable contact with the arrested person and the actual, real access to a lawyer promptly after deprivation of liberty takes place[43].

As for proceedings concerning the detention of a suspect, there is no doubt as to the formal possibility of using the assistance of defence counsel, since any preventive measures may only be applied with regard to the suspect, that is the person who has been presented with charges.

Nevertheless, certain issues related to effective access to a defence counsel require attention. Note that the proceedings concerning the use of pre-trial detention may last up to 2 hours from the moment in which the arrested person is actually deprived of liberty. Consequently, the possibility of offering effective defence is affected by a strict time frame, especially that during the proceedings the suspect remains first at the disposal of the public prosecutor and then at the disposal of the court. Doubts raised as to the standard of the right to defence with regard to the brevity of proceedings and the arrested person's access to a lawyer are therefore justified.

We should, however, contemplate the actual possibility of access to a lawyer in this procedure. By virtue of Article 301 of the CPC, the suspect, at his or her request, must be questioned in the presence of a duly appointed defence lawyer, and the lawyer's failure to appear does not prevent

[42] See A. Klepczyński, P. Kładoczny, K. Wiśniewska, O (nie)dostępnym dostępie do adwokata, Warsaw 2017, 4 et seq.

[43] See M. Śliwa, Funkcjonowanie dyżurów adwokackich i zapewnienie pomocy obrońcy w postępowaniu przyspieszonym w świetle możliwości rozszerzenia go w celu wykonania projektowanej dyrektywy w sprawie tymczasowej pomocy prawnej, Warsaw 2015, 46-52.

the suspect from being questioned. The provision is applied to a suspect who is deprived of liberty[44].

The regulation provides for the possibility of questioning in the presence of an "appointed" defence counsel. It does not confer on the suspect any right to appoint a defence counsel for the first questioning. Consequently, in a situation where questioning takes place directly after charges are presented, the suspect is basically deprived of the possibility of appointing a defence counsel and obtaining their assistance[45]. Nevertheless, publications on the subject include opinions that the authorities carrying out pre-trial proceedings should provide the possibility to appoint a defence counsel prior to the first questioning, so that the suspect may be questioned in the presence of the lawyer, even if the legislator did not foresee any procedural implications of failure to appoint a defence counsel in this specific situation[46].

The conclusions which may be drawn from a literal interpretation of Article 301 of the CPC are to some extent diluted in the light of Article 325g § 3 of the CPC, according to which the suspect must be allowed to prepare for defence, in particular by the appointment of a defence counsel. Since laws on inquiry accentuate the necessity to allow the suspect reasonable time to appoint a defence counsel, by the principle of *a minori ad maius* it follows that such obligation is also applicable in the case of investigation[47].

What guarantees the said right in Article 301 of the CPC is a situation in which the questioning authority is obliged to grant the suspect's request, that is to question him or her in the presence of a defence counsel[48]. Accordingly, it is not clear why in the case of proceedings concerning the use

[44] S. Steinborn, Dostęp…, 41.

[45] Ibidem.

[46] See: A. Małolepszy, M. Zbrojewska, Obiektywna podatność oskarżonego na pokrzywdzenie w procesie karnym, PS 2014, no. 5, 63-72.

[47] See: S. Steinborn, Art. 301, In: Kodeks postępowania karnego. Komentarz do wybranych przepisów, ed. S. Steinborn, LEX/el 2016, vol. 1.

[48] See e.g. B. Skowron, Art. 301. Przesłuchanie z udziałem obrońcy, In: Kodeks postępowania karnego. Komentarz, ed. K. Dudka, LEX/el 2018, Vol. 1; Z. Brodzisz, Art. 301 [Questioning in the presence of the defence counsel], In: Kodeks postępowania karnego. Komentarz, ed. J Skorupka…, Vol. 9.

of a preventive measure, of which questioning the suspect is a mandatory part[49], there is no obligation to notify the defence counsel of questioning. One cannot forget that according to Article 3(2a) of directive 2013/48/EU the suspect should be able to contact defence counsel before questioning. In the context of the principle of equality of parties, it is even more unclear, especially that there exists an obligation to notify the public prosecutor of the hearing[50]. Admittedly, such defence counsel must be notified if required by the suspect, although this right raises doubts due to the absence of the obligation to advise of such a right.

Although Article 9 § 3 of the CPC directly mentions questioning, in practice we need to assume that the provision refers to a hearing[51]. The problem outlined above is not remedied by the obligation to notify the defence counsel of the complaint hearing and the hearing to extend the pre-trial detention period, as the suspect is not personally present in such hearings, so the presence of the defence counsel is the only factor which ensures that the right to defence may be exercised.

As regards research referred to above, it is worth mentioning that during the pre-trial detention procedure defence counsels formulate complaints not only with regard to the lack of confidentiality of communication with the suspect but also the duration of such communication[52].

3.4. Confidentiality of communications between the person deprived of liberty and their lawyer

The subject of confidentiality of communications between the arrested person or a detained person and their lawyer is one of those areas where the minimum standard laid down in the directive on the right of access

[49] The findings of case law contain opinions that derogation from questioning leads to the emergence of an unconditional reason for appeal under Article 9 § 1.1 of the CPC, see decision of the Court of Appeal in Wrocław of 7 March 2018, II AKz 142/18, "Biuletyn Orzecznictwa Apelacji Wrocławskiej" 2018, no. 1, item 374.

[50] See: D. Dudek, Konstytucyjna wolność człowieka a tymczasowe aresztowanie, Lublin 1999, 296-297.

[51] See: K. Eichstaedt, Czynności sądu w postępowaniu przygotowawczym, Warsaw 2008, 110.

[52] See: A. Klepczyński, P. Kładoczny, K. Wiśniewska, O (nie)dostępnym….

to a lawyer is clearly prejudiced. Directive 2013/48/EU imposes an unconditional obligation to keep all such communication confidential. Such obligation is also formulated in Article 3 § 1 of the CPC with respect to a detained person and in Article 5 § 1 of the CPC with respect to an arrested person. However, the law foresees radical exceptions which may significantly restrict the right to defence.

On the basis of Article 3 § 2-3 of the CPC, over the period of 4 days of the arrest the public prosecutor may reserve the right to be present either personally or delegate a person who will be present during specified contacts; he or she also has the authority to inspect the correspondence between the person deprived of liberty and defence counsel. Although relevant publications present the view according to which the CPC stipulates that any restriction of confidentiality of communications between the suspect and their defence counsel must be imposed carefully[53] – by reservation that it is possible "in highly justified cases" or "in the best interest of the pre-trial proceedings" – existing regulations allow far-reaching interference in confidentiality of such contacts. The reasons for the interference, intended as a safety buffer, were formulated as imprecise phrases which can be broadly construed. In reality, they do not guarantee that the confidentiality of communications will be excessively restricted and do not offer sufficient protection against 'automatic' procedural decisions on limitations to said confidentiality. Although the regulations are exceptional in nature, and by their nature they must be construed narrowly, their normative content leaves immense leeway for the public prosecutor to make decisions[54].

Article 5 § 1 of the CPC contains a similar provision. It gives the arrested person the right to promptly contact a lawyer in an available manner, and to communicate with the lawyer; however, in exceptional cases, justified by specific circumstances, the detaining officer may reserve his or her presence during the contact. Even though the legislator doubly quantified the circumstances justifying such possibility by requiring that

[53] K. Eichstaedt, Art. 73. Prawo tymczasowo aresztowanego do kontaktów z obrońcą, In: Kodeks postępowania karnego. Tom I. Komentarz aktualizowany, ed. D. Świecki…, Vol. 2.

[54] See: W. Posnow, Art. 73. [Porozumiewanie z obrońcą], In: Kodeks postępowania karnego. Komentarz, ed. J. Skorupka…, Vol. 3-4.

the detaining officer's presence during the said conversation should be dictated only by the best interest of pending proceedings[55], and despite the fact that grounds for the possibility to limit the confidentiality of the arrested person's contact with an attorney or solicitor are a consequence of the judgment of the Constitutional Tribunal which challenged the constitutionality of Article 5 § 1 of the CPC[56], the person effecting the arrest has considerable freedom to decide whether to interfere with the confidentiality of communications (just as by virtue of Article 3 § 2-3 of the CPC).

Undoubtedly, restriction of contacts between the lawyer and the arrested, suspect or accused may have serious negative implications for the effectiveness of the defence[57]. The above approves of the view of the erroneous provision of Article 3 § 2-4 of the CPC and Article 5 § 1 of the CPC, as any limitations concern the first stage of pre-trial proceedings and apply automatically after the criminal proceedings enter the *in personam* phase, and sometimes even earlier, that is from the moment of arrest.

It should also be mentioned that if the suspect is detained, another restriction does not affect the confidentiality of communications but the very possibility of making contact. This is achieved by making such contact conditional on the public prosecutor's consent, i.e. an order issued under Article 7 of the PEC[58] with regard to contact in person (a visit), and under Article 217c of the PEC with regard to contact by phone.

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[55] R.A. Stefański, S. Zabłocki, Art. 245. Prawa osoby zatrzymanej, In: Kodeks…, Vol. 3.

[56] In its judgment of 1 December 2012, K 37/11, OTK-A 2012/11, item 133, the Constitutional Tribunal found that Article 5 § 1 of the CPC does not comply with Article 42.2 in connection with Article 31.3 of the Constitution of the Republic of Poland, as it did not indicate the grounds the existence of which would enable the detaining officer to be present during the arrested person's conversation with a lawyer.

[57] See: B. Grabowska-Moroz, ed., Prawo dostępu do obrońcy w świetle prawa europejskiego, Warsaw 2018, 27.

[58] Act of 6 June 7 – Penal Enforcement Code, i.e. Polish Journal of Laws 2019, item 676, as amended ("PEC").

4. SUMMARY AND CONCLUSIONS

At the end of the present discussion we must note that the minimum standard for the formal right to defence as defined by the directive on the right of access to a lawyer may be reduced to the right to choose the means and manners of defence as early as at the moment of the first procedural action listed in Article 3(2) of the directive. The right to choose the means and manners of defence is the departure point for all privileges of persons related to the right to defence as a general concept. It emphasizes the fundamental nature and the essence of the right to defence – an individual's capability of taking actions and the freedom of choosing these actions[59]. The provisions contained in the Polish Criminal Procedure Code fail to make the right fully exercisable in a manner compliant with the minimum standard laid down in Directive 2013/48/EU. In the present legal situation, through the absence of measures facilitating unconstrained use of legal aid at the initial stage of the criminal proceedings, the current practice is that of tacit consent for initial actions in criminal proceedings, including arrest and steps taken with regard to pre-trial detention, to be carried out without the participation of the suspect's lawyer.

It should be noted that the inconsistencies between the Polish legal order and the directive discussed above concern primarily the subjective scope of the right to a lawyer, scope of the right to a lawyer for the person deprived of liberty and confidentiality of communications between the person deprived of liberty and their lawyer.

In the context of matters discussed above and the juxtaposition of the minimum standard set by the directive on the right of access to a lawyer with solutions currently used in national criminal procedure regulations, the overall conclusion is that there is an overarching necessity of the implementation of Directive 2013/48/EU in the Polish legal system and providing suspects with real access to a lawyer already at the earliest stage of criminal proceedings.

In this respect, an interesting view is expressed by S. Steinborn and M. Wąsek-Wiaderek, who recommend changing the definition of the suspect

[59] P. Karlik, T. Sroka, P. Wiliński, Art. 2 [Zasada nieuchronności odpowiedzialności karnej; prawo do obrony…, nb. 211.

and shifting the moment of the acquisition of the status of the suspect as a party to pre-trial proceedings to an earlier stage. The framework of the definition of the suspect would be based on two premises: the substantive one, that is the presence of a reasonable suspicion that an offence has been committed, and the formal one, i.e. taking procedural action aimed at prosecuting a given person[60].

Due to the absence of any legislative initiative to implement the directive on the right of access to a lawyer, the minimum standard set forth in the directive may be implemented by direct application of the directive itself[61]. If a member state has failed to implement EU legislation or such implementation is incorrect, an individual may rely on such legislation as long as it is unconditional, sufficiently precise and confers specific rights[62].

Another postulate worth considering is a change in the location of the provision of services by duty lawyers at police stations or in public prosecutor's offices. This would enable proceedings to be carried out in a realistically more prompt manner without the need to await the arrival of an attorney or solicitor, ensuring that the person deprived of liberty could immediately avail themselves of legal aid, and reducing the potential of exerting any undesirable influence on the arrested person or the suspect.

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[61] See T.T. Koncewicz, A. Podolska, Dostęp do adwokata…, 20-21.

[62] See judgment of the Court of Justice of the European Union of 5 January 2014 in case C-176/2 Association de médiation sociale, EU:C:2014:2; judgment of the Court of Justice of the European Union of 7 July 2016 in case C-46/5 Ambisig, EU:C:2016:530.

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